COMMENTS RECEIVED ON PUBLIC DISCUSSION DRAFTS

INTERNATIONAL VAT/GST GUIDELINES

GUIDELINES ON PLACE OF TAXATION FOR BUSINESS-TO-CONSUMER SUPPLIES OF SERVICES AND INTANGIBLES

PROVISIONS ON SUPPORTING THE GUIDELINES IN PRACTICE

25 February 2015
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International Vat Association (IVA)
John Esplend
Karen Butler
KPMG
Louise Birkett
Marsha White
Meridian Global Services
National Foreign Trade Council (NFTC)
PwC (Africa)
PwC
Retail NZ
RICHTER
Software Finance & Tax Executives Council (SOFTEC)
SwissBanking
TAJ, Societe d’Avocats
TAXAND
TAX EXECUTIVES INSTITUTE (TEI)
Tax Mediation Association
Tom Borec
USCIB
VAT in Industry Group (VIG)
VODAFONE
Mr Piet Battiau  
Head of Consumption Taxes Unit  
OECD Centre for Tax Policy and Administration  
Organisation for Economic Cooperation and Development  
2 rue André-Pascal  
75775, Paris  
Cedex 16  
France  

Submitted by email to: piet.battiau@oecd.org  

20 February 2015  

Dear Piet,  

Discussion draft for public consultation: 'International VAT/GST Guidelines - Guidelines on place of taxation for business-to-consumer supplies of services and intangibles and provisions on supporting the guidelines in practice'  

AFME¹ and the BBA² welcome the opportunity to respond to the OECD discussion draft entitled "International VAT/GST Guidelines - Guidelines on place of taxation for business-to-consumer

¹ The Association for Financial Markets in Europe (AFME) represents a broad range of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks and other financial institutions. AFME advocates stable, competitive and sustainable European financial markets, which support economic growth and benefit society.

² The British Bankers’ Association (BBA) is the leading association for the UK banking and financial services sector, speaking for 180 banking members, headquartered in 50 jurisdictions and operating in over 180 territories worldwide jurisdictions, on the full range of UK or international banking issues. Collectively providing the full range of services, our member banks make up the world’s largest international banking centre.
supplies of services and intangibles and provisions on supporting the guidelines in practice” (the
discussion draft).

While AFME and the BBA have separate and distinct memberships, for the purposes of the
discussion draft, both organisations have decided to submit a single, combined response since
our respective members share the same concerns in relation to the matters covered by the
discussion draft.

We welcome that the OECD is consulting with business on the OECD’s proposals and believe
that this approach is to the benefit of both policymakers and business. Safeguarding VAT
revenues, whilst ensuring a level playing field, is crucial for both business and governments and
we believe that the key elements for achieving these aims are simplicity, consistency, flexibility
and proportionality in any rule making or OECD best practice proposals.

**Focussing on the B2C proposals**

We agree that the principles laid down to ensure that tax on services and intangibles is levied in
the jurisdiction where the final consumption takes place are more straightforward in the B2C –
rather than the B2B - context.

We note that the ‘two step rule’ in the B2C context should lead to taxation at the place of
consumption by ensuring that the place of supply is where the service is physically performed
(Guideline 3.5) with the fallback being the place where the customer has its usual residence
(Guideline 3.6). We would highlight that any requirements for a business to verify the customer’s
place of usual residence will need to be based on readily available information collected in the
ordinary course of business. Otherwise, obtaining verification of a customer’s residence could
be onerous and potentially unworkable for business.

We also note the reference in the proposed guidelines (Paragraph 3.24) to the use of
information provided by third party payment providers regarding a customer’s trading history as
one of the potential indicia that may be used to determine the jurisdiction of the customer’s
usual residence. We recommend that the OECD exercises caution regarding the inclusion of
any indicia which rely on information provided by third parties generally, but more specifically
payment providers. Such information may involve multiple parties in a complex series of
transactions where information regarding customers is not held on a consistent basis. We also
note the emergence of non traditional payment service providers (i.e. non-financial institutions)
and note that governments may find it difficult to enforce the disclosure of information by such
payment service providers. Given the potential complexities involved, we would recommend the
removal of the reference to ‘information provided by third party payment providers’ from
Paragraph 3.24. We do not believe that removing these words would weaken the key message
in Paragraph 3.24 of the discussion draft.

There is an underlying assumption in the guidelines that countries will be encouraged to
implement a simplified registration and compliance regime. It is, however, currently unclear on
what basis countries will adopt and apply this principle. Any failure to implement and allow for a
simplified registration process (and therefore a simplified compliance regime) will increase
business costs and we would call on the OECD to provide further guidance for tax
administrations in this respect.
We would note that the Commission’s implementation of the VAT Mini One Stop Shop is a means of simplifying VAT registration in the EU. We suggest that the OECD considers a similar system as a means of simplifying VAT registration more widely. This would potentially enable businesses to register for VAT purposes through one central hub. Whilst such an approach may have several benefits for governments and business, these would only be fully realised if there is consistent implementation across jurisdictions. We would note that there is a risk of double or non-taxation if these guidelines are implemented on a piecemeal or non-uniform basis.

Another key consideration will be ensuring that compliance requirements are simplified and applied consistently on a global basis. In this respect, VAT return filing procedures and invoice requirements may require further consideration by the OECD. We note the list of information to be provided as part of the VAT return filing procedure in Paragraph 7 of Annex 3. We would urge the OECD to promote this as best practice to increase the likelihood that this will be adopted consistently by tax administrations.

We welcome the recognition within the proposed guidelines that the availability of electronic filing in a simple and commonly used format is essential. We would see this as a fundamental requirement to support global VAT registrations. We note that VAT invoicing requirements can be burdensome and would support the recommendation that tax authorities should consider eliminating invoices for B2C transactions. There is, however, a risk that an inconsistency may emerge where some jurisdictions will require invoices with VAT amounts shown in instances where VAT invoices are not required on a domestic basis for B2C supplies. This is likely to create a significant compliance burden for companies. We believe that such circumstances should be addressed by the guidelines.

**General Comments**

We believe that Annex 3 represents an important new piece of work and we would recommend that it is included as a separate chapter within the guidelines to ensure that this work is given suitable prominence within the guidelines. If this is not possible, we would suggest that Annex 3 is incorporated in any future OECD work on VAT implementation.

We note that Annex 3 also states that jurisdictions which do not differentiate between B2B and B2C supplies may consider allowing the use of the simplified registration and compliance regime. Whilst this may be helpful in some circumstances, we would suggest that the OECD endorses the use of the reverse charge mechanism in B2B scenarios which ensures simplicity for business and enforceability for governments in a manner consistent with the policy objectives.

For services connected with movable property supplied in a B2B context we believe that it is important not to undermine the general rule for B2B services. Therefore - as noted in Paragraph 3.62 - we would support the application of the general rule based on customer location.
Chapter 4 – Supporting the guidelines in practice

We believe that it is important to note that the guidelines have been developed on the basis that the parties involved act in good faith and that all transactions are legitimate and with economic substance. Business accepts that counter-measures need to be in place in order to ensure compliance with the rules. However, we would urge that they are applied responsibly, proportionately and in line with the principles of the guidelines.

We note that consistent interpretation and implementation of the guidelines on a global basis will help to minimise the existence of disputes between parties. In addition, we also note that mutual cooperation and exchange of information between governments should help to resolve potential disputes arising and make compliance as simple as possible for business. We therefore welcome the principles outlined in Paragraphs 4.8 to 4.16 of the discussion draft designed to assist parties in the event that disputes arise.

As outlined in Paragraphs 4.17 to 4.21 of the discussion draft, we welcome the inclusion of taxpayer services (including for example the provision of local guidance and the creation of points of contact) as part of the principles of good tax administration being developed by the OECD Forum on Tax Administration.

Once again we are very grateful for the opportunity to share our comments with the OECD on the discussion draft. We would be happy to discuss any of the above comments in greater detail and would be pleased to contribute further as the OECD’s work develops.

Yours sincerely,

Richard Middleton
Managing Director
Tax and Accounting Policy
AFME

Sarah Wulff-Cochrane
Director of Policy
Policy Taxation
BBA
Central Department
Taxes and Duties

February 20, 2015
Jan Koerner
ZRS – C 104
Tel. +49 621 60-47645
Fax +49 621 60-21105
jan.koerner@basf.com

Comments on the OECD Discussion Drafts regarding the INTERNATIONAL VAT/GST GUIDELINES entitled “Guidelines on Place of Taxation for Business-to-Consumer supplies of services and intangibles and Provisions on supporting the Guidelines in practice” 18 December 2014 – 20 February 2015

Dear Mr. Battiau,

We are referring to the OECD Discussion Draft “Guidelines on place of taxation for Business-to-consumers supplies of services and intangibles” issued on 18 December 2014. We would like to thank you for the possibility to provide our comments that allow us to engage with you on these important issues.

Chapter 3 – A. The Destination Principle

We endorse the statements in the paragraphs 3.7 and 3.8. As a significant number of jurisdictions have different set of rules for business-to-business-supplies and business-to-consumer-supplies, it is of utmost importance to provide clear and practical guidance on how supplier could establish the status of their customers. Experience in a significant number of jurisdictions being members of the OECD has shown that providing the customer’s VAT registration number or similar indicia like the information available in commercial registers are practical and clear means to establish the customer’s status as business. In case that a supplier cannot provide such indicia, the supplier should be enabled to rely on the presumption that the customer is a non-business customer for VAT/GST purposes.

Chapter 3 – C.3.2 Business-to-Consumer Supplies – VAT Collection in cases where the supplier is not located in the jurisdiction of taxation

As paragraph 2 of Annex 3 considers that the simplified registration and compliance regime could be extended to cross-border business-to-business supplies, we would like to comment particularly paragraph 3.30 of the guidelines. As appropriately stated in paragraph 3.25, it is often complex and burden-
some for non-resident suppliers to comply with the obligations to register, collect and remit VAT/GST due abroad.

However, we see a certain inconsistency in this context that paragraph 3.30 excludes the input tax recovery for the simplified registration and compliance regime for non-resident suppliers. Under such a simplified registration and compliance regime as described in paragraph 3.30, the basic principle of neutrality (cp. Chapter 2) would be at risk for non-resident suppliers as they would have double filing requirements abroad: one filing for output tax, one filing for input-VAT recovery. The simplified registration and compliance regime as described in paragraph 3.30 might thus lead to a discrimination of non-resident suppliers compared to resident suppliers.

We would like to propose two alternatives to solve such inconsistency:
- either the simplified registration and compliance regime for non-resident suppliers shall encompass the input tax recovery in the affected jurisdiction;
- or the simplified registration and compliance regime for non-resident suppliers shall be made optional, depending on the decision of the non-resident supplier to opt for the “normal” registration and compliance regime for resident suppliers or for the simplified registration and compliance regime for non-resident suppliers.

Annex 3 – Main Features of a Simplified Registration and Compliance Regime for Non-resident Suppliers

With regard to the record keeping in paragraph 10, we would suggest the amendment the last sentence that the records could be kept in the jurisdiction of residence of the non-resident supplier and be made available to the taxing jurisdiction on request within a reasonable delay.

Chapter 4 – C. Taxpayer Services

We endorse paragraph 4.20 and would like to propose to amend that paragraph that advanced cross-border-ruling procedures of the affected jurisdictions (jurisdiction of origin and jurisdiction of destination) of cross-border supplies of services, intangibles and also goods shall be encouraged by the OECD. In this context we would like to refer to the recent experiences within the European Union regarding cross-border VAT rulings.

Please do not hesitate to contact us should you have any questions or want to have a more detailed discussion.

Yours sincerely,

BASF SE
Central Department Taxes and Duties

[Signature]

Jan Koerner
Dear Mr. Battiau,

BDI\(^1\) refers to the OECD Discussion Draft “Guidelines on place of taxation for Business-to-consumers supplies of services and intangibles” issued on 18 December 2014. We would like to thank you for the possibility to provide our comments that allow us to engage with you on these important issues.

Due to the increase of cross border trade and the specificity that business collect CAT/GST on behalf of governments, we want to underline the importance of the VAT/GST Guidelines for business to provide a sound global framework based on neutrality principles and the destination principle. In view of the BEPS Action Plan 1 “digital economy” the development of additional guidelines is key as the collection of VAT in Business-to-Consumer transaction needs to be addressed in order to protect business from double taxations and the overall system from unintended non-taxation.

**General Comments on place of taxation**

In our view, it is appropriate to provide separate Guidelines for B2C and B2B supplies. The place of taxation is crucial for both transactions. We support the OECD’s approach to encourage taxing jurisdictions to provide clear practical guidance on how suppliers could establish the

\(^1\) BDI (Federation of German Industries) is the umbrella organization of German industry and industry-related service providers. It speaks on behalf of 37 sector associations and represents over 100,000 large, medium-sized and small enterprises with more than eight million employees. German industry and industry-related service generate a third of German gross domestic product (GDP).
status of their costumer (business or non-business). The main features of a simplified registration and compliance regime for non-resident suppliers in Annex 3 is the key element of the discussion draft and should be included in a separate chapter of the Guideline to underline its importance. We welcome the proposed approach as it ensures simplicity for business and enforceability by governments.

Comments on the discussion draft of the B2C Guidelines

The proposals to use the consumer location to determine the place of taxation for suppliers of services and intangibles in cases of undefinable place of consumption is not as simple as that. For business and especially for SMEs, those rules are burdensome and difficult to implement. Furthermore, there is concern that certain cross-border activities will cease, because of non-practicability.

We therefore underline the necessity to develop applicable solutions for the B2C Sector taking into account the upcoming experiences with the system change in 2015 for supplying telecommunication services to non-taxable persons in the EU. The documentation for identifying final consumers is not trivial for non-cross-border-activities either.

Comments on the discussion draft on the B2B Guidelines

We support the OECD approach to recommend the implementation of a reverse charge mechanism to reduce the administrative burden and complexity for non-resident suppliers of cross-border B2B services and intangibles. Regarding services connected with movable property supplied in a B2B context, the application of the general rule based on costumer location leads to an appropriate result and fosters the practical application of the two fundamental principles. Therefor we would like to endorse the statement referred to in paragraph 3.62.

However, we support the Drafts approach, that the reverse charge mechanism is not an appropriate solution for the B2C supply of services and intangibles.

Comments on the draft Supporting provisions (Chapter 4 of the Guidelines)

Although OECD proposes a sound concept easing application and practicality of such a place of taxation rule to simplify the VAT – process with regard to registration and compliance systems, the consistent and uniform interpretation on the implementation of the guidelines is crucial.

For business, prevention is the best way to minimize conflicts. Mutual cooperation and exchange of information between governments help to resolve disputes regarding the Guidelines but also to make compliance as simple as possible for business and creating efficiency on both sides – business and governments – when managing VAT/GST in practice.
With regard to the ongoing BEPS debate, we must underline the necessity to consider that VAT/GST is a mass transaction tax with a corresponding risk of mistakes. In general, these mistakes have no impact on governments’ VAT/GST revenue, particularly in B2B transactions where the parties involved have full input VAT recovery. Therefore any measures applied in such a context should be proportionate, based on the gravity of the mistake, and take into account whether there is any negative impact on governments’ VAT/GST revenues. We refer to the OECD Lucern Communique dated September 9th/10th which encourages tax administrations to ensure that penalties for genuine mistakes made by business have regard to the net amount of revenue lost.

Please do not hesitate to contact us if you have any questions.

Sincerely,

Berthold Welling

Annette Selter
Dear Piet,

BIAC thanks the OECD for the opportunity to provide comments on its Discussion Draft on the two new elements of the International VAT/GST Guidelines (the Guidelines). Thank you also for the significant amount of effort that you and others have put into this project. Additionally, BIAC has been very pleased to help the OECD in developing the Guidelines through its involvement in the OECD’s Technical Advisory Group (TAG). This is a best practice, and we very much look forward to our continued involvement in that forum.

There are several important interactions between direct and indirect taxation across the BEPS Action Items – including the Transfer Pricing and Permanent Establishment proposals. Although we warmly welcome the involvement of the Consumption Taxes Unit and Working Party 9 in the OECD’s Digital Economy work, we would welcome similar close involvement in the other relevant direct taxation areas of the BEPS project. Only with close coordination between all actions and between all Working Parties will we be able to reach solutions that are effective, but also proportionate and practical.

We believe that the Guidelines have great potential to provide the practical framework for the consistent application of VAT/GST across the world, and for example, to address many of the specific concerns raised in relation to the digital economy.

In relation to the VAT/GST TAG, I would like to reiterate how grateful we are to be involved in the process, and to be able to provide practical business input early in the development of the Guidelines. We continue to believe that TAGs are an excellent model for business engagement that...
could be used more widely across other BEPS Actions. Although the opportunity may have passed in relation to developing proposals, we encourage the OECD to consider whether such an approach could be adopted when developing the detailed implementing guidance for such proposals. Businesses, like tax authorities, will be faced with the challenges of implementing a broad range of OECD proposals, and we are ready and willing to provide our perspective to ensure that proposals are practicable and proportionate.

We very much hope that you find our comments useful, and we look forward to working with you on these important issues.

Sincerely,

Will Morris
Chair
BIAC Tax Committee
Introduction

1. In today’s global and highly interconnected economy, business as tax collector, more than ever, requires a global VAT/GST framework which strikes the balance between business and government needs and which looks both at conceptual as well as practical aspects of VAT/GST. The development of the Guidelines by the OECD aims to provide this global framework based on 2 fundamental principles – the neutrality principle and the destination principle.

2. At its meeting in Tokyo in April 2014 the Global Forum on VAT endorsed the Guidelines on the B2B cross-border supply of services as a truly global standard for VAT/GST – a significant milestone for VAT/GST around the world. It also urged the OECD to finalize its work on the remaining chapters of the Guidelines (including the VAT treatment of cross-border B2C supplies) for endorsement at the next meeting of the Global Forum on VAT in November 2015.

3. BIAC and the entire business community supported and welcomed this endorsement as an important basis for further work on VAT/GST issues related to B2C services, thanked the OECD for its inclusive approach and is delighted that WP9 and the CFA approved the 2 new elements of the Guidelines for public consultation.

General comments

Working process

4. BIAC remains highly committed to supporting the OECD TAG process and recognizes that increased time pressure and resource constraints require an efficient working practice and one which also allows the process to remain fully transparent. This means extra effort for all of us – the OECD, Governments and Business - which we need to manage together as a team just as we have done so far with great success.

5. In this environment, a public consultation becomes even more important in order to manage different views and perspectives and to get input on the work from the wider business community.

6. As in the past, BIAC is highly committed to actively supporting the public consultation from the business side and has reached out and encouraged its members to feed their input directly into the OECD.

Discussion draft of the B2C Guidelines (part of Chapter 3 of the Guidelines)

7. As a starting point, we would like to stress that safeguarding VAT/GST revenues and achieving a level playing field is crucial for business, just as it is for governments. For this, clear, consistently interpreted and more uniformly applied rules on VAT/GST across the world, particularly on the place of taxation and on the actual collection of VAT, are of utmost importance. This will improve neutrality for business, as tax collector, while at the same time safeguarding VAT revenues for governments and gaining efficiency for both sides by allowing technology to be used on a broader and more effective basis.
8. Key elements for business are simplicity, consistency, flexibility and proportionality – both when it comes to determining the place of taxation (i.e. evidence and indicia for the customer’s usual place of residence) and also when it comes to collecting the VAT/GST at stake (i.e. a simplified registration and compliance regime for non-resident suppliers).

9. Annex 3, developed jointly by business and governments in the TAG, is a hugely significant piece of work, which covers the main features of a simplified registration and compliance regime for non-resident suppliers and builds in further detail on current government best practices and earlier OECD work in this area. BIAC endorses the approach outlined in Annex 3 and we believe it will be a useful tool for governments seeking to enact legislations consistent with these guidelines. Business would therefore highly appreciate and recommend the inclusion of annex 3 in a separate chapter in the Guidelines to give it the importance it deserves. If this is not possible, annex 3 as it plays a key role in the future work on implementation packages, should be incorporated there.

10. In annex 3 the OECD recommends a simplified registration and compliance regime primarily in the context of B2C supplies of services by non-resident suppliers. Business greatly appreciates such an approach, since in B2B scenarios, the reverse charge regime, which is the collection mechanism recommended by the Guidelines for B2B scenarios, is a clear win–win solution for ensuring simplicity for business and enforceability for governments.

11. We have also seen developments in some jurisdictions around the world, which try to extend the B2C simplified registration mechanism to B2B scenarios. Business is of the view that this extension is not the appropriate way forward, it complicates systems and increases business compliance costs.

12. At the same there are best practices (i.e. Norway) which clearly show that giving business the required flexibility, ensures simplicity for business and enforceability for governments, which leads to efficiency gains for both sides. We, therefore, suggest looking at this whole aspect in more detail as part of the future work of the Consumption Taxes unit, to determine the pros and cons of both approaches.

13. On a different matter, regarding services connected with movable property supplied in a B2B context, the application of the general rule based on customer location generally leads to an appropriate result and fosters the practical application of the 2 fundamental principles – destination and neutrality. Therefore, business would like to endorse the statement referred to in paragraph 3.62.

14. Finally, BIAC would like to stress the importance of footnote 24 of the Guidelines, which highlights that a registration for VAT purposes does not, by itself, constitute a permanent establishment. In effect, the destination principle in the Business to Consumer guidelines results in VAT taxing rights allocated to the destination country even when the seller has no local presence or PE. BIAC believes that footnote 24 should go further by indicating that a PE determination for a remote seller with no local presence is contrary to the guidelines. As developments in practice show, more and more tax authorities around the world are now
trying to reclassify a mere VAT/GST registration as a PE for corporate (or other) tax purposes. There is a risk that this tendency may lead to increased revenue losses for governments on VAT/GST, as businesses become discouraged from acting as tax collector for VAT/GST given the potential wider tax implications at stake. In turn, this will also lead to increased distortions of competition for businesses.

The draft Supporting Provisions (draft chapter 4 of the Guidelines)

15. Business would like to stress that prevention is the best way to minimize disputes – the more consistently the Guidelines are interpreted and implemented at a global level, the less disputes on neutrality and place of taxation issues should occur. However, being realistic, there will of course be instances where jurisdictions will implement or interpret the neutrality or place of taxation principles in different ways. We would hope of course that such instances are rather the exception, but it is clear that chapter 4 is vital in trying to resolve disputes when they occur in practice.

16. Mutual cooperation and the exchange of information between governments is key not only to aiding the resolution of disputes regarding the Guidelines but also when it comes to making compliance as simple as possible for business and creating efficiencies on both sides – business and governments – when managing VAT/GST in practice.

17. Together with the principles of good tax administration developed by the FTA as a solid foundation, taxpayer services (e.g., provision of local guidance, creation of points of contact, the WP9/TAG process as a platform for engagement on implementation issues and best practices) are highly important and welcomed by business. They are crucial for making the fundamental principles, which the Guidelines are based on, work in practice for both business and governments.

18. The Guidelines have been developed with the proviso that the parties involved act in good faith and that all transactions are legitimate and with economic substance. BIAC would like to stress and endorse the importance of this point. At the same time BIAC understands that proportionate measures need to be taken by governments in the context of the Guidelines to protect against evasion and avoidance, which also create distortions of competition for business.

19. We urge the OECD and governments to apply these measures responsibly and proportionately in line with the principles of these Guidelines, particularly the principle of neutrality.

20. In addition we would like to highlight that VAT/GST is a mass transaction tax, often with thousands if not millions of incoming and outgoing transactions. In this environment genuine mistakes that have nothing to do with evasion or avoidance can happen in the complex day to day commercial and VAT collection process, and quite often these mistakes have no impact on governments’ VAT/GST revenues, particularly in B2B transactions where the parties involved have full input VAT recovery. Therefore, any sanctions, applied in such a context should be proportionate, based on the gravity of the mistake, and take into account whether there is any
negative impact on governments’ VAT/GST revenues. The OECD Lucerne Communique dated September 9th/10th 2009 also refers - tax administrations are encouraged to ensure that penalties for genuine mistakes made by business have regard to the net amount of revenue lost.

General BEPS related aspects

21. We would like to highlight that several corporate tax related BEPS action items (see below) also have potential impacts on VAT/GST. We would, therefore, like to encourage the OECD Consumption Taxes Unit and WP9 to reach out on these aspects to their colleagues in the relevant OECD Tax Units and Working Parties in order to consider and discuss the potential effects of these action items on VAT/GST. From a business perspective it is critical to further bridge the silos that often exist between corporate (and other) tax and VAT/GST in order to align the taxes more closely together where possible. BIAC is very happy to support the OECD on this matter and encourages the OECD to do further work on the Guidelines — in particular the B2B guidelines to address issues that the broader BEPS agenda will raise.

22. Corporate tax related BEPS actions with potential impacts on VAT/GST include:

Transfer pricing

• Transfer pricing adjustments
• In the absence of an alignment between governments on how TP adjustments are treated for VAT/GST - increased risks, including double taxation and unintended non-taxation and increased legal uncertainty.

Permanent establishment

• Increased VAT compliance obligations for business through the increased potential of the ‘force of attraction’ rules
• Increased risk that conflicting “establishment” definitions for VAT create double taxation and unintended non-taxation – particularly if the Guidelines are not implemented and applied consistently (general rule, specific rules) across the world

Corporate restructuring

• Acquisition and reorganization costs – the different approach between corporate taxes and VAT/GST.

Conclusions and Next Steps

23. Once finalized and provided they are consistently implemented by governments across the world, the Guidelines should help resolve many of the VAT/GST issues identified in the BEPS discussion draft on the digital economy. This shows the great value of the Guidelines developed by the OECD.
24. Business is highly committed to continuing its support on the further development of the Guidelines and encourages governments across the world to implement the Guidelines on a consistent basis.

25. Having promoted this public consultation within the wider business community, BIAC through the well-established OECD TAG process, would be pleased to assist in helping to capture and group the comments received by the OECD from the wider business community for further discussion and approval in WP9 and the CFA.

26. Additionally BIAC is highly committed to supporting the OECD on future work on VAT/GST such as work on implementation packages, exemptions for low value goods, or on any other areas of future focus.

27. BIAC would like to thank the OECD for the work started on the Guidelines in 2006 and would like to congratulate the OECD on the great outcome achieved to date. This is an excellent foundation on which to build future work on VAT/GST.

28. With the global outreach on VAT/GST to non-OECD countries, particularly through the setting up of the Global Forum on VAT, the OECD has started a new and very important chapter by raising the profile of and attention on VAT/GST as a truly global tax. BIAC is already very much looking forward to the 3rd Global Forum on VAT in Paris in November 2015 and would be pleased to support the OECD through providing input and assisting with the organisation from the business side.
Submission to the Organisation of Economic Cooperation and Development (OECD)

GUIDELINES ON PLACE OF TAXATION FOR BUSINESS-TO-CONSUMER SUPPLIES OF SERVICES AND INTANGIBLE: Discussion Drafts for Public Consultation

20 February 2015

Introduction

Booksellers NZ Incorporated (BSNZ) is the trade association for more than 75 percent of bookstores in New Zealand, representing 300 stores throughout the country.

BSNZ is making this submission in respect of the OECD discussion drafts for public consultation related to Guidelines on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles (Provisions on Supporting the Guidelines in Practice).

BSNZ is a member of Retail NZ (RNZ) and we are fully supportive of the submission made by RNZ, dated 20 February over the signature of Mr Greg Harford.

Price Competitiveness

The price competitiveness of New Zealand bookstores is currently severely cramped by the fact that the New Zealand Government does not collect GST on small value goods, including books, below the de minimis of $400. This position is being exacerbated by the continued rise of purchasing from online retailers domiciled overseas which is not subject to the 15% GST as applied to all consumers spending in New Zealand. The amount of revenue lost by the NZ Government failing to implement the so called “universal” tax, universally, is estimated to be $200 million at the lest and possibly as great as $500 million.

Booksellers are aware of the effect of this uncompetitive position every time they open their stores. They know they will not sell as many books as they would if they did not face the 15% GST challenge which they are unable to control. Consequently, they know they cannot stay open for as long hours as they would like to give their community the service it deserves, because they know they cannot afford the staffing costs. Thus, their community loses out culturally and economically.

Our bricks and mortar member bookstores face fair competition in various forms including from each other, non-member bookstores and non-member online bookstores based in New Zealand. This competition is on a level playing field as all purchases from these New Zealand domiciled businesses are subject to GST. However, competition from offshore online retailers supplying New Zealanders with low value goods, including books, is distortionary and unfair.
Registration for GST/VAT purposes of offshore suppliers in the local market

BSNZ strongly supports the basic principle of the Discussion Draft as contained in paragraph 3.28:

“Work carried out by OECD and other international organisations, as well as individual country experience, indicate that, at the present time, the most effective and efficient approach to ensure the appropriate collection of VAT on such cross-border business-to-consumer supplies is to require the non-resident supplier to register and account for the VAT in the jurisdiction of taxation.”

BSNZ submits this solution could also be easily applied to the collection of VAT/GST on low value goods imported from overseas retailers by domestic consumers. We further submit that agreement be sought from the OECD membership to extend funding to allow Working Party No. 9 of the OECD Committee on Fiscal Affairs (CFA) to include small value goods within the work currently under way relating to services and intangibles. We see no valid reason for Working Party No 9 to place the issue of low value goods at the bottom of its priorities, which appears to be the current position.

New Zealand Bookstores

With BSNZ member and non-member stores numbering more than 400, New Zealand has one of the largest number of bookstores per capita than any OECD country at one store per 1,125 persons. Bookstores are a vital part of the New Zealand community and cultural infrastructure.

Total book sales through brick and mortar stores (including online purchases from those stores) in New Zealand, is estimated to have been $153 million in 2014 ($115 million as calculated by Nielsen’s Bookscan panel, plus 30% to account for sales from non-member retailers who do not provide sales figures to Bookscan).

With more than 4.85 million books sold in 2014 (Nielsen) at an average selling price of $25.39 (inclusive of GST), the NZ Government collects approximately $20 million in GST per annum from the sales of books. There are no statistics available as to the number of books bought by New Zealand consumers from offshore retailers. However, books are obviously part of the overall retail sector where $3.19 billion of goods were bought from online retailers (2013), increasing at a rate of 14% per annum. This figure includes purchases from both onshore and offshore online retailers. We do not have a figure for the percentage value bought from offshore online retailers but it will definitely be material, as will the value of books bought from offshore retailers.

GST in New Zealand

GST is implemented by law in New Zealand universally, there being no exceptions other than financial transactions. The exception to this general rule is that New Zealand Customs have a special dispensation not to apply GST on small value goods purchased from overseas under a de minimis value of NZ$400.

There has been a long standing campaign by BSNZ and other organisations e.g. RNZ, to have this distortion removed in order to establish fairness in the competitive environment.
Solutions sought

A number of proposals have been made to government proposing solutions to the collection of GST on low value goods. However, none have proved feasible mainly because of the cost that would be incurred by Customs in the collection of GST on small value goods.

In 2012/13 BSNZ commissioned Victoria University of Wellington, with the supervision of Professor Norman Gemmell, Chair of the Institute of Public Finance, to research the de minimis issue, its effects on the general economy of New Zealand and on bookstores in particular. These research documents, which also looked at possible solutions are attached herewith, and can be found via this link:  http://goo.gl/UJYqAQ

Following presentations of this research in public and private seminars, (the latter included the New Zealand Inland Revenue Department (IRD)), a working party of officials from Customs, Treasury and IRD (lead agency), was established to advise the New Zealand Minister of Revenue on the issue. We understand that it was originally intended for a public discussion paper to be released by the Minister late in 2013.

Prevention of Base Erosion and Profit Shifting (BEPS)

This plan did not proceed. Instead we understood from the Minister that the matter had been drawn into the work stream related to the BEPS project being undertaken by the OECD. BSNZ understands and fully supports the efforts of the OECD to assist members in developing the means to meet the “Tax Challenges of the Modern Economy”. However, we contend that there is an urgent need to ensure that consumption related taxes can be and should be, applied evenly across all consumption where VAT/GST would normally be applied.

Further Information

If requested, BSNZ would happily provide further information and/or represent its views to the OECD by way of teleconference or similar.

Yours faithfully

[Signature]

Lincoln Gould
Chief Executive Officer
Booksellers New Zealand Inc.
Piet Battiau,
Head of Consumption Taxes Unit,
Centre for Tax Policy and Administration
2, rue André Pascal
75775 Paris
France

20 February 2015

Submitted by email: piet.battiau@oecd.org

Comments on the OECD Discussion Drafts regarding the INTERNATIONAL VAT/GST GUIDELINES entitled “Guidelines on Place of Taxation for Business-to-Consumer supplies of services and intangibles and Provisions on supporting the Guidelines in practice” 18 December 2014 – 20 February 2015

Through its members, BUSINESSEUROPE represents 20 million European small, medium and large companies. BUSINESSEUROPE’s members are 41 leading industrial and employers’ federations from 35 European countries, working together since 1958 to achieve growth and competitiveness in Europe.

BUSINESSEUROPE is pleased to provide comments prepared by the members of its VAT Policy Group, chaired by Kristian Koktvedgaard, on the OECD Discussion Draft on International VAT/GST Guidelines.

General Comments

BUSINESSEUROPE welcomes the efforts taken to develop and further enhance the International VAT/GST guidelines. The developments in the international trade have shown significant, if not exponential, growth in international cross border trade. These developments occur both in B2B transactions and in B2C-transactions and underline the necessity to develop a global framework to ensure both the neutrality of the VAT-system as well as an equal playing field for both domestic and international businesses.

The area of B2C services and intangibles are particularly important due to the fact that it is easy to provide these services from a distance by electronic means.

VAT/GST has the underlying specificity that businesses collect it on behalf of governments. BUSINESSEUROPE fully agrees that it should be made as easy as possible for businesses to perform these tasks, regardless if the place of taxation shifts to the place of destination. More specifically, SMEs need easy access to information on registration requirements as well as easy procedures of administration.
A good threshold is whether you are able to: i) explain to businesses how the system operates in a particular jurisdiction ii) how a business registers and reports iii) how a business corrects errors and mistakes and iv) how a business arrange for payments. If one is able to explain this, then businesses will register and thus VAT revenue will flow to those jurisdictions. BUSINESSEUROPE believes that the guidelines will be helpful in achieving this and therefore fully supports the efforts taken with the guidelines.

BUSINESSEUROPE finds that the current discussion paper underlines the importance of the joint effort taken by OECD, governments and businesses in order to achieve a balanced and realistic approach on this important tax.

An important aspect for the success of these guidelines is a consistent and uniform interpretation on their implementation. Safeguarding VAT/GST revenues and achieving a level playing field is crucial for business, just as it is for governments. Unfortunately, fraudster hides in the shadows of different VAT/GST regimes and often makes use of its differences. This creates a problem for both the business community and governments. A uniform application of VAT/GST regimes combined with easy access to information on the tax systems is the best tool to fight fraud and is - economically speaking - the best way to approach the issue. Therefore, clear, consistent and uniform rules on VAT/GST across the world are of utmost importance.

Further to the characteristics mentioned in Guideline 3.7 and paragraph 3.39, There are five key elements for businesses regarding VAT/GST: simplicity, consistency, neutrality, flexibility and proportionality – both when it comes to determining the place of taxation (i.e. evidence and indicia for the customer’s usual place of residence) and also when it comes to collecting the VAT/GST at stake (i.e. a simplified registration and compliance regime for non-resident suppliers).

The Annex 3 developed jointly by business and governments covers the main features of a simplified registration and compliance regime for non-resident suppliers and is a completely new, unique and hugely significant piece of work. BUSINESSEUROPE would therefore highly recommend that the Annex 3 becomes a separate chapter. If not possible, we would suggest that given that Annex 3 plays a key role in the future work on implementation packages, it should be incorporated there instead.

In addition, Annex 3 recommends a simplified registration and compliance regime primarily in the context of B2C supplies of services by non-resident suppliers. BUSINESSEUROPE welcomes this approach, since in B2B scenarios, the reverse charge regime - which is the collection mechanism recommended by the Guidelines for B2B scenarios - is clearly a win–win solution given that it ensures simplicity for business and enforceability for governments. We have also seen developments in some jurisdictions around the world, which try to extend the B2C simplified registration mechanism to B2B scenarios.

When applying this in practice, governments should consider whether local businesses are VAT/GST-exempt under certain thresholds and if so, either thresholds or very
simplified registration formats should be considered for businesses with limited B2C-trade in that country. In our view the OECD guidelines should express a more positive attitude towards the introduction of a threshold for B2C supplies of services in order to reduce the administrative burden for:

- B2C activities without the possibility of compliance via a one-stop-shop and;
- SMEs with few cross-border activities (e.g. starters) for which the administrative burden – even with a one-stop-shop – is disproportionate to the scope of the cross border activities.

At the same time there are best practices (i.e. Norway) which clearly show that giving businesses the required flexibility ensures simplicity for business and enforceability for governments, leading to efficiency gains for both sides. Therefore BUSINESSEUROPE encourages further work on this matter in order to determine the pros and cons of both approaches.

Also, BUSINESSEUROPE finds that the proxy mentioned in paragraph 3.7 (page 10) to be of high importance since they generate certainty, simplicity and efficiency. In paragraph 3.7, under b., we would rather the phrase to read “a significantly better result for both authorities and business” in order not to give the impression that they are a safety net only for national authorities.

On services connected with movable property supplied in a B2B context, the application of the general rule based on customer location leads to an appropriate result and fosters the practical application of the 2 fundamental principles – destination and neutrality. Therefore, BUSINESSEUROPE would like to endorse the statement referred to in paragraph 3.62. However, we must stress that this is an area where harmonization and transparency is of utmost importance. It is crucial to guarantee that businesses can easily have access to the application of these rules in a specific country, allowing them to access how the rules and interpretations apply on their specific services.

Finally, BUSINESSEUROPE would like to stress the importance of footnote 24 of the Guidelines, which highlights that a registration for VAT purposes by itself does not constitute a permanent establishment – as this is a very important aspect to underline it could be considered to inserted it in the overall text of the Guidelines.

**On the draft supporting provisions (draft chapter 4 of the Guidelines)**

BUSINESSEUROPE would like to reiterate that the more consistently the Guidelines are interpreted and implemented at a global level, the less disputes on neutrality and place of taxation issues shall occur – an emphasis is made on the prevention side. However, different interpretations by different jurisdictions on the implementation of neutrality or of the place of taxation principles are to be expected, making clear that chapter 4 is vital in trying to resolve disputes when they occur in practice.
BUSINESSEUROPE believes that mutual cooperation and exchange of information between governments is key for effective resolution of disputes that may arise and for making compliance easy and possible for businesses. This would mean added efficiency for businesses and governments when managing VAT/GST.

Together with the principles of good tax administration developed by the FTA as a solid foundation, taxpayer services (i.e. provision of local guidance, creation of points of contact, the WP9/TAG process as a platform for engagement on implementation issues and best practices) are highly important and welcomed by BUSINESSEUROPE. They are crucial for making the fundamental principles work.

The Guidelines have been developed with the assumption that the parties involved act in good faith and that all transactions are legitimate and with economic substance. BUSINESSEUROPE encourages the OECD and governments to apply these measures responsibly and proportionately, particularly the neutrality principle.

Also, it is important to take in account that VAT/GST is a mass transaction tax that may lead to genuine mistakes, unrelated with evasion or tax avoidance but simply due to its nature. Consequently measures applied in such a context should be proportionate and based on the gravity of the mistake, as well as taking into account whether there is a negative impact on governments’ VAT/GST revenues. BUSINESSEUROPE would like to stress the key role that national authorities have in developing a policy of cooperative compliance and voluntary corrections.

BUSINESSEUROPE is willing to engage in a constructive dialogue with the OECD on the further development of the Guidelines.

On behalf of the BUSINESSEUROPE VAT Policy Group

Yours sincerely,

James Watson
Director
Economics Department
18 February 2015

Mr Piet Battiau
Head of Consumption Taxes Unit
OECD Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
2 Rue Andre-Pascal
75775, Paris
Cedex 16
France

Dear Piet

**RE: INTERNATIONAL VAT/GST GUIDELINES – GUIDELINES ON PLACE OF SUPPLY FOR B2C SUPPLIES OF SERVICES AND INTANGIBLES AND PROVISIONS FOR SUPPORTING GUIDELINES**

1. The CBI is pleased to comment on the OECD’s Public Discussion Draft on the International VAT/GST treatment of B2C supplies of services and intangibles.

2. As the UK’s leading business organisation, the CBI speaks for some 190,000 businesses that together employ around a third of the private sector workforce, covering the full spectrum of business interests both by sector and by size.

3. The CBI welcomes and supports the broad themes of the guidelines in seeking to apply simplicity, consistency and proportionality to the determination of VAT/GST place of supply rules. Simplicity, consistency and proportionality are critical factors for all businesses but particularly those that supply intangibles and services across borders and who may therefore be exposed to domestic tax legislation in numerous jurisdictions without having necessarily created an establishment (permanent or fixed) in those countries. Excessive complications in the application of VAT/GST rules in such circumstances can stifle trade and growth, so these documents are to be welcomed as well drafted, balanced and focussed.

4. This response paper highlights the areas of concern for British business and where we think further consideration might be given in the Guidelines.

**Indirect Taxes and Permanent Establishments**

5. The interaction between VAT/GST, these new Guidelines on B2C services and Action Point 7 of the BEP’s agenda on Permanent Establishment is extremely important. Action point 7 of the BEP’s agenda could create significant new reporting and compliance obligations for VAT/GST through additional VAT/GST registrations, together with the increased use of force of attraction rules and a risk of differing (and potentially conflicting) rules on the definition of establishment for the purposes of...
different tax rules. Coupled with increased VAT/GST registration requirements under the proposals in these B2C Guidelines, it is extremely important that clarity is given to the relationship between a permanent establishment and a VAT/GST registration and vice versa. Footnote 24 of the B2C Guidelines makes the point that a VAT/GST registration should not, of and in itself, create a PE. As this is such a critical point, we believe it should not be relegated to a footnote, but made more prominent in the body of the document.

**Proxies for determining place of supply**

6. It is extremely important that suppliers be allowed to rely on information that they can, or can reasonably be expected to be able to, collect from their customer *at the time of sale* when using a proxy to determine the place of supply rules. This point is made in paragraph 3.23 of the Guidance. We believe this point could be made more firmly given it is so fundamental to business operations and competitiveness.

7. Specifically in relation to paragraph 3.24 we agree it is important to recognise that indicia will vary over time as technology and business practices develop. We also think it is important to stress more robustly that governments should be encouraged to avoid the creation of a defined list of accepted indicia or any suggestion that only specific types of indicia be allowed. Any indicia used must be suitable, but we would encourage that countries be advised to allow flexibility in this area.

8. We note also in paragraph 3.24 reference to “third-party payment providers” and would respectfully suggest that this is removed. Any reliance on third party data, particularly such data that is not readily available to the supplier at the time of sale or that requires the collation of data from multiple parties (for example in the case of payment providers there is unlikely to be a single payment provider for any particular business or range of customers) is likely to raise significant legal issues including, but not limited to, data privacy and concerns over liability for tax and penalty in the event the third party data is not correct. There would also be significant systems constraints and costs which may outweigh the benefit.

9. We would also like to stress the importance of a reasonable timeframe for businesses to implement systems changes required in dealing with such a significant change in tax legislation. A year would not be an unreasonable request.

**Simplified registration and compliance regime**

10. We welcome and support the simplified registration and compliance regime. Annex 3 sets the right tone but we believe such an important topic should not be relegated to an Annex.

11. We would recommend that guidance be given on the threshold at which a registration would be required. Consistent levels of threshold across countries would be extremely helpful to businesses. In addition, the value of the threshold should be set at a level that would protect country revenue yet stimulate trade and compliance by avoiding the additional burden (and potential barrier to market access) that a cross border registration would entail on small sales volumes. This may require registration levels to be set at rates higher than those for domestic registrations.

12. Co-mingling the guidance on B2B and B2C in the same part of the Guidelines detracts to some extent from the clarity of the document and consideration might be given to splitting these. This might give an opportunity to include crucial parts of the B2C elements more fully into the body of the document.
Input Tax recovery

13. We accept the lack of input tax credit within the simplified registration and compliance regime as an almost inevitable consequence of simplification, but we would like to see recognition that alternative mechanisms for input tax recovery should be made available. This will facilitate the principle of neutrality.

B2C General rules (plural)

14. Unlike the tax treatment of B2B services where there is one General rule (Guideline 3.1) and a Special rule, for example, for services taxed by reference to place of performance, the guidelines for B2C services suggest 2 General rules; one for services taxed by reference to place or performance (Guideline 3.5) and one for other cases (Guideline 3.6).

15. We accept that in most cases the practical answers to tax determination are likely to be the same in the B2C context irrespective of which construct is used (the number of General rules versus the number of Special rules), but we would recommend that the Guidelines do not create two General rules for B2C services. Instead, the Guidelines should follow the same format used for B2B services such that there is one General rule and then a Special rule. The lack of a hierarchy among the two General rules and the temptation for a country to cherry pick from them is a concern arising from the way these rules are drafted when compared to those for B2B services. It also adds an unnecessary layer of complication and lack of symmetry in the overall drafting of the Guidelines.

Books of record

16. We think it important that the Guidelines make clear that accounting and other documentation concerning the taxes payable in a particular country are not required to be maintained in that country, but supplied in a reasonable manner and timeframe to taxing authorities upon request. It would be very inefficient and impractical to bifurcate and maintain separate documentation at a physical site in each country.

Tax representatives

17. We would also like to see the Guidelines make it clear that the use of a Tax representative in a country is optional and also that it is not a requirement.

Application of the Guidelines in case of evasion and avoidance

18. We accept that jurisdictions may wish to take measures to protect against evasion or avoidance. However, we believe it is vital that the Guidelines underline that any such measures should be applied in a proportionate manner and also in a way that is specifically directed to tackle the perceived abuse. As we have seen in practice, rules which are not sufficiently targeted increase the complexity and cost of compliance for legitimate businesses, whilst doing little to diminish the actual instance of evasion or avoidance. In line with this, we would also recommend that tax authorities should be encouraged to ensure that penalties for genuine mistakes take into consideration the net amount of revenue lost.

19. We trust that you will find the above comments helpful and we are at your disposal should you wish to discuss the issues we have raised in this paper in more detail.
Please contact me at nick.burgin@uk.bp.com or neil.anthony@cbi.org.uk for more information.

Yours sincerely

Nick Burgin
Chairman
CBI Indirect Taxes Working Group
Charlie Livingston

Dear Piet,

In Section A3:3 you list a few principles that you believe the destination principle will allow you to achieve. I would like to comment briefly on these.

- international neutrality is maintained;

There is no neutrality when compliance is low. Look at what is happening in Europe with the new EU VAT rules. They impose a worldwide burden to collect tax, but in reality only EU businesses will comply. Non-EU businesses don't believe the EU has jurisdiction to enforce the rules so don't see why they should bother.

I own a small web business in the UK. I sell digital downloads. I compete with other sellers from around the world, but particularly the US. These sellers have openly stated that they are not going to comply with the new rules; they simply don’t see how it affects them. Until EU Member States start going after small US businesses, I don’t see how I can be expected to compete with them. After all, I am at a huge competitive disadvantage, in that I have to raise my prices to account for the VAT as well as add friction to my checkout in the form of questions about where my customers reside, questions which they don't want to answer.

Do you know what conversion rates are? They are the rate at which one's website visitors convert to customers. For every step you add to the checkout process, like asking for the customer's billing address, you lose sales. This is a simple fact of ecommerce. The less steps – the less friction – the better. Your GST/VAT proposals fly in the face of this and require sellers to ask intrusive questions of our customers that lower our conversion rates, leading to lower profit levels.

- compliance by businesses involved in these supplies is kept as simple as possible;

Compliance, at least under the EU VAT regime, is very far from simple. Ecommerce is inherently complex. To determine where a customer resides, what rate of VAT applies to them (there are 81 different rates in the EU alone), and how to display the full VAT-inclusive price to them before the checkout is not an easy thing to do. Then there is keeping the data for 10 years, filing quarterly returns, accounting for refunds, etc.

I haven't even mentioned the cost of making changes to established ecommerce systems. It's difficult to determine where a customer is, and to then have your website respond to that information. You have to show different prices depending on whether your customer is from Spain or Greece. But how do you know that without asking them? It's kind of impossible. IP addresses are not a reliable indication of residence. They are easily faked. In fact, as customers
become more and more concerned with privacy, the use of fake IPs will only increase, making it more unreliable. Already it is estimated to be unreliable in 10% of cases.

- clarity and certainty are provided for both business and tax administrations;

In my experience there has been very little clarity surrounding the new EU VAT rules. With 28 different countries interpreting the rules, it is almost like there are 28 different sets of rules. Some countries seem to think that emailing a PDF counts as a digital service, others don't, to give just one example. How are businesses supposed to be able to comply when there is so much uncertainty?

- The costs involved in complying with the tax and administering it are minimal;

In fact the costs are substantial. First of all there is the cost of making one’s websites compliant. This means making complex changes to code. Then there is the time spent filing the returns. Every single transaction needs to be looked at and analysed: where was this sale made? What's the VAT rate in that country for this good? This has to be done every 3 months, potentially for thousands of transactions.

- Barriers to evasion and avoidance are sufficiently robust;

The fact is that there are almost no barriers to evasion or avoidance. US sellers are immune, or at least think they are, from EU tax authorities. So they will not comply. And Australian sellers have the same attitude, as do Canadian sellers. As do other sellers from all over the world.

How can the EU realistically police the entire business world? Will it be investigating businesses of all sizes in every single country in the world? Because if not, how can it possibly hope to ensure compliance?

There are doubts that the EU has legal jurisdiction to enforce the new rules in non-EU countries.

In Annex 3 you mention proportionality. It is my opinion that the new rules impose a disproportionately large burden on the smallest of businesses, such as my own.

One final question to consider, and perhaps the most important: if every single country in the world introduced legislation along the lines you suggest, even one-man businesses like mine would have to comply with the VAT regimes of 150+ countries simultaneously. That is the nature of digital goods. They are sold worldwide, without restriction. It is not unusual for even a tiny business (revenue under €100,000 a year) to sell to 50+ countries. Do you think it's feasible for a business of that size or smaller (say under €10,000 a year revenue) to create a website compliant with the rules of 150+ countries, and to submit tax to all of them, perhaps quarterly? Without a decent threshold in place, say of
€1,000,000 turnover, the rules in their present form are simply unworkable. Even with a threshold of that size, the rules would present a significant technical and administrative challenge.

Yours sincerely,
Charlie Livingston
Dear Mr Battiau

Consultation: Guidelines on place of taxation for business-to-consumer supplies of services and intangibles

We are pleased to respond to your invitation to comment on the draft guidelines on the place of taxation for business-to-consumer (B2C) supplies of services and intangibles.

Summary of our conclusions

The guidelines largely replicate provisions found in the model currently adopted by the European Union on place of supply. We agree that it is difficult to see how countries can avoid having a VAT/GST registration system for non-established persons without compromising the destination principle.

We also agree that there is a need for a simplified compliance regime in relation to VAT on supplies to consumers. The suggested method in Annex 3 of the guidelines largely tallies with the system adopted by the EU in its recent Mini-One-Stop-Shop proposals. While these have only recently been introduced and are as yet untested, we agree that they, or a version of them, are likely to be the best way forward.

To achieve true tax neutrality, however, it is our view that businesses making B2C supplies must be able to recover VAT that they incur in the destination country where it relates to their taxable activities. We agree that businesses should have the ability to use the normal registration procedures where appropriate (perhaps under certain conditions) or else that there should be a parallel refund system allowing VAT incurred on local expenditure relating to supplies that have been subject to VAT to be recovered.
The guidelines suggest that countries consider having _de minimis_ limits allowing small value transactions to escape local VAT. We believe that if small businesses are not to be disadvantaged, it is essential to have _de minimis_ limits. Similar suggestions have been put to the European Commission. We would suggest that those limits should be modelled on similar lines to those adopted in the EU for B2C supplies of goods. We discuss this in more detail below.

We appreciate that the guidelines are of necessity not prescriptive. This means though that in some cases it is possible that two (or more) countries both claim taxing rights: the country where the business is established and the country where the consumer resides or has a residence if there is more than one. Consideration needs to be given to measures to avoid double taxation in such circumstances. One possibility would be to have a rule that allows the country of the consumer's usual residence to have priority taxing rights but allow the country of the supplier to tax where this right is not exercised. Care would also need to be taken to avoid not just double taxation, but the risk of non-taxation through exploitation of the cross-border rules. By allowing for countries to apply exceptions to the general rule, the guidelines do open up these possibilities.

The guidelines reference land related services at one point to illustrate candidate services to fall outside the general rule. This is an area of EU VAT that has raised many interpretational issues and we have recently done extensive work with HMRC in the UK and as part of the _Fiscalis_ programme set up by the European Commission to look at producing guidance on what are and are not land related services. We attach a copy of our original UK document for your reference. The examples and analysis, with only minor exceptions, was agreed in principle with HM Revenue & Customs. We note that land creates particular problems because of differences in countries' domestic land law regimes. We would recommend that the OECD take note of the _Fiscalis_ work and consider producing separate and more comprehensive guidance on defining these services.

Our detailed comments are set out below.

**Principles**

We agree with the objectives of the draft guidance, which are expressed most aptly in paragraph 4.1 of Chapter 4 as follows –

‘The objective of the Guidelines is to provide guidance to jurisdictions in developing practical legislation that will facilitate a smooth interaction between national VAT systems in their application to international trade, with a view to minimising the potential for double taxation and unintended non-taxation and creating more certainty for business and tax authorities.’

We also agree that since it is not practical to impose a self-accounting obligation on consumers, who by definition will not have to be registered for VAT, it is necessary to impose an obligation on businesses not established in the country where consumption takes place to register and account for VAT on supplies they make to consumers in that country. This is in line with the conclusions that have been reached in the European Union and which are currently in the process of being implemented in relation to digital services.

The imposition of a duty on foreign suppliers to account for VAT will create significant burdens, more so than for local businesses and we therefore examine below the recommendations in the guidance concerning how such a system might be implemented.
Compliance issues

General
Annex 3 of the guidelines recognises that it is necessary to create as simple a system as possible to encourage compliance and therefore suggests that registration requirements be kept to a minimum. It also suggests that input tax should be dealt with separately from output tax, which is the approach adopted by the EU.

The separation of the right to deduct from the requirements to account for output tax potentially detracts from the neutrality of the tax. Further, as has already been experienced within the EU, it can be the case that a country will adopt a policy of delaying or even deferring indefinitely refunds of VAT due to a non-resident taxpayer.

If a compliant non-resident tax population is to be achieved (and we recognise here the potential difficulty with enforcing the measures on non-resident businesses as has already been experienced in the European Union with non-resident suppliers of digital services to consumers), it is equally important that there should be a compliant tax authority. Guidelines should therefore recommend reciprocal obligations for tax authorities to refund VAT or their own equivalent within reasonable time limits. Broadly speaking, the tax authorities should have no greater time limit in which to process refunds to foreign taxpayers than local businesses have to account for and pay any output tax due. This would ensure that foreign taxpayers are in no worse off position than a local business filing a single return that sets off the amount due to the tax authority against the amount due to the taxpayer.

Registration requirements
We agree that the data needed for registration should be kept to a minimum. In light of this we question what purpose a requirement to provide a telephone number of the contact person serves particularly where the time zone of the contact may be several hours before or after that of the registering authority. We assume that a contact is going to be reluctant to agree to a tax authority contacting them out of hours – and perhaps in a foreign language. They may further not be happy with discussing tax affairs by phone if they have no facilities for recording the contents of a call that might be important later on. We therefore consider that a telephone number should be optional not mandatory. Consideration should be given to tax authorities providing some level of foreign language support also – at least in terms of basic registration and form-filling guidance. The EU currently operates a web-based information portal which collates basic information on Member State VAT regimes in one place. Despite its faults this is a worthy undertaking and one on which the OECD should consider recommending that members collaborate.

Similarly, it is difficult to understand why business URLs need to be provided unless this is limited to the URLs of those sites that are used to provide B2C services into the jurisdiction in question. While there is unlikely to be an objection in most cases, it is important that the purpose behind every requirement be identified so as not to impose meaningless burdens on business. Our concern here is that we are aware of case law that indicates that tax authorities in some countries will use even the most minor failure to comply with formal, perhaps overly burdensome, procedures as an excuse to deny taxpayers their fundamental rights.

In the vast majority of cases, digital compliance will be the most appropriate means of communication but as was found in a recent UK case dealing with a requirement to submit VAT returns online (LH Bishop), there may be a small minority of taxpayers who are incapable of doing so and therefore alternative means of compliance should be made available. Digital should therefore be the default, but not the only means of compliance.
The simplified system contemplates a regime in which VAT due on services is accounted for without regard to the deduction of any VAT that may have been incurred (as indeed is the system used by MOSS). We agree that that is the most appropriate way of approaching the issue provided that separation should not result in countries being able to deny taxpayers the right to deduct the tax inherent in the normal VAT system.

We note that the guidance suggests that the availability of a simplified process should not prevent a person making supplies of B2C services in a country other than that in which he is established from using the normal registration process and accordingly becoming liable to account for VAT as if he or she were established in the country of consumption. We agree that this should be the case if it suits the supplier to become registered locally and file local VAT returns. We note that there have been problems within the UK where there are two possible systems to account for VAT (the normal system and the ‘reverse charge’) that can lead to loss on the part of the taxpayer and care will need to be taken to make the appropriate system as clear as possible to avoid such eventualities. Unnecessary complexity or overly burdensome administration could simply serve to reduce the level of compliance from non-resident businesses.

**Records and invoicing**
We agree that the guidelines should make recommendations that minimise record keeping and invoicing requirements and harmonise these as far as possible across jurisdictions.

Since the guidance is about services to consumers that are unable to recover any VAT, the invoicing requirements do not need to be complicated and a simplified system would seem appropriate. Indeed, if it is possible to have a system with a single rate of VAT, there would appear to be no need for detailed descriptions of what is supplied; details would only be required where they are needed to apply different rates.

**Other features of a VAT system as applied to cross-border B2C services**

**Rates of tax**
The EU system has so far broadly adopted a policy in respect of electronic services of applying a single standard rate. We agree that having a single rate simplifies issues but only if the single rate is also applied to the services rendered by persons in the country of taxation. We would suggest that the guidelines should deal with potential problems arising from rates. As it is, the only reference to rates is in relation to the VAT return procedures.

**De minimis limits**
One of the problems facing small business is the possibility that a transaction may be regarded as subject to VAT even though it is of a small value and there are very few such transactions, possibly even just one. The EU rules relating to digital services recognise no mandatory de minimis rules but the guidance suggests that they may be appropriate.

We agree with the guidance; there is a need for de minimis rules because otherwise small businesses will be deterred from providing cross-border services even where they might be the most appropriate supplier. The alternative might be that they simply would not comply relying on the high probability that their transactions would not be divulged to other tax authorities (eg in the UK a business is not required to register for VAT unless its turnover is in excess of £81,000 per annum. It follows that data about such undertakings would simply be prohibitively expensive to collect).
We consider that there should be *de minimis* rules but these should recognise that in a global market they should be applied not on a country-by-country basis but, if possible, on a cumulative global basis. We will expand on this concept if desired.

We recognise that refund procedures may prevent claims below certain limits but these should not be such as to place small businesses at a competitive disadvantage with other suppliers.

**Prevention of double taxation and avoidance on unintended non-taxation**

Because the guidance offers options to tax authorities as to the rules that they adopt, there will inevitably be cases where two or even more jurisdictions might claim taxing rights.

For example, section D.2.2 contemplates that in B2C transactions a jurisdiction might decide that the general rules may lead to inappropriate results. In such cases, the guidelines suggest that a specific rule might be appropriate that overrides the general rule. If one jurisdiction adopts a specific rule and the other does not agree that the general rule would lead to inappropriate results, double taxation might occur.

In our view, there needs to be guidance on how to deal swiftly with the incidence of double taxation. The most likely solution would be one in which the country imposing a specific rule defers to the country applying the general rule, or *vice versa*, but we make no specific recommendation other than to suggest that it be addressed. In this regard the pilot schemes in the EU offering multi-territory rulings on transactions may offer useful data in this context on what works well and what does not.

**Dealing with a foreign tax jurisdiction and dispute resolution**

One of the potential problems that arises with cross-border dispute transactions is that of dealing with foreign tax authorities including when disputes arise as they inevitably will. This is considered in Chapter 4 under the heading ‘Taxpayer Services’ and also under the heading in Chapter 3 ‘Availability of information’.

For example, we have recently been looking at the question of whether or not a person that undertakes a hobby but makes sales of his work is a taxable person or not. In most cases, he would not be seen as such but we recognise that there may be exceptions. It is therefore possible that a foreign business might not regard an activity involving a consumer elsewhere as a business but the other jurisdiction would. Quasi-governmental organisations and fund vehicles are other common sources of disagreement between EU Member States as to what constitutes a taxable person. Settling disputes in such circumstances may create problems and experience of similar issues across the European Union has shown that local tax authorities cannot always be relied upon to give clear guidance on their approach, undermining legal certainty – particularly for smaller businesses who may not be able to afford specialist advice.

We agree with the concept of making information *easily* available. We also agree that the information should not be limited to rates, details of the liability of different services and other compliance requirements. There is, as suggested in the section on taxpayer services a need to ensure that –

- The information is available in the potential taxpayer’s language;
- There is provision of points of contact; this may include email where a person needs to communicate in a language other than those in which the guidance is published – the responsibility for dealing with a person who does not speak
a commonly used language should rest with the tax authority. In the modern
digital world, suppliers in one country do not necessarily have to know the
local language of their customers who may simply order from a website and
we believe that tax authorities will need to recognise this if they wish to
maximise supplier compliance;

- There need to be procedures to deal with disputes eg in the UK there is an
independent VAT tribunal that has the power in certain cases to decide
matters on the basis of papers submitted by the parties. Such a procedure is
more likely to ensure equality of arms than one in which the tax authorities
are represented but the taxpayer is not. There may of course be cases which
do require a hearing (including the hearing of witnesses). Dealing with
disputes with a foreign tax authority that only allows procedures on its own
terms will be difficult for the vast majority of foreign businesses except for the
very large businesses with international operations.

**Evasion, avoidance and abuse**

We suspect that in most countries, specific legislation is not required to counter
evasion; such activity will already be recognised as illegal and therefore be subject to
normal sanctions against criminal activity.

We think that as in the EU, a distinction should be made between the terms
‘avoidance’ and ‘abuse’. The definition set out in the guidelines is closer to the EU
description of the term abuse, which was defined in relation to VAT in the case of
*Halifax* (see para 2 of the conclusions of the Court in para 99). This is available on
the following link –

http://www.bAILII.org/cgi-
bin/markup.cgi?doc=/eu/cases/EUECJ/2006/C25502.html&qUery=title+(+halifax+)&m
ethod=boolean

It is important to distinguish the terms because it is inherently the responsibility of
governments to define what is subject to tax; it is not consistent with the principle of
legal certainty for governments to create unclear or defective legislation and then
seek to adopt measures that allow the tax authorities *ex post facto* to undo what a
taxpayer has done in good faith (see para 72 of Halifax above). It could create
particularly serious consequences for small and medium businesses that do not have
the same access to guidance as larger businesses.

It follows that countries should be required to publish guidance for foreign businesses
on the VAT system in their country and provide all the information such a foreign
business would reasonably be expected to know. It is inherent on the local tax
authority that they should also publish guidelines on how they will implement the VAT
rules in practice and then that they should actually adhere to these guidelines.

We are unfortunately unable to send a delegate to the public consultation event on
25 February but would welcome the opportunity to meet with you either in London or
Paris to discuss any issues that arise particularly those relating to services relating to
land.

Yours sincerely

Simon Newark
P.tech/subsfinal/ITX/2015
Guidelines on place of taxation for business-to-consumer
supplies of services and intangibles: CIOT comments 20 February 2015

Chairman, Indirect Taxes Sub-Committee

The Chartered Institute of Taxation

The Chartered Institute of Taxation (CIOT) is the leading professional body in the
United Kingdom concerned solely with taxation. The CIOT is an educational charity,
promoting education and study of the administration and practice of taxation. One of
our key aims is to work for a better, more efficient, tax system for all affected by it –
taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of
taxation, including direct and indirect taxes and duties. Through our Low Incomes
Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax
system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and
industry, government and academia to improve tax administration and propose and
explain how tax policy objectives can most effectively be achieved. We also link to,
and draw on, similar leading professional tax bodies in other countries. The CIOT’s
comments and recommendations on tax issues are made in line with our charitable
objectives: we are politically neutral in our work.

The CIOT’s 17,000 members have the practising title of ‘Chartered Tax Adviser’ and
the designatory letters ‘CTA’, to represent the leading tax qualification.
Place of Supply of services connected with immovable property

A technical paper prepared for members by the CIOT

1 July 2014

Introduction

This guide has been prepared with a view to providing some clarity regarding the place of supply of services connected with immovable property. The guide seeks to bring together all appropriate legislation, guidance and case law on this area, and aims to be a comprehensive list of services and their VAT treatment. We will update the document in line with case law and new legislation.

For each service, the footnote indicates the source of the treatment stated. The CIOT has indicated in relation to each service whether it agrees with the stated treatment and, if not, why not. We sought the views of HMRC in late 2013 on the treatment of the services and have indicated whether or not HMRC agreed with the view stated. However, it should be borne in mind that HMRC will assess the tax liability of any transaction on its particular facts.

For ease of use, the guide covers the place of supply of four categories of service:

1. Use of and access to land and buildings; eg letting of land or access to premises.
2. Physical or tangible land-related services; eg construction services or assembly / dismantling of immovable structures.
3. Professional or intangible services supplied by property professionals; eg estate agents, surveyors etc.
4. Professional or intangible services supplied by other professionals; eg accountants and lawyers.

Where the examples are specific in nature, it is because they derive from case law or particular guidance, and so are illustrative of what is and is not considered to be connected with land. Where an example is specifically covered by Council Implementing Regulation 1042/2013, we have simply agreed with the treatment, because it is directly applicable anyway.

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</table>
CIOT COMMENTARY

Council Implementing Regulation (EU) No 1042/2013 has provided significant guidance relating to:

- The nature of immovable property
- The level of connection required between the service and the immovable property
- The types of services which are and are not considered to be connected with immovable property

Whilst these parts of the Regulation do not apply until 1 January 2017, the UK has already implemented most (if not all) of this in guidance; see in particular Revenue & Customs Brief 22/12.

In addition, the recent judgment of the European Court in the RR Donnelley case further highlighted the close connection required in order for a supply to be considered as being connected with immovable property.

CIOT general view

We interpret the Regulation and guidance to the effect that, in order for services to be considered to be connected to immovable property, they must have a sufficiently direct connection with that property [our emphasis]. ie there are two elements to consider:

1. That there must be a direct connection to property; and
2. The connection must be to a specific property.

We also consider that the services must generally:

1. Allow physical use of specific property (eg lease of a specific property);
2. Change the physical characteristics of specific property (eg construction of a new building);
3. Survey or assess specific property (eg geographical survey of specific land); or
4. Have the property as a central and essential element of the service; or
5. Change the legal status of physical property (eg lawyers’ fees relating to the sale of a property).

It is for these reasons that (save for the examples listed in Regulation 1042/2013, and exceptional circumstances) legal and consultancy services would NOT normally have a sufficiently direct connection with specific property, unless they are ancillary to another service which is connected to that property. Such services would, therefore, fall under the normal place of supply rules.

\[1\] Minister Finansów v RR Donnelley Global Turnkey Solutions Poland Sp. Zoo, ECJ Case C-155/12
## USE OF AND ACCESS TO LAND AND BUILDINGS ETC.

<table>
<thead>
<tr>
<th>Description of supply</th>
<th>Connected to land?</th>
<th>Agreed by CIOT?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The grant, assignment or surrender of any interest in or right over land.²³</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>2. The grant, assignment or surrender of a personal right to call for or be granted any interest in or right over land.⁴⁵</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>3. The grant, assignment or surrender of a license to occupy land or any other contractual right exercisable over or in relation to land²⁵ (including the provision of hotel and holiday accommodation⁵, seasonal pitches for caravans and facilities at caravan parks for persons for whom such pitches are provided and pitches for tents and camping facilities¹).</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>4. The provision of car parking.⁸</td>
<td>Y</td>
<td>Y²⁸</td>
</tr>
<tr>
<td>5. The provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation¹⁰ or for the purpose of a supply of catering.¹¹</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>6. The supply of timeshare accommodation by a principal, when the points are converted into supplies of land¹², arranging the exchange of timeshare units¹³ and supplies of hotel and holiday accommodation by tour operators acting as principal.¹⁴</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>7. Arranging the supply of hotel accommodation or similar services¹⁵ acting in the name and on behalf of another person.¹⁶</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>8. The letting of a caravan (touring or static), or a tent, on a camp site or similar¹⁷</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>9. The supply of telecommunications, broadcasting or electronic services, provided by a taxable person acting in his own name, together with hotel accommodation or similar services.¹⁸</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>10. The supply of telecommunications, broadcasting or electronic services in circumstances other than the above ie not supplied with hotel accommodation etc.¹⁹</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>11. The granting of rights of access to airport lounges²⁰.</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>12. The grant of fishing rights which relate to a specific</td>
<td>Y</td>
<td>Y²²</td>
</tr>
</tbody>
</table>

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² Paragraph 2 a), Part 1, Schedule 4A, VAT Act 1994; Regulation 1042/2013 (ref Art 31a 2(h))
³ Where the supply is a major interest, it is not within Article 47, although the place of supply will be where the land is located
⁴ Paragraph 2 b), Part 1, Schedule 4A, VAT Act 1994; VATPOSS07600
⁵ Paragraph 2 c), Part 1, Schedule 4A, VAT Act 1994
⁶ Paragraph 6.4, Public Notice 741A, January 2010
⁷ Revenue & Customs Brief 22/12
⁸ VATPOSS07600
⁹ If parking is available across territories, an apportionment would need to be made on a just and reasonable basis
¹⁰ Regulation 1042/2013 (ref Art 31a 2(i))
¹¹ Paragraph 2 d), Part 1, Schedule 4A, VAT Act 1994
¹² Regulation 1042/2013 (ref Art 31a 2(i)); Macdonald Resorts Ltd v Revenue & Customs Commissioners (Case C-270/09)
¹³ RCI Europe v Revenue and Customs Commissioners (Case C-37/08)
¹⁴ Notice 709/5, Tour Operators Margin Scheme
¹⁵ Revenue & Customs Brief 22/12
¹⁶ 1042/2013 (ref Art 31a 3(d))
¹⁷ Regulation 1042/2013 (ref Art 31a 2(i))
¹⁸ Regulation 1042/2013 (ref Art 31c)
¹⁹ The opposite of the above
²⁰ Revenue & Customs Brief 22/12; Regulation 1042/2013 (ref Art 31a 2(j)) It is not clear how this applies to passes to airport lounges entitling the holder to access to lounges in different countries. It seems likely that the rule only applies where the access is to a specific lounge otherwise the general rule will apply.
²¹ P/tech/subsfinal/ITX/2015

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<table>
<thead>
<tr>
<th>Description</th>
<th>Taxation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stretch of water, or hunting rights in a defined area of land</td>
<td>N</td>
</tr>
<tr>
<td>The grant of a right to moor a boat or a similar right over a defined area</td>
<td>Y</td>
</tr>
<tr>
<td>The supply of space for the use of advertising billboards - for example the</td>
<td>Y</td>
</tr>
<tr>
<td>use of a plot of land or the side of a building to allow a billboard to be</td>
<td></td>
</tr>
<tr>
<td>erected.</td>
<td>Y</td>
</tr>
<tr>
<td>Advertising services including those that involve the use of a billboard.</td>
<td>N</td>
</tr>
<tr>
<td>Lease or supply of a memorial or plaque which is affixed to land or buildings and cannot be easily removed.</td>
<td>Y</td>
</tr>
<tr>
<td>Supply of a memorial plaque or other display which is not affixed to land or buildings.</td>
<td>N</td>
</tr>
<tr>
<td>The provision of a site for a stand at an exhibition where the exhibitor obtains the right to a defined area of the exhibition hall and does not receive any additional services.</td>
<td>Y</td>
</tr>
<tr>
<td>The provision of a site for a stand at an exhibition where the exhibitor does not reserve in advance a specific area of the exhibition hall or has no choice as to the location of the stand or where or whether the exhibition will take place (irrespective of whether any additional services are received).</td>
<td>N</td>
</tr>
<tr>
<td>The provision of stand space (whether or not specifically reserved or allocated) together with accompanying services as a package, including such things as the design and erection of a temporary stand, security, power, telecommunications, hire of machinery or publicity material.</td>
<td>N</td>
</tr>
<tr>
<td>The supply of warehouse space where the grant is of a right to use a specific area of a UK warehouse or storage area for the exclusive use of the customer to store goods, and a right of access to the storage area is granted.</td>
<td>Y</td>
</tr>
<tr>
<td>The storage of goods where the supplier does not grant a right to a specific area for the exclusive use of the customer, nor a right of access to the storage area.</td>
<td>N</td>
</tr>
<tr>
<td>The hire of a theatre, with or without additional services or facilities.</td>
<td>Y</td>
</tr>
<tr>
<td>Provision of a recording studio where technicians are included as part of the supply.</td>
<td>N</td>
</tr>
<tr>
<td>Providing another person with access to office premises</td>
<td>N</td>
</tr>
</tbody>
</table>

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21 Revenue & Customs Brief 22/12; Rudi Heger GmbH v Finanzamt Graz-Stadt (Case C-166/05), 22 See, for example, Fonden Marselisborg Lystbådehavn v Skatteministeriet (Case C-428/02) 23 Paragraph 6.4, Public Notice 741A, January 2010; VATPOSS07600 24 International Trade and Exhibitions J/V Ltd v C & E Comrs (1996) VTD 14212; VATPOSS07600 25 Paragraph 6.5.1, Public Notice 741A, January 2010; VATPOSS07700 – this is a supply of engineering services 26 Based on RR Donnelley, use of specific, immovable property, where property is the subject matter of the supply. 27 Based on RR Donnelley, use of specific, immovable property, where property is the subject matter of the supply.
<p>| | | |</p>
<table>
<thead>
<tr>
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<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>26.</td>
<td>Provision of a defined area in a data centre to enable the customer to house its own racks, together with the necessary infrastructure and power/data connections (with or without on-site support and technical services).</td>
<td>Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Y40</td>
</tr>
<tr>
<td>27.</td>
<td>Provision of an non-specific area in a data centre to enable the customer to house its own racks, together with the necessary infrastructure and power/data connections (with or without and on-site support and technical services).</td>
<td>N</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Y</td>
</tr>
<tr>
<td>28.</td>
<td>Provision of rack space (whether allocated or unallocated) in a data centre to house the customer’s servers (with or without on-site support and technical services).</td>
<td>N</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Y41</td>
</tr>
<tr>
<td>29.</td>
<td>Bridge or tunnel toll fees.42</td>
<td>Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Y43</td>
</tr>
</tbody>
</table>

39 This is a real case involving Germany. The regional tax authority for the data centre supplier considers it is a supply connected with land, and insists on the supplier charging German VAT. However, centralised tax authority has rejected an EU refund claims on the basis that the supply is not connected with land.

40 There are similarities here both to the position regarding the supply of a recording studio, and to the storage of goods. On balance, the storage example is perhaps more relevant (ie it is specialist storage) and so the principle in RR Donnelley Global Turnkey Solutions Poland Sp. z o.o (Case C-155/12) may apply. An apportionment may be necessary where additional services are provided on a selective basis.

41 When considering space for the actual servers, even if a defined space is allocated, we consider that the provision of the rack and supporting facilities (power, security etc) tip the balance away from a supply connected with immovable property, although many cases will need to be decided on their own merits. It is clear that this is a judgment call and that there will be situations in which the rule in item 26 will apply.

42 Revenue & Customs Brief 22/12; Regulation 1042/2013 (ref Art 31a 2(j))

43 Presumably an apportionment or simplification may be required for bridges etc connecting countries.
**PHYSICAL OR TANGIBLE SERVICES – EG CONSTRUCTION, DEMOLITION, REPAIR ETC.**

<table>
<thead>
<tr>
<th>Description of supply</th>
<th>Connected to land?</th>
<th>Agreed by CIOT?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>30.</strong> Any works of construction, demolition, conversion, reconstruction, alteration, enlargement, repair or maintenance of a building or civil engineering work or permanent structure such as pipelines for gas, water or sewage including painting and decorating.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>31.</strong> Services that involve the installation, assembly or repair of machines or equipment or the erection etc of buildings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. Installation, assembly, repair or maintenance of machines which, when installed, will form a fixture that ‘cannot be easily dismantled’ or moved including commissioning and inspection.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b. Installation, assembly, repair or maintenance of machines or equipment which are not installed as a fixture and are not, and do not become, part of the land or property.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. Erection of pre-fabricated buildings, which would take around 80 man days to dismantle and remove.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d. Erection of portable units (for student accommodation) which would take around ½ a day to dismantle and remove.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e. Dismantling / de-commissioning a printing machine over 50 yards long and over 4 yards wide, weighing 400-500 tons, fixed onto sole plates which rested on the floor, and which took 15 men around 3 months to dismantle.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>f. Demolition of two scrap shears, both over 60 tons in weight, bolted to foundations, which required 8 days to dismantle.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>g. Commissioning of an industrial waste incinerator complex, with an area of 755 square metres, and between 20 and 25 metres high at some points.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>h. Installation and rental of poly tunnels; large steel framed structures, bolted into 84 concrete blocks per tunnel, then encased in further</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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44 Regulation 1042/2013 (ref Art 31a 2(c) and (d))
45 Paragraph 2 e), Part 1, Schedule 4A, VAT Act 1994
46 Revenue & Customs Brief 22/12; Regulation 1042/2013 (ref Art 31a 2(d) and (l))
47 Paragraph 6.4, Public Notice 741A, January 2010
48 Subject to the individual examples which follow
49 The examples which follow are specific cases. What is important to both is (i) the extent of attachment to the ground and (ii) how long it would take to dismantle / remove the item from the ground. It is recognised that this is a sliding scale, and case law indicates that anything less than two man-days may not be sufficiently fixed to the ground for the supply to be related to land.
50 Revenue & Customs Brief 22/12; Regulation 1042/2013 (ref Art 31a 2(m) and (n)); see specific examples above for what may be taken to mean ‘cannot be easily dismantled or moved’
51 Paragraph 6.5.1, Public Notice 741A, January 2010; VATPOSS07700
52 Revenue & Customs Brief 22/12
53 Rudolf Maihofer v Finanzamt Augsburg-Land (C-315/00)
54 The University of Kent v C & E Comrs (2004) VTD 18625
55 McLean and Gibson (Engineers) Ltd v C & E Comrs (2001) VTD 17500
56 Scottish Discount Co Ltd v Blin [1986] SLT 123
57 Mechanical Engineering Consultants Ltd v C & E Comrs (1995) VTD 13287
58 Argents Nurseries Ltd v Revenue & Customs Comrs (2007) VAT decision 20045
<table>
<thead>
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<th></th>
<th>Concrete; the removal of which would be a ‘considerable operation’ and which are not designed to be moved.</th>
</tr>
</thead>
<tbody>
<tr>
<td>i.</td>
<td>Storage units, which rest upon the ground under their own weight and are not fixed to the ground. The units can be dismantled and it would take two man-days to do so.</td>
</tr>
<tr>
<td>j.</td>
<td>A permanently moored boat, with no engine or means of propulsion, together with a plot of land and landing stage etc for use as a restaurant and disco.</td>
</tr>
<tr>
<td>k.</td>
<td>Services of installing an underwater fibre-optic cable.</td>
</tr>
<tr>
<td>l.</td>
<td>Supply and installation of an underwater fibre-optic cable.</td>
</tr>
</tbody>
</table>

32. Agricultural work on land (including tillage, sowing, watering and fertilization).²⁴

33. The supply of plant and equipment together with an operator, for work on a construction site⁶⁵, or to allow the customer to carry out work on land or property where the supplier has responsibility for the execution of work.⁶⁶

34. The supply of equipment with an operator, where it can be shown that the supplier has no responsibility for the performance of the work.⁶⁷

35. The secondment of staff to a building site.⁶⁸

36. The hiring out of civil engineering plant on its own.⁶⁹

37. Services connected with oil/gas/mineral exploration or exploitation relating to specific sites of land or identifiable areas of the seabed.⁷⁰

38. On-site security¹¹ or supervision¹² services, where the purpose of the presence is the protection of immovable property, rather than its moveable contents.


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²⁴ Revenue and Customs Commissioners v UK Storage Company (SW) Limited [2012] UKUT 359 (TCC) – included as illustrative as to whether ‘immovable property’ – now superseded by storage changes.
²⁵ Susanne Leichenich v Peffekoven & Horeis, (C-532/11) - included as illustrative as to whether ‘immovable property’
²⁶ Whilst the cable will be connected to something at either end, such cabling is not normally fixed to the seabed, and so we do not consider this to become immovable property.
²⁷ Aktiebolaget NN v Skatteverket (Case C-111/05) – this is a supply of goods
²⁸ Revenue & Customs Brief 22/12; Regulation 1042/2013 (ref Art 31a 2(e))
²⁹ Paragraph 6.4, Public Notice 741A, January 2010
³⁰ Revenue & Customs Brief 22/12; Regulation 1042/2013 (ref Art 31b)
³¹ Revenue & Customs Brief 22/12; Regulation 1042/2013 (ref Art 31b)
³² Paragraph 6.5.1, Public Notice 741A, January 2010 – this is a supply of staff
³³ Paragraph 6.5.1, Public Notice 741A, January 2010; VATPOSS07700
³⁴ Paragraph 6.4, Public Notice 741A, January 2010
³⁵ Revenue & Customs Brief 22/12
³⁶ Regulation 1042/2013 (ref Art 31a 2(b))
## Professional or Intangible Services Supplied by Property Professionals

<table>
<thead>
<tr>
<th>Description of Supply</th>
<th>Connected to Land?</th>
<th>Agreed by CIOT?</th>
</tr>
</thead>
<tbody>
<tr>
<td>40. Services such as are supplied by estate agents, auctioneers, architects, surveyors,</td>
<td>Y</td>
<td>Y(^{75})</td>
</tr>
<tr>
<td>engineers and others involved in matters relating to particular land(^{73}) buildings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>or civil engineering works.(^{74})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>41. The management, conveyancing, survey or valuation of property by a solicitor,</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>surveyor or loss adjuster.(^{76})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>42. Surveying and assessing property(^{77}), for example to assess the risk and</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>integrity of immovable property (^{78}), or determine the contamination level of a</td>
<td></td>
<td></td>
</tr>
<tr>
<td>site prior to construction, including the surveying (such as seismic, geological or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>geomagnetic) of land or seabed, including associated data processing services to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>collate the required information.(^{79})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>43. Environmental impact assessments, for example on whether a wind turbine should</td>
<td>N</td>
<td>Y(^{80})</td>
</tr>
<tr>
<td>be cited at a particular location, or the effect of new building projects.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>44. Oceanography services, such as measuring or reporting sea currents and marine</td>
<td>N</td>
<td>Y(^{81})</td>
</tr>
<tr>
<td>habitats.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>45. Drawing up of plans for a building or part of a building designated for a</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>particular site(^{82}) regardless of whether or not the building is erected.(^{83})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>46. Drawing up of plans for a building or part of a building that do not relate to</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>a particular site.(^{84})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>47. Architects’ services where there is no specific site of land.(^{85})</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>48. Valuing property, for insurance or loan purposes(^{86}) to determine the value</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>of a property as collateral for a loan, or to assess risk and damages in disputes.(^</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(^{87})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>49. Valuing property as part of a wider supply eg preparation of accounts.</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>50. Advice or information relating to land prices or property markets (not site</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>related).(^{88})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51. The services of an interior designer contracted to redesign the decor of a</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>particular hotel(^{89}) or other building eg offices, restaurant etc.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>52. Creation of a ‘corporate’ colour scheme/style, for example for a hotel chain to</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>use in their own properties(^{90}).</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{73}\) Paragraph 2 f), Part 1, Schedule 4A, VAT Act 1994  
\(^{74}\) Paragraph 6.4, Public Notice 741A, January 2010; VATPOSS07600  
\(^{75}\) See, for example, Brodrick Wright & Strong Ltd v C & E Comrs (1987) VAT decision 2347  
\(^{76}\) Paragraph 6.4, Public Notice 741A, January 2010; see for example Brodrick Wright & Strong Ltd v C & E Comrs (1987) VTD 2347; VATPOSS07600  
\(^{77}\) Regulation 1042/2013 (ref Art 31a 2(f))  
\(^{78}\) Paragraph 6.4, Public Notice 741A, January 2010; VATPOSS07600  
\(^{79}\) These services arguably do not relate to specific property, but the wider environment, and specific property is not a central and essential element of the service  
\(^{80}\) Even where an element of the work may involve the topography of the sea bed, the focus of the services does not relate to specific property  
\(^{81}\) Regulation 1042/2013 (ref Art 31a 2(a))  
\(^{82}\) Revenue & Customs Brief 22/12  
\(^{83}\) Regulation 1042/2013 (ref Art 31a 2(a))  
\(^{84}\) Revenue & Customs Brief 22/12; Regulation 1042/2013 (ref Art 31a 3(a))  
\(^{85}\) Paragraph 15.5.8, Public Notice 741A, January 2010  
\(^{86}\) Revenue & Customs Brief 22/12  
\(^{87}\) Regulation 1042/2013 (ref Art 31a 2(g))  
\(^{88}\) Paragraph 6.5.1, Public Notice 741A, January 2010; VATPOSS07700  
\(^{89}\) Paragraph 6.5, Public Notice 741A, January 2010; VATPOSS07600  
\(^{90}\) Paragraph 6.5, Public Notice 741A, January 2010; VATPOSS07700
## Professional or Intangible Services Supplied by Other Professionals

<table>
<thead>
<tr>
<th>Description of supply</th>
<th>Connected to land?</th>
<th>Agreed by CIOT?</th>
</tr>
</thead>
<tbody>
<tr>
<td>53. Legal services such as conveyancing and drawing up of contracts of sale or leases dealing with applications for planning permission or otherwise arranging the sale or lease of land or property even if the underlying transaction resulting in the legal alteration of the property is not carried through. Such services have as their object the legal alteration of specific property.</td>
<td>Y</td>
<td>Y(^{95})</td>
</tr>
<tr>
<td>54. Legal services regarding a claim of ownership over a particular piece of land or property. Such services do not have as their object the legal alteration of specific property</td>
<td>Y</td>
<td>Y(^{97})</td>
</tr>
<tr>
<td>55. Legal services connected to contracts, including advice given on the terms of a contract to transfer immovable property, or to enforce such a contract, or to prove the existence of such a contract, where such services are not specific to the negotiation or agreement to transfer a title on an immovable property.</td>
<td>N</td>
<td>N(^{99})</td>
</tr>
<tr>
<td>56. Property management services consisting in the operation of commercial, industrial or residential real estate by or on behalf of the owner of the property, which may comprise a package of services including rent collection, arranging repairs and the maintenance / preparation of accounts.</td>
<td>Y</td>
<td>Y(^{102})</td>
</tr>
<tr>
<td>57. Portfolio management of investments in property where strategic decisions are taken regarding purchases and sales of property. Such services do not have as their object the legal alteration of specific property; rather they represent investment decisions in properties, so we would also consider investment advice etc relating to a single property as not related to land</td>
<td>N</td>
<td>Y(^{104})</td>
</tr>
<tr>
<td>58. The legal administration of a deceased person's estate which happens to include property.</td>
<td>N</td>
<td>Y(^{106})</td>
</tr>
<tr>
<td>59. Services of an accountant in simply calculating a tax return from figures provided by a client, even where those figures relate to rental income.</td>
<td>N</td>
<td>Y(^{108})</td>
</tr>
<tr>
<td>60. Accountancy services relating to the letting of property. The property services are ancillary to the other services provided which do not have as their object the legal alteration of specific property.</td>
<td>N(^{109})</td>
<td>Y(^{110})</td>
</tr>
<tr>
<td>61. Rent collection services. Accountancy services, even if calculating rental income from properties or preparing or auditing service charge accounts, do not have as their object the legal alteration of specific property.</td>
<td>Y</td>
<td>N(^{112})</td>
</tr>
</tbody>
</table>

\(^{91}\) Revenue & Customs Brief 22/12

\(^{95}\) Regulation 1042/2013 (ref Art 31a 3(h))

\(^{97}\) Revenue & Customs Brief 22/12; Regulation 1042/2013 (ref Art 31a 2(p))

\(^{99}\) Paragraph 6.4, Public Notice 741A, January 2010; Aspens Advisory Services Ltd v C & E Comrs (1995) VTD 13489; VATPOS07600 – presumably only where there is a composite supply of property management services and the accounting etc services are ancillary

\(^{102}\) Such services do not have as their object the legal alteration of specific property; rather they represent investment decisions in properties, so we would also consider investment advice etc relating to a single property as not related to land

\(^{104}\) Paragraph 6.5.1, Public Notice 741A, January 2010; VATPOS07700

\(^{106}\) The property services are ancillary to the other services provided which do not have as their object the legal alteration of specific property

\(^{108}\) Paragraph 6.5.1, Public Notice 741A, January 2010; VATPOS07700

\(^{110}\) HMRC has confirmed that, notwithstanding their guidance in VATPOS07600 (which at 30 June 2014 still includes these as land related services), they agree that such services are not land-related

\(^{112}\) Accountancy services, even if calculating rental income from properties or preparing or auditing service charge accounts, do not have as their object the legal alteration of specific property
Guidelines on place of taxation for business-to-consumer supplies of services and intangibles: CIOT comments 20 February 2015

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>N</th>
<th>Y</th>
</tr>
</thead>
<tbody>
<tr>
<td>62.</td>
<td>Preparation of accounts / tax computations for individuals or a property rental business with only UK properties.</td>
<td>N</td>
<td>Y&lt;sup&gt;114&lt;/sup&gt;</td>
</tr>
<tr>
<td>63.</td>
<td>Submission of an option to tax over land or buildings.</td>
<td>N</td>
<td>Y&lt;sup&gt;115&lt;/sup&gt;</td>
</tr>
<tr>
<td>64.</td>
<td>The VAT registration of a property investment company.</td>
<td>N</td>
<td>Y&lt;sup&gt;116&lt;/sup&gt;</td>
</tr>
<tr>
<td>65.</td>
<td>Provision of SDLT, capital allowances, VAT advice etc in relation to the acquisition, disposal or letting of a particular site or property.</td>
<td>N</td>
<td>Y&lt;sup&gt;117&lt;/sup&gt;</td>
</tr>
<tr>
<td>66.</td>
<td>Provision of general SDLT, capital allowances, VAT advice etc not relating to a particular site or property, or where the property element in incidental to the advice.</td>
<td>N</td>
<td>Y&lt;sup&gt;118&lt;/sup&gt;</td>
</tr>
<tr>
<td>67.</td>
<td>Provision of advice to a lender (eg advice on rental / business potential, not valuation) in relation to a proposed property transaction.</td>
<td>N</td>
<td>Y&lt;sup&gt;119&lt;/sup&gt;</td>
</tr>
<tr>
<td>68.</td>
<td>Services of an insolvency practitioner, whether acting as an Administrator, Receiver or in another capacity.</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>69.</td>
<td>Services of an LPA Receiver.</td>
<td>N</td>
<td>Y&lt;sup&gt;120&lt;/sup&gt;</td>
</tr>
<tr>
<td>70.</td>
<td>Feasibility studies assessing business potential in a geographic area (which do not relate to a specific property or site).</td>
<td>N</td>
<td>Y&lt;sup&gt;121&lt;/sup&gt;</td>
</tr>
<tr>
<td>71.</td>
<td>Supplies of e-versions of pre-existing maps etc.</td>
<td>N</td>
<td>Y&lt;sup&gt;122&lt;/sup&gt;</td>
</tr>
<tr>
<td>72.</td>
<td>Insurance of property except where recharged as part of a service charge / additional rent in respect of a specific property.</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>73.</td>
<td>Insurance of property where recharged as part of a service charge / additional rent in respect of a specific property.</td>
<td>Y</td>
<td>Y&lt;sup&gt;125&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

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<sup>111</sup> Assumed to be one of the five property specific services in *Aspen Advisory Services Ltd v C & E Comrs* (1995) VTD 13489

<sup>112</sup> HMRC's view is that rent collection is a service which has specific property as a central and essential element of the service and so is land related. The CIOT takes the view that the rent arises from the supply of the property. Mere collection of the debt is debt collection and so not a land related service. However, the CIOT recognises that the term 'rent collection' may be a loose term that in reality is not pure debt collection and so might be a land related service (see item 66). However, it is important in all cases to have regard to what the principal aim of the service is.

<sup>113</sup> *W H Payne & Co* (1995) VTD 13688

<sup>114</sup> Accountancy services do not have as their object the legal alteration of specific property, or the property as a central and essential element of the supply

<sup>115</sup> Whilst this may relate to a specific property, it does not have as its object the legal alteration of the property, or the property as a central and essential element of the supply

<sup>116</sup> This is an obligation of the company and does not have as its object the legal alteration of the property

<sup>117</sup> Whilst this may relate to a specific property, it does not have as its object the legal alteration of the property, or the property as a central and essential element of the supply

<sup>118</sup> This is general advice, not related to a specific property (irrespective of whether specific property would make the supply connected with land in the first place)

<sup>119</sup> Whilst valuation of a property may be connected with land, other services are one-step-removed from that, and do not have as their object the legal alteration of specific property

<sup>120</sup> Whilst LPA Receivers are appointed in relation to specific property, we consider that their services are one step removed from the actual professional services which are connected with land (such as estate agents etc)

<sup>121</sup> Paragraph 6.5.1, Public Notice 741A, January 2010; VATPOSS07700

<sup>122</sup> Such services do not have as their object the legal alteration of specific property; rather they represent business decisions

<sup>123</sup> is generally available, therefore not connected to land

<sup>124</sup> VATPOSS07700

<sup>125</sup> If it is insurance over a specific property, and recharged as a service charge / additional rent in respect of a property, we cannot see why it is not connected with land.
EXTRACTS FROM RELEVANT LEGISLATION

**Article 47, The Principal VAT Directive**
*Supply of services connected with immovable property*

Article 47

The place of supply of services connected with immovable property, including the services of experts and estate agents, the provision of accommodation in the hotel sector or in sectors with a similar function, such as holiday camps or sites developed for use as camping sites, the granting of rights to use immovable property and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision, shall be the place where the immovable property is located.

**Schedule 4A to the VAT Act 1994**

*Part 1 General Exceptions*

*Services relating to land*

(1) A supply of services to which this paragraph applies is to be treated as made in the country in which the land in connection with which the supply is made is situated.

(2) This paragraph applies to—

(a) the grant, assignment or surrender of any interest in or right over land,
(b) the grant, assignment or surrender of a personal right to call for or be granted any interest in or right over land,
(c) the grant, assignment or surrender of a license to occupy land or any other contractual right exercisable over or in relation to land (including the provision of holiday accommodation, seasonal pitches for caravans and facilities at caravan parks for persons for whom such pitches are provided and pitches for tents and camping facilities),
(d) the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering,
(e) any works of construction, demolition, conversion, reconstruction, alteration, enlargement, repair or maintenance of a building or civil engineering work, and
(f) services such as are supplied by estate agents, auctioneers, architects, surveyors, engineers and others involved in matters relating to land.

(3) In sub-paragraph (2)(c) ‘holiday accommodation’ includes any accommodation in a building, hut (including a beach hut or chalet), caravan, houseboat or tent which is advertised or held out as holiday accommodation or as suitable for holiday or leisure use.

(4) In sub-paragraph (2)(d) ‘similar establishment’ includes premises in which there is provided furnished sleeping accommodation, whether with or without the provision of board or facilities for the preparation of food, which are used by, or held out as being suitable for use by, visitors or travelers.

**COUNCIL IMPLEMENTING REGULATION 1042/13 (Land elements take effect 1 January 2017)**

Amending Implementing Regulation (EU) 282/2011 as regards the place of supply of services

*Article 13b*

For the application of Directive 2006/112/EC, the following shall be regarded as ‘immovable property’:

(a) any specific part of the earth, on or below its surface, over which title and possession can be created;

(b) any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved;

(c) any item that has been installed and makes up an integral part of a building or construction without which the building or construction is incomplete, such as doors, windows, roofs, staircases and lifts;

(d) any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction.”;

*‘Subsection 6a*

*Supply of services connected with immovable property*
Article 31a

1. Services connected with immovable property, as referred to in Article 47 of Directive 2006/112/EC, shall include only those services that have a sufficiently direct connection with that property. Services shall be regarded as having a sufficiently direct connection with immovable property in the following cases:

(a) where they are derived from an immovable property and that property makes up a constituent element of the service and is central to, and essential for, the services supplied; [or]

(b) where they are provided to, or directed towards, an immovable property, having as their object the legal or physical alteration of that property.

2. Paragraph 1 shall cover, in particular, the following:

(a) the drawing up of plans for a building or parts of a building designated for a particular plot of land regardless of whether or not the building is erected;

(b) the provision of on-site supervision or security services;

(c) the construction of a building on land, as well as construction and demolition work performed on a building or parts of a building;

(d) the construction of permanent structures on land, as well as construction and demolition work performed on permanent structures such as pipeline systems for gas, water, sewerage and the like;

(e) work on land, including agricultural services such as tillage, sowing, watering and fertilisation;

(f) surveying and assessment of the risk and integrity of immovable property;

(g) the valuation of immovable property, including where such service is needed for insurance purposes, to determine the value of a property as collateral for a loan or to assess risk and damages in disputes;

(h) the leasing or letting of immovable property other than that covered by point (c) of paragraph 3, including the storage of goods for which a specific part of the property is assigned for the exclusive use of the customer;

(i) the provision of accommodation in the hotel sector or in sectors with a similar function, such as holiday camps or sites developed for use as camping sites, including the right to stay in a specific place resulting from the conversion of timeshare usage rights and the like;

(j) the assignment or transfer of rights other than those covered by points (h) and (i) to use the whole or parts of an immovable property, including the licence to use part of a property, such as the granting of fishing and hunting rights or access to lounges in airports, or the use of an infrastructure for which tolls are charged, such as a bridge or tunnel;

(k) the maintenance, renovation and repair of a building or parts of a building, including work such as cleaning, tiling, papering and parqueting;

(l) the maintenance, renovation and repair of permanent structures such as pipeline systems for gas, water, sewerage and the like;

(m) the installation or assembly of machines or equipment which, upon installation or assembly, qualify as immovable property;

(n) the maintenance and repair, inspection and supervision of machines or equipment if those machines or equipment qualify as immovable property;

HMRC consider that (a) and (b) are not cumulative provisions, which appears correct.
(o) property management other than portfolio management of investments in real estate covered by point (g) of paragraph 3, consisting of the operation of commercial, industrial or residential real estate by or on behalf of the owner of the property;

(p) intermediation in the sale, leasing or letting of immovable property and in the establishment or transfer of certain interests in immovable property or rights in rem over immovable property (whether or not treated as tangible property), other than intermediation covered by point (d) of paragraph 3;

(q) legal services relating to the transfer of a title to immovable property, to the establishment or transfer of certain interests in immovable property or rights in rem over immovable property (whether or not treated as tangible property), such as notary work, or to the drawing up of a contract to sell or acquire immovable property, even if the underlying transaction resulting in the legal alteration of the property is not carried through.

3. Paragraph 1 shall not cover the following:

(a) the drawing up of plans for a building or parts of a building if not designated for a particular plot of land;

(b) the storage of goods in an immovable property if no specific part of the immovable property is assigned for the exclusive use of the customer;

(c) the provision of advertising, even if it involves the use of immovable property;

(d) intermediation in the provision of hotel accommodation or accommodation in sectors with a similar function, such as holiday camps or sites developed for use as camping sites, if the intermediary is acting in the name and on behalf of another person;

(e) the provision of a stand location at a fair or exhibition site together with other related services to enable the exhibitor to display items, such as the design of the stand, transport and storage of the items, the provision of machines, cable laying, insurance and advertising;

(f) the installation or assembly, the maintenance and repair, the inspection or the supervision of machines or equipment which is not, or does not become, part of the immovable property;

(g) portfolio management of investments in real estate;

(h) legal services other than those covered by point (q) of paragraph 2, connected to contracts, including advice given on the terms of a contract to transfer immovable property, or to enforce such a contract, or to prove the existence of such a contract, where such services are not specific to a transfer of a title on an immovable property.

Article 31b

Where equipment is put at the disposal of a customer with a view to carrying out work on immovable property, that transaction shall only be a supply of services connected with immovable property if the supplier assumes responsibility for the execution of the work.

A supplier who provides the customer with equipment together with sufficient staff for its operation with a view to carrying out work shall be presumed to have assumed responsibility for the execution of that work. The presumption that the supplier has the responsibility for the execution of the work may be rebutted by any relevant means in fact or law.

Article 31c

For the purpose of determining the place of supply of telecommunications, broadcasting or electronically supplied services provided by a taxable person acting in his own name together with accommodation in the hotel sector or in sectors with a similar function, such as holiday
camps or sites developed for use as camping sites, those services shall be regarded as being supplied at those locations.’

It shall apply from 1 January 2015
However, Articles 13b, 31a and 31b shall apply from 1 January 2017.

Extract from Revenue & Customs Brief 22/12
What do we mean by land?
For the purpose of determining the place of supply, land means any:

- specific part of the earth, on, above or below its surface, over which title or possession can be created
- building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved
- item making up part of a building or construction and without which it is incomplete (such as doors, windows, roofs, staircases and lifts)
- item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction

When is a service related to land?
In order for a service to be land related for determining the place of supply it must have a sufficiently direct connection with a specific piece of land.
This will include services:

- derived from land and where the land is a central and essential part of the service
- intended to legally or physically alter a property

Status of this document
This document considers a wide range of services that have been the subject of HMRC guidance and references each to the case law/regulation that deals with how to determine the place of supply. VAT is a constantly evolving tax and interpretations of the rules change as a result of both case law and further legislation. Further, the treatment of transactions is very heavily dependent on its specific facts. Accordingly, the status of each statement in this document needs to be researched at the time of any decision.

While care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from acting as a result of any statement contained in this summary can be accepted by the author, editor or the CIOT as publisher. This introductory guide is not intended to comprise exhaustive coverage of the subject; reference should be made to the legislation for all technical and practical questions.
February 23, 2015

Mr. Piet Battiau
Head of Consumption Taxes Unit
Centre of Tax Policy & Administration
OECD
2, rue André Pascal 75775 Paris Cedex 16
France

By email: piet.battiau@oecd.org

Dear Mr. Battiau,

Re: CPA Canada response to the OECD Draft International VAT/GST Guidelines on the Place of Taxation for Business-To-Consumer Supplies of Services and Intangibles & Provisions on Supporting the Guidelines in Practice

Chartered Professional Accountants of Canada (CPA Canada) is the national organization established to support a unified Canadian accounting profession. We represent highly qualified professionals who demonstrate an ongoing commitment to providing the highest standards of accounting, ethics and best business practices.

CPA Canada welcomes the opportunity to comment on the draft International VAT/GST Guidelines on the Place of Taxation for Business-To-Consumer Supplies of Services and Intangibles and commend the OECD for the work undertaken to date.

We strongly support the development of these guidelines which we believe will encourage neutrality, consistency and certainty across jurisdictions and greater harmonisation with regard to the taxation of international trade. This is particularly important given the recommendations in Action 1 of the BEPS Action Plan (Digital Economy) regarding the collection of VAT/GST on B2C supplies and the potential for competitive distortions which have been created between domestic and foreign suppliers in some jurisdictions.

General Observations

The proposal to tax cross border supplies of services and intangibles based on the jurisdiction of the consumer and to require non-resident vendors to collect and remit VAT on these supplies will impose significant
challenges and compliance costs for businesses. It is of critical importance that the compliance costs imposed on non-resident businesses be kept as low as possible and in this regard, simplified compliance procedures for non-resident businesses will be essential to encourage compliance by these businesses. Simplified procedures will be necessary for all areas of compliance, including: registration, filing of returns and remittance of taxes. Critically, VAT should not become a barrier to trade and there is a risk that if the compliance burden is too high (both in terms of cost and risk) businesses may choose not to supply customers in some countries.

Specific Observations/Comments

B2B vs. B2C Supplies

The guidelines recommend that the reverse charge mechanism be used for cross border B2B supplies and non-resident supplier registration for cross border B2C supplies. Foreign suppliers will therefore have to determine if their customers are businesses or consumers, a distinction many suppliers do not make now. This imposes a significant compliance burden on suppliers. While the guidelines and commentary provide some suggestions as to how suppliers could determine their customers’ status, we submit that the better view is to have foreign suppliers charge VAT in respect of both B2B and B2C supplies. This would alleviate the compliance burden for businesses which would otherwise be required to distinguish between their business and non-business customers and apply different VAT/GST rules to each.

For B2B supplies, simplified compliance procedures that result in the tax being charged should ensure that any VAT charged/paid to suppliers should be recoverable (or easily recoverable) as an input VAT deduction or input tax credit taking into account appropriate documentary requirements.

Guideline 3.5

This guideline recommends that the place of physical performance is an appropriate proxy to determine the place of consumption for “on the spot supplies” of services to final consumers.

We agree with this recommendation and note that paragraph 3.18 suggests that the general rule for B2C “on the spot” supplies could also be adopted as a specific rule in a B2B context. Paragraph 3.18 correctly states that this would alleviate the compliance burden for businesses which would otherwise be required to distinguish between their business and non-business customers and apply different VAT/GST rules to each. We believe the Guidelines should be much stronger on this point and actually make a recommendation that the same rules apply for on the spot B2C and B2B supplies regardless of the size of the business. Having different rules for B2B
and B2C on the spot supplies would be very impractical and impose a significant compliance burden on businesses.

**Guideline 3.6**

**Usual residence of the customer**

We agree that the usual residence of the customer could be a reasonable and workable proxy to determine the place of consumption for cross border supplies not falling within the rule for “on the spot” services. We also support the guidance that is provided on how businesses could determine and evidence the usual residence of the customer, particularly the suggestion that countries be encouraged to allow suppliers to be able to rely as much as possible on information that they routinely collect in the course of their normal business activities.

We suggest that the guidance that is provided be made stronger and presented in the form of recommendations rather than options countries may wish to consider. It is also extremely important that countries adopt the same or at least very similar requirements for determining the usual residence of a customer in order to minimize compliance costs and encourage compliance by businesses. Countries should also be encouraged to accept evidence that a supplier is required to maintain in its home jurisdiction for other purposes if it provides reasonable evidence of the usual residence of its customers (e.g. evidence to support zero rating of a supply in the supplier’s home jurisdiction).

**Registration and compliance**

We agree with the observation made in the guidelines that collecting and remitting tax may be more burdensome for non-resident suppliers than domestic suppliers, particularly where a supplier is selling into many jurisdictions. We strongly support the recommendation that simplified online registration and compliance systems that are separate from traditional registration and compliance systems should be put in place by jurisdictions to facilitate compliance by remote sellers. Unduly burdensome registration and compliance regimes will likely result in non-resident businesses not complying with their obligations or choosing not to make supplies into certain jurisdictions.

We generally welcome and support the guidance that is provided in areas such as registration, filing and invoicing. We believe however, that the guidance could be made stronger by presenting it in the form of recommendations, particularly in the areas of registration thresholds and invoicing.

Registration thresholds for non-resident suppliers of remotely delivered B2C services and intangibles are essential to ensure that compliance requirements are proportionate and workable from a business perspective.
We recognize that this may a difficult area for governments but believe that a recommendation be included in the Guidelines that countries should introduce registration thresholds for non-resident suppliers of remotely delivered services and intangibles.

With respect to invoicing, we agree with the statement that invoicing requirements are amongst the most burdensome responsibility of VAT systems. We welcome the suggestion that countries eliminate the requirement for invoices for B2C supplies covered by the simplified registration regime, or alternatively, to accept the invoicing requirements of the suppliers’ home jurisdiction or to accept commercial non-VAT invoices. We suggest that this point be made as a strong recommendation rather than an option jurisdictions may consider.

**Permanent Establishment**

It is our experience that non-resident suppliers are sometimes reluctant to register in a jurisdiction for VAT/GST purposes out of fear that it may trigger consequences for corporate income tax purposes. In fact, some countries take the position that a VAT registration, of itself, gives rise to a permanent establishment or other filing obligations for corporate tax purposes. This can act as a very significant disincentive for non-resident suppliers to register. If countries wish to encourage compliance with the guidelines, they should clearly state that registration for remote B2C supplies does not, of itself, create a permanent establishment or other filing obligations for corporate tax.

Sincerely,

John Bain  
Chair, CPA Canada Commodity Tax Committee  
Partner, KPMG LLP
c.c.: CPA Canada Commodity Tax Committee
   - Sania Ilahi, Vice Chair, CTC and Partner, Tax Services, Ernst & Young LLP
   - Danny Cisterna, CTC Past Chair and Partner, Indirect Tax/Financial Services, Deloitte
   - Rosemary Anderson, National Practice Group Leader, Thorsteinssons LLP
   - Rino Bellavia, Partner, BDO Canada LLP
   - Cathy Kuhrt, Partner, Tax Services, Grant Thornton LLP
   - Mario Seyer, Tax Services Leader – Montréal, PricewaterhouseCoopers LLP
   - Heather Weber, Indirect Tax Services Leader, MNP LLP
   - Gabe Hayos, Vice President, Taxation, CPA Canada
   - William Dobson, Special Advisor, Taxation, CPA Canada
Response to Discussion Drafts of two new elements of the OECD International VAT/GST Guidelines

I comment on these two new elements as a “nanobusiness” supplying electronic documents containing knitting patterns. I reside within the UK, therefore my tax authority is Her Majesty’s Revenue and Customs.

General Comments

The EU has already implemented a change to the way digital items traded cross-border are taxed. As per the OECD Guidelines, from January 1, 2015, all cross border sales into any EU Country are to have VAT applied with no minimum threshold for sales. In the UK, for nanobusinesses, the impact has been horrific. Information was not widely publicised, and I found out about it via a US based knitting website. I can only speak for traders within the knitting pattern world, but the inconsistent implementation, and the principle that one jurisdiction is expecting someone resident in another jurisdiction to pay tax (with subsequent questions concerning the legality of an EU country being able to force a citizen of a non-EU country to remit this tax) has led to much confusion, with next to no clarification being forthcoming from anyone in any position of authority. It appears tax authorities are as ignorant as the rest of us about how this will be implemented, with HMRC having to change its mind seemingly on a daily basis.

Paragraph 3.3

Recommendations that:

- Compliance by businesses involved is kept as simple as possible
  This is currently not being met, as different EU member states are providing different interpretations of the directive. There is no guarantee that should I follow the HMRC Guidelines, but fall foul of those in Spain, that the Spanish Tax Authority will not pursue me.

- Clarity and Certainty are provided for both businesses and their tax administrations.
  Please see http://euvataction.org for details about how there has not been anything like the dictionary definition of either word.

- The Costs Involved in complying with the tax and administering it are minimal
  Not at all currently. If one imagines sales of my £4 pattern (my most expensive). If, in a year, I sell 3 to German customers, 2 to French customers, 3 to Spanish customers and 1 to a Hungarian customer, I need to work out the totals, find out the applicable VAT Rate in those countries (as I am responsible for my accounting, I would rather know what I expect the sum to be), ensure by using two or three pieces of non-conflicting information that the buyers are in those countries, then filling in the HMRC VAT MOSS system. All this takes time and effort, has to be done four times a year, and will give each country possibly less money in revenue than it costs to administer. I then need to securely store the information I used on an online repository, with all relevant safeguards, possibly register as a Data Controller under the Data Protection Act, and ensure that that information is secure and accessible for 10 years. Tell me which piece of technology on your desk is over 10 years old, and is guaranteed to be backwards compatible with the hardware and applications you were using in 2005. My “full time job” is IT, and I can tell you that your spreadsheet program is unlikely
to be fully compatible, which will give you issues unless you do work (more cost) to keep the data up to date each year.

In terms of the costs to me of ascertaining my customer’s location. If my customer is resident in the UK, but has travelled to Germany, which is where she is when she purchases, then she will be liable for the German rate of VAT. So how do I, with tiny resources verify her location? Her IP Address tells me Germany. Her billing address tells me UK. Her Phone Number tells me UK – therefore my conclusion would reasonably be UK – which is incorrect and has me in breach of taxation laws over the princely sum of 80p.

Paragraph 3.4

While guidelines are not intended to provide detailed prescriptions, unfortunately, with 28 member states of the EU, and many, many more states worldwide, you need to strive for clear and unambiguous treaties on how this is implemented. Already, I see examples of different states implementing the same EU Directive in different ways – if the VAT is a tax on consumption in a multinational market, but is collected from the final seller in the supply chain, not from the consumer themselves, but not ensuring that there is consistency in implementation – then you are actually ensuring that the “big boys” such as Amazon and iTunes will become even more dominant than they are now, and that the small sellers who wish to remain independent, and not be tied to these companies, will just give up and join the ranks of the unemployed – because a Sole Trader cannot be expected to be au fait with the Tax systems of every single country in which he or she may trade.

What is to stop Country A from aggressively pursuing all VAT due on cross border sales into its territory, but then insisting that its own small traders do not report their cross border sales below a certain amount? That is also not a level playing field.

Paragraphs 3.13, 3.20, 3.23 & 3.24

The “usual residence” test would be an excellent way to implement this – it would then make the issue identified above go away – however HMRC guidance is to collect two pieces of location information (three if these contradict), to determine location. Such items are not readily available to the smaller seller, who may have a website cart that links to Paypal or another online payment provider – to whom the seller contracts out the necessity of storage and processing of sensitive information. Paypal operates as a trusted intermediary, and would therefore not be able to provide smaller sellers with the sort of information required for “usual place of residence” as, certainly within the EU, this would fall without their remit for data protection. Websites, which are the usual media for digital delivery may be set up to collect IP Addresses – however, people who work for international companies may have their IP Address assigned by a DHCP server in a different country to their usual residence. They may be travelling – or they may, as many do, be using a “proxy tunnel” which will make them appear to be in a different state from that which they are – this is commonly used online to get around issues such as viewing content online that is meant to be limited to a single market.

Section C3 (in its entirety)

This all needs to be underpinned with binding international treaties for it to work. In the current regime, how much VAT has been collected by the EU Member States for sales into the EU from outside the EU since 2003? How much effort has gone into collecting this? To pass laws as individual countries, which then allegedly place a burden on the citizens of another country to comply, with nothing to back them up for failure to perform is a complete waste of taxpayers’
money, and a complete waste of time. What interest does Canada or the US have in ensuring that Lithuania collects the tax owing? Who will enforce it? It is all very well to issue “motherhood and apple pie” statements, but to try to then shrug off the details is a bit disingenuous. International treaties and international rules will ensure that there is truly a level playing field. Otherwise, what is there to stop Country X passing a law, then turning up on my doorstep to say “you owe us $Y”?

**Paragraph 4.27**

Avoidance and unfairness is unavoidable given these guidelines. Without clear and enforceable treaties, those people outside a trading bloc which has implemented the guidelines (eg the EU) will continue to trade, and to be liable for VAT that will never be paid. Already certain countries take no notice of copyright etc on the internet, so what makes anyone think that VAT will be any different? Therefore, currently, with the EU adopting these guidelines, and the USA and Canada not, someone supplying the same type of digital good into the EU as I do will price without taking into account the liability for VAT. As a citizen of an EU state, I need to take this into account, and therefore my costs are artificially approximately 20% higher, and I am uncompetitive. Without treaties, enforcement and sanctions, how is that achieving your aims.

**Conclusion**

I appreciate that there are always going to be issues with trying to establish fair and equitable ways of doing business in a truly global market – however, you are 10 years behind the times, and change cannot happen quickly where there are multiple jurisdictions involved. Talking over the principles is all well and good – but the EU is an example of where rushing into this is going to fail. It is a well-intentioned directive, implemented incredibly badly.

If this is clear and fair, and works well, then someone needs to answer this question (an example of how technology has trumped diplomacy and technocracy again). On Sunday, I fly from Heathrow to Singapore. I will then be attending meetings and delivering training sessions in Malaysia for 2 weeks. I live in the UK. Whilst on the flight, I realise I do not have enough knitting to keep me occupied. I go online (which I can on this flight) and purchase a pattern. I use this pattern on the flight, which crosses the airspace of a number of countries in its 13 hour duration. I land in Singapore, but never knit there, as I am straight into a taxi and off to the factory. I finish knitting while I am in Malaysia and delete the pattern from my laptop. To whom do I owe the tax, and to whom should the seller (most likely USA-based) remit that tax, and at what rate? I reside in the UK, but have never used nor will use that service in the UK. I used it in the air, and in Malaysia. Under the OECD’s proposed rules, it would be owed to the UK, as that is my usual location. Goodness knows what my IP Address would be, and the only information I provide the seller is my UK Delivery address via Paypal. The seller does not, and cannot know where I am, so therefore cannot comply with the spirit of the principle that taxation should occur in the country of consumption.
Opinion Statement FC 6/2015

on two new elements of the

OECD International VAT/GST Guidelines

Prepared by CFE Fiscal Committee

Submitted to the OECD

in February 2015

The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries (16 OECD member states) with more than 100,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

The CFE is registered in the EU Transparency Register (no. 3543183647-05).
Introduction

This Opinion Statement responds to the OECD public consultation of 18 December 2014 on two new proposed elements of the OECD International VAT/GST Guidelines. The proposed changes are related to the OECD work on taxation of the digital economy (BEPS Action 1). The CFE has previously commented on the draft consolidated VAT/GST guidelines (Opinion Statement FC 3/2013) and on BEPS Action 1 (Opinion Statements FC 7/2014 and FC 17/2014). The numbering of the paragraphs below refers to the paragraphs in the OECD discussion drafts of 18 December 2014.

We will be pleased to answer any questions you may have concerning our comments. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

Chapter 3- determining the place of taxation for cross-border supplies of services and intangibles

3.3 The preliminary issue, prior to the determination of the place of taxation, is to qualify exactly which are the supplies at stake, and to differentiate them in categories.

Within the list of recommended approaches, also the effectiveness of the VAT system that implies the taxation under the destination principle has to be considered and the correct exercise of the right of deduction has to be ensured.

3.8 The supplier does not have to make reasonable efforts. It is the receiver of the supply who must provide elements of proof of his status. Reference has to be made to the situation of the taxable person: A customer can be a business but may not necessarily be acting as a business, when purchasing a service as a consumer. We suggest using the presumptions applied for supplies of telecommunications, broadcasting or electronically supplied services (see Art. 24b Implementing Regulation (EU) No. 282/2011, as amended by Implementing Regulation (EU) No. 1042/2013).

3.13 It is not clear whether the place of performance rule is identical to the use and enjoyment rule or whether for digital supplies it only represents the place of download of the service.

3.24 The information provided by the customer generally may be considered as important evidence bearing on the determination of the jurisdiction of the customer’s usual residence, but this criterion does not comply with the use and enjoyment rule. Accordingly, it would be better to establish a priority of the principles that have to be applied to the supply (e.g. first, the use and enjoyment, second, where the use and enjoyment it is not applicable, the usual residence) with the aim to avoid double taxation or non-taxation.

3.25 In EU countries, there is the MOSS for that purpose (Mini one stop shop), which allows a taxable person who supplies digital services to be registered in one member state.

3 http://www.cfe-eutax.org/node/3157
4 http://www.cfe-eutax.org/node/3671
3.27 Such a reverse charge mechanism does not offer an appropriate solution for collecting VAT on business-to-consumer supplies of services and intangibles from non-resident suppliers. This mechanism could not be applied to B2C transactions, because it provides for a shift of the tax liability on the consumer, who is not registered for VAT purposes, making it extremely difficult for tax authorities to control the supplies.

3.28 For non-resident suppliers, the best solution (simple and effective) is to be registered with the MOSS.

3.29 When implementing a registration-based collection mechanism for non-resident suppliers, it is recommended that jurisdictions consider establishing a simplified registration and compliance regime to facilitate compliance for non-resident suppliers. The highest feasible levels of compliance by non-resident suppliers are likely to be achieved if compliance obligations in the jurisdiction of taxation are limited to what is strictly necessary for a proper collection of the tax. Appropriate simplification is particularly important to facilitate compliance for businesses faced with obligations in multiple jurisdictions. Maintaining traditional registration and compliance procedures for non-resident suppliers of business-to-consumer services and intangibles would risk creating barriers that may lead to non-compliance or to certain suppliers declining to serve customers in jurisdictions that impose such burdens.

3.30 The concept of neutrality does not only refer to the distortion of competition but also to the taxation at consumption through the right of deduction.

3.33 The use of spontaneous exchanges of information is not sufficient. The principle to be applied for the exchange of information is reciprocity.

3.34 The exchange of information can be effective only if the tax authorities recognise the evidential value of specific information, which should be established on a common basis for all countries. This is essential to keep the amount of data to be requested from the taxpayer reasonable, but also to prevent the exchange of large amounts of non-relevant information which may create an obstacle to effective administrative cooperation.

3.36 The problem is still the acceptance of the same rules/proxies in all countries.

3.37 Referring to the second step, it is to be recalled that the only common result that has to be achieved is the taxation at the place of consumption, so that the specific rule will be applied only in cases in which the general rule does not produce that effect. The aim of the two-step approach is to find an appropriate result, not to compare two possible outcomes with a view to identifying the “better” result.

3.57 Contrary to what is stated in the discussion draft, the terms should be understood narrowly within the meaning of national civil laws, because that is the only criteria which provides legal certainty and avoids conflicts of interpretation, as these are well-established terms in countries’ legal traditions.

3.59 Referring to the utilisation of immovable property, if each jurisdiction would be able to choose whether to apply a specific rule, this would be detrimental to legal certainty. Moreover, countries could use this freedom as an instrument of tax policy, leading to frequent changes in the law, or
choose to apply turnover thresholds for transactions, leading to further divergences among countries.

Annex 3 [to chapter 3] - main features of a simplified registration and compliance regime for non-resident suppliers

Invoicing

11. It is not possible to eliminate invoice requirements because with the invoice, the supply is proven and traceable for the supplier. This requirement has to be maintained.

Use of third-party service providers

14. It is necessary to establish a joint and several liability between the non-resident supplier and the third party with the aim to tackle VAT fraud and tax evasion.

Application in a business-to-business context

15. The reverse charge provides a sort of derogation from the principle of taxation at the place of consumption.

It is not possible to accept that jurisdictions, in their general rules, do not differentiate between business-to-business and business-to-consumers supplies in their national legislation because it is necessary to apply the rules of taxation, in order to ensure the right of deduction.

17. Implementing a threshold of digital supplies to require the registration of the supplier may cause distortion of competition.

Chapter 4 - mutual cooperation, dispute minimisation, and application in cases of evasion and avoidance

4.5. It is not clear what “economic substance” of a transaction intends to say, because a transaction is economical in itself. One might consider speaking about juridical substance, meaning the coincidence between the economic substance and the legal form.

4.20 Advance ruling procedures in that field could produce undesirable effects such as the distortion of competition in cross border trade due to the tax policy of a State.
Dear Mr. Battiau,

It is with great interest that the Confederation of Netherlands Industry and Employers¹ VNO-NCW and the Royal Association MKB-Nederland² (hereinafter “we”) have taken note of the contents of the draft elements of the OECD International VAT/GST Guidelines relating to the place of taxation of B2C supplies of services and intangibles and the provisions to support the application of these Guidelines in practice. We are the leading Dutch national business federations covering almost all business sectors of the Dutch economy and representing companies of all sizes, from large to medium-sized and small companies. Given our involvement in the discussions on the future of VAT/GST we are very pleased to have the opportunity to provide, in addition to the comments of BIAC, a contribution on specific topics.

Before we explain these topics we would like to express our great appreciation for the joint work of OECD, governments and business to the present draft Guidelines.

Our contribution includes the following specific topics:

a. The desirability of a threshold – the requirement of proportionality
b. Proxies
c. The availability of information
d. Tax compliance in a cooperative way

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¹ VNO-NCW, a member of BIAC, cooperates closely with MKB-Nederland through a shared work organisation situated in The Hague.
² Royal Association MKB-Nederland is the Dutch federation of SMEs.
At the end of our contribution we would like to emphasize the importance of footnote 24 of the OECD International VAT/GST Guidelines.

a. The desirability of a threshold – the requirement of proportionality (page 18, paragraph 17)

Although we agree with the destination principle as the leading principle for determining the place of taxation we are of the opinion that a strict application of this principle in case of cross-border B2C electronic services is contrary to the requirement of proportionality. The result of a strict application is that the businesses concerned are confronted with substantial compliance costs and problems caused by e.g.:

- The need to gain knowledge and understanding of the VAT rules, rates etc. of a multiple of countries.
- The need to delve into the more complex local processes as time limits and procedures (e.g. for supplementary returns) of a multiple of counties;
- The need to change ERP systems and internal processes in order to deal with tax rates, etc. of a multiple of counties (huge IT costs);
- Different national fines in a multiple of countries for e.g. exceeding time limits;
- The need to be continuously informed on changes in regulations and jurisprudence (huge costs because of advisory services and possible adjustment of ERP systems).
- Different archiving requirements.
- The need to identify the usual residence of customers.

Although e.g. proxies reduce the practical problems in determining the usual residence of customers, as in the new EU VAT rules for B2C electronic services as from 1st January 2015, the practice shows that businesses, due to the practical consequences of the new EU rules, have decided to terminate the cross-border supply of electronic services. Those decisions have been taken by businesses from a multinational size to small businesses. In our opinion VAT rules may never have an effect that is contrary to the policy to promote and stimulate cross-border activities, especially by SMEs. In our view the introduction of a threshold would be an appropriate measure to create a workable result for both businesses and national authorities (less audit problems).

A threshold would mean a relief in case of a. B2C activities without the possibility of compliance via a one-stop-shop and b. of SMEs with few cross-border activities (e.g. starters) for which the administrative burden and costs – even with a one-stop-shop – are disproportionate to the scope of the cross border activities. Against this background we would advocate a more positive approach of a threshold in the Guidelines.
b. Proxies (page 10, paragraph 3.7)
It would be useful to stress in the Guidelines that proxies are important with a view to certainty, simplicity and efficiency. In Guideline 3.7, under b., the phrase “a significantly better result” seems to be a safety net for only national authorities. In our view the phrase “for both authorities and business” should be added in order to create the right balance.

c. The availability of information (page 18, paragraph 13/Chapter 4)
We agree that the Guidelines encourage jurisdictions to make available on-line all information necessary to register and comply with the simplified registration and compliance regime, preferably in the languages of their major trading partners (page 18, paragraph 13). We are of the opinion that it would be very useful for business if the on-line availability would also include all information on the national VAT/GST rules (rates, compliance obligations etc.). That information would help business to comply with their tax obligations. Therefore we advocate to implement an encouragement in Chapter 4 of the Guidelines.

d. Tax compliance in a cooperative way – Chapter 4
The implementation in Chapter 4 of the importance of an active role of national authorities in developing a policy of cooperative compliance and voluntary corrections by business would be very welcome. A relationship with businesses based on trust and cooperation would make it possible for tax authorities to develop a targeted approach of fraud. That would be in the mutual interest of national authorities and legitimate business.

Last but not least
We emphasize, as well as BIAC, the importance of footnote 24 of the OECD International VAT/GST Guidelines. The footnote underlines that a registration for VAT purposes does not in itself constitute a permanent establishment. We are concerned about the tendency by tax authorities to qualify a mere VAT/GST registration as a permanent establishment for e.g. corporate tax purposes.

We are looking forward to the further development of the present draft Guidelines.

Yours sincerely,

C. Oudshoorn
Director

The Confederation of Swedish Enterprise is Sweden’s largest business federation representing 49 member organizations and 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise highly appreciates the work the OECD is doing in the indirect tax area and warmly welcomes the opportunity to comment upon the International VAT/GST Guidelines on the place of taxation for cross border business-to-consumer supplies of services and intangibles.

General comments

The destination principle vs the origin principle

Implementing a destination based principle for taxing cross border business-to-consumer (B2C) services and intangibles intends to put the B2C suppliers on an even footing from a VAT rate perspective. This will be a good achievement from a VAT neutrality point of view and will lead to a situation where it will no longer be desired to establish B2C businesses in countries with low VAT rates or with no VAT at all when selling cross border B2C services.

However, we can unfortunately conclude that there are some negative aspects connected with the use of the destination principle in B2C supplies as well. This since we are currently experiencing some problems with the implementation of the destination based principle for certain B2C services within the EU. The problems we
have met so far are mostly related to VAT registration and VAT compliance, i.e. difficulties to;

- register for VAT abroad or via the MOSS-portal (mini-one-stop-shop),
- be VAT compliant in different countries,
- identify in which country the customers are established and
- handle difficulties related to different threshold levels used by countries.

A continuous use of the origin principle for B2C supplies, on the other hand, causes problems with VAT rates being used by member states and/or by the business community as a commercial advantage or as a mean to increase profits / taxes. At the same time, we also receive comments that not all businesses consider it to be a commercial problem levying a high VAT rate, as the Swedish one, when supplying B2C services. There are in other words some pros and cons connected with the use of both principles.

The implementation of the destination principle for B2C sales of e- and telecom services within the EU provides the OECD with a unique opportunity to analyse, evaluate and reflect on the effects the destination principle have on such sales. We therefore recommend that the OECD conducts such analysis and evaluation.

The Confederation of Swedish Enterprise believes that the Ottawa taxation framework principles (neutrality, efficiency, certainty, simplicity, effectiveness, fairness and flexibility) constitute an appropriate framework when analysing the tax challenges. Further on, the OECD should take into account that not all the OECD member countries have well developed VAT or similar systems. It is, thus, of utmost importance that the OECD keeps encouraging countries to use simplified VAT registration and collection procedures.

In order for a destination based principal to work in practice it is essential to promote the use of simplified and harmonized rules and procedures. Otherwise the use of the destination principle may result in B2C suppliers choosing not to sell digitalised products to consumers in certain countries or choose not to register for VAT in the consumer’s country.

Finally, there is one very important point to highlight when it comes to supplier registration as a collection mechanism for VAT/GST purposes. As stated in the International VAT/GST business-to-business (B2B) guidelines, a registration for VAT purposes by itself does not constitute a permanent establishment. It is, however, the experience by more and more businesses that, by acting as VAT/GST collectors for governments, foreign VAT registrations are often misused by governments and are being re-qualified as permanent establishment for corporate income tax purposes. This forces businesses to pay corporate income tax in jurisdictions where, based on international direct tax principles, no corporate income tax should be levied. In the long term if this continues to happen on a larger scale, such developments could
undermine the efficient collection of VAT/GST by dissuading businesses from registering for VAT/GST purposes.

Comments on specific guidelines

Please find below some comments on the International VAT/GST Guidelines on place of taxation for cross border B2C supplies of services and intangibles.

3.1 We agree that VAT neutrality in international trade in B2B supplies is generally achieved through the implementation of the destination principle. For B2C supplies, however, it is not obvious for us that the destination principle will lead to VAT neutrality in the same way as for B2B supplies. This since the collection of VAT in B2C supplies, through a local VAT registration for the supplying company, will lead to a more difficult VAT reporting situation for a B2C supplier compared with what is the case in B2B cross border supplies, i.e. where the buying company reports the output VAT via the reversed charge mechanism.

3.2 We fully agree that VAT systems must have clear and well defined mechanisms (proxies) for identifying the jurisdiction of consumption. The main challenge is to find useful proxies leading to a taxation based on neutrality, efficiency, effectiveness etc. and that at the same time can be used over time for future business as new products and business models are developed. In this respect the experience from the B2C sales of e- and telecom services within the EU is relevant to analyse and evaluate.

3.8 It will be essential for jurisdictions to implement an easy-to-use-process allowing suppliers to verify the validity of their customers VAT or tax registration numbers. If this is not easy for suppliers to do, the cross border B2C supplies may be reported incorrectly to a large extent which could lead to unnecessary compliance burdens. It cannot be emphasized enough that it is important not to overburden suppliers that have been acting in good faith and having made reasonable efforts to validate their customers VAT or tax registration numbers. It is important that the VAT rules should not hinder the trade or the development of new services.

3.12 At first sight it seems easy to agree up on a rule based on the customer’s usual residence, to be the most appropriate approach for determining the country of consumption. However, since it is becoming more common for individuals to be resident in more than one country, such rule may cause some major challenges in a nearby future. Further on, what kind of relevant information should be collected from the buyer in order to identify the land of consumption? What kind of evidence should the supplier provide to tax administrations in different jurisdictions in order to show the land of consumption / taxation?

3.13 We see a need for the OECD member states to agree upon a set of harmonized and easy-to-use rules and regulations for cross border B2C supplies
with regards to the VAT registration and collection procedures, in order for the
destination principle to work in practice. We also see a need for a common threshold
in order to avoid a VAT registration obligation for single low value supplies.

3.23 We fully agree that in the B2C context, suppliers are less likely to have
an established relationship with their customer as in the B2B context. It is, therefore,
essential for suppliers to have clear guidance how to determine in which tax
jurisdiction a consumer is deemed to be resident. In this respect the experience from
the B2C sales of e- and telecom services within the EU is relevant to analyse and
evaluate. What kind of evidence is relevant to use and could a single piece of
evidence be enough? For many low-value transactions the only customer
information available by the seller is the credit card details. Are such information
appropriate and a good indicator to use when determining the place where the
individual is resident? And is it advisable for the B2C suppliers to display their
customer’s credit card details to Tax Authorities, due to the sensitivity of such
details?

3.28 We agree with the conclusion that it will be more effective to use the
seller than the individuals for VAT collection purposes. As mentioned above, we do,
however, see a lot of challenges with a model where the seller has to register for
VAT purposes in all jurisdictions where their consumers are resident. We therefore
see a need for a useful threshold in order to avoid a VAT registration obligation for a
few low value supplies.

3.29 We fully agree that a simplified registration and compliance regime etc.
will be a key factor for success when implementing the destination principle for non-
resident suppliers. We have received comments from Swedish companies that they
sometimes avoid selling single digitalized products to consumers resident in other
countries due to the complex and burdensome registration and compliance
procedures within the EU.

3.30 We endorse the recommendation to operate simplified registration and
compliance regimes separately from the traditional registration and compliance
regimes.

On behalf of the Confederation of Swedish Enterprise

February 19, 2015

Krister Andersson

Head of the Tax Policy Department
David Hoogvorst

My situation:

I’m one of the web shop keepers that is ‘hit’ by the EU VAT changes.

I sell hobby software, that I develop myself, to consumers, on the internet. This type of niche software can only exist in a worldwide market, as I need to reach every possible person interested to earn enough money to make a living. So I need to remove any overhead and any barrier to purchase. It’s a ‘standard’ software product, so with no specific changes for specific clients.

The problem:

The main issue that I have with the new regulations is to determine the place of purchase.

The rules require two independent and non-conflicting proofs of location. This is impossible to get before showing the price including VAT, and in most cases very hard to get after the purchase.

As said, I don’t want to put any obstacles in front of my prospective buyers before purchase, such as a series of questions that are completely irrelevant to buying or using the product. I’m afraid that it will scare away customers. But assume I would ask, and consumers find out that they will pay less if they claim to be from Luxembourg, or discover that they can buy VAT-free if they claim to be from Australia, well, would that help?

My solution so far is to have one price for all, and calculate the tax after purchase. So this leaves me with a larger profit for sales outside of the EU (no VAT at all), and the smallest profit in Hungary with their 27% rate. As most of my users will use the software at home, I take the PayPal or Stripe address to determine the VAT rate. I also store the IP address, but I’m not sure what to do if it conflicts with the credit card address.

I’m not much in favor of contacting the customer and ask in which country they were when they purchased in case the data conflicts. But if I need to, it can be done. Hopefully the customer will understand why I need to ask and is willing to answer. But if he doesn’t, do I really need to cancel the purchase and block the software license the customer just purchased? That wouldn’t make anyone happy. I really don’t need the extra work either. (I don’t even want to think about the case where a French person on a cruise starting in Rotterdam and currently sailing in a Norwegian fjord buys my product. I’ve no idea how to determine that and which rules to apply).

If I understand correctly, when I would get an audit from the Polish tax authorities in 2024, I need to provide proof for all my customers since 1-1-2015 that I flagged as non-Polish, that they really were not in Poland at the time of purchase. And that that can happen 28 times, once for each EU member state. Is that a realistic demand for a one person operation such as mine?

Suggestions:
It would be a great relief if the address data that PayPal or Stripe or other payment processors provide are accepted as proof of location. In my case, 99% of the buyers use my software at home.

Also, it would be great if the tax authority of each member state would be trusted by the other member states to correctly determine taxes that are due. So that I can only be audited by the Dutch tax authorities.

Finally, it would help if the EU would agree on one VAT rate throughout the EU for e-services.

Then two asides that bother me:

1. It is not very motivating to be forced to collect taxes for another state. Maybe within the EU it is acceptable, but for companies outside of the EU, this might be a tough call. Why is this tax not due where the ‘value is added’, so in the country of the supplier, and then for anyone that buys, inside or outside the EU. This is very easy to do, and very easy to check.

2. I understand that UK sellers are exempt for VAT up to a staggering 81,000 GBP in sales. When I sell to the UK from The Netherlands, I have to collect 20% VAT (UK rate) from the first sale. This not only makes my product 20% more expensive for a UK consumer, giving a UK seller a great advantage, but on top of that I have to pay this 20% to the UK instead of to my own state! Here in the Netherlands, there is no such threshold. So when attempting to create a level playing field, there’s still a lot of work to do.
Dear Piet,

Further to your invitation for comments, we are pleased to respond on behalf of the global member firms of Deloitte Touche Tohmatsu Limited (“Deloitte”) to the OECD’s Committee on Fiscal Affairs consultation on the new draft elements of the OECD International VAT/GST Guidelines (the Guidelines), published in December 2014.

Deloitte has extensive international experience in advising the governments of OECD member countries and more specifically in relation to developing their VAT/GST systems. We have also many international clients, who are active in sectors most impacted by the Guidelines (e.g. telecoms). Additionally, Deloitte is contributing to the work on the Guidelines through our participation in the Technical Advisory Group (TAG) for VAT/GST Guidelines. Therefore we are very familiar with the Guidelines and have regularly referred to their principles in our analysis and recommendations.

We support the OECD’s work on the Guidelines and their aim to address uncertainty and the risks of double taxation and unintended non-taxation that result from inconsistencies in the application of VAT/GST to international trade.

We welcome the new draft VAT/GST Guidelines on the B2C supplies of services and intangibles, as there is an increasing need for further alignment between the national VAT systems at the global level due to the rapid growth of cross-border digital supplies of services. We understand the aim to tax these services in the country of consumption, but would like to emphasise that any new VAT registration and declaration obligations for non-resident suppliers would need to be accompanied by appropriate and proportionate simplification mechanisms to balance the administrative burdens and compliance cost for businesses. The key features of such simplification mechanisms would in our view include fully electronic registration and declaration systems and access to relevant information and thresholds for VAT registration on B2C services, applied across countries as consistently as possible. We would also call for careful consideration of any unintended links and impacts between the VAT/GST Guidelines and other BEPS work on the corporate tax side, such as the unintentional creation of a permanent establishment for corporate tax purposes by a VAT registration on the services supplied to final consumers in the country.

In preparing our global response to the consultation, we arranged two global briefings for clients in order to introduce the December 2015 addition to the OECD VAT/GST Guidelines and obtain their input. We have used this information to inform our comments on the new draft elements of the Guidelines.
We hope that you will find our contribution useful and are looking forward to further opportunities to work with you. We are happy to discuss any comments or questions you may have regarding these responses.

Yours sincerely,

David Raistrick  
Partner  
*Global Indirect Tax Leader*

Justin Whitehouse  
Partner  
*Global Public Sector Tax Leader*

Odile Courjon  
Partner  
*Indirect Tax France*

Robert Tsang  
Partner  
*Asia Pacific Indirect Tax Leader*
1. Background

1.1 Consultation on new draft elements of the OECD International VAT/GST Guidelines

The OECD published in December 2014 a draft addition to the International VAT/GST Guidelines, containing draft elements concerning the place of taxation of business-to-consumer supplies of services and intangibles (B2C Guidelines) and draft elements on provisions to support the application of the Guidelines (Supporting provisions). We understand that this is to be considered the full set of Guidelines including the chapters on mutual cooperation, anti-evasion and avoidance provisions as communicated in April 2014.

The drafts on which public comments were invited are:

- An adaption of section A in Chapter 3 on the place of supply of services and intangibles;
- Draft sections C and D of Chapter 3 on the place of supply of B2C services and intangibles;
- A draft Annex 3 to Chapter 3 on the main features of a simplified registration and compliance regime for non-resident suppliers.
- A draft Chapter 4 on mutual cooperation, dispute minimisation and application in cases of evasion and avoidance.

1.2 Deloitte contribution

There is no doubt that the OECD work on the international VAT Guidelines is significant in shaping VAT systems throughout the world, especially outside the EU and the OECD, e.g. in Asia, the Middle East and Africa. By developing the Guidelines based on the core principles of VAT: the neutrality principle and the destination principle, the OECD addresses the key problems businesses face when dealing with international trade in services – uncertainty and double taxation resulting from the inconsistent application of VAT. The new drafts add to this by providing recommendations also on the simplified VAT collection methods and mechanisms for dispute resolution.

Deloitte recognises the importance of the OECD work on a global level and has been focussed in preparing our response to the consultation on the Guidelines. We arranged two briefings for clients in two of our regions (Asia Pacific, plus Europe, the Middle East and Africa or EMEA) in order to introduce the new draft Guidelines and obtain input on the impact they might have on their business and more generally on the international role of the Guidelines. The calls were popular and well attended - we had over 400 attendees in total and received also further written input.

In the following parts of response, we have used this input to inform our comments on the new draft elements of the Guidelines.

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1 In our response, we use the term ‘VAT’ to mean both VAT and GST, as appropriate.
2. Chapter 3 – Determining the Place of Taxation for Cross-Border Supplies of Services and Intangibles

2.1 Background

Public comments are invited on the following parts of the draft Chapter 3:

- section A of the Guidelines, setting out the main features on how the destination principle is to be applied for both B2B and B2C-services and intangibles.
- section C setting out the general rules for taxation of B2C-services and intangibles;
- section D setting out specific rules for taxation of B2C-services and intangibles; and
- Annex 3 to Chapter 3 on the main features of a simplified registration and compliance regime for non-resident suppliers.

2.2 Section A – the destination principle

Sections A and B have been merged into one single section A. Section A addresses the main features of applying the destination principle to both B2B and B2C supplies.

Our comments:

- We consider that the draft section A serves its purpose well in describing the main features of the application of the destination principle in both a B2B and B2C context;
- Paragraph 3.5 describes the different objectives of place of supply rules for B2B and B2C supplies and respectively different VAT collection mechanisms. The paragraph is long and complex and may benefit from splitting to facilitate the reading, unless keeping the concept together in one paragraph is considered more important. Our main comment is however regarding the last sentence, which notes that the aim is not to recommend jurisdictions develop separate rules for B2B and B2C supplies. Due to a usually higher compliance burden on business caused by the lack of simpler VAT collection systems for B2B supplies (such as the reverse charge), we and businesses would strongly prefer the OECD to make clear recommendations for consistent, separate rules and collection mechanisms for B2B and B2C supplies. Therefore we would recommend to delete the last sentence: we appreciate that it may be difficult to obtain agreement to such a recommendation with some Governments, however we still consider it an important point to raise. Without a clear, uniform set of provisions applying across jurisdictions, these rules arguably become difficult to adopt.
- Paragraph 3.7 contains a definition of B2B and B2C supplies, referring to a business customer as a person ‘recognised as a business’ for VAT purposes specifically or by national law. These definitions do not seem to address with sufficient clarity a relatively common situation where a person acts in two capacities, business and non-business, such as private individuals carrying out a business or (local) governments which are considered businesses for some activities, but not for all of their activities. It would be helpful to make it clearer that the treatment may differ depending on a supply/activity, particularly where a jurisdiction implements different rules for B2B and B2C services.
• Paragraph 3.8 encourages jurisdictions to provide clear practical guidance on how suppliers could establish the status of their customer, referring to the use of the VAT identification number of the customer as an indication. This is an approach used in the EU. Although it is a good proxy for suppliers, it has sometimes caused difficulties in practical application. Some EU businesses have experienced problems when their client is a taxable person, but not VAT registered because they fall within the scope of a particular scheme, such as the scheme for small entrepreneurs. We understand that this has even led to a lawsuit in one of the EU Member States. Relying on a VAT registration or tax registration number would not be reliable either in a situation described above, where a business does not act in a business capacity in respect of a particular supply. However, in this case the suppliers ought to be able to rely on the information provided by the customer. We think there could be more emphasis in the text on ensuring there is the flexibility to use other indicia to prove commercial reality where necessary, leaving the onus on taxpayers but also giving some choice.

2.3 Section C – Business to Consumer supplies – The general rules

This section describes the general rules for the place of taxation of B2C supplies distinguishing between on the spot supplies and other supplies of services.

Our comments:
General
• We welcome the inclusion of Guidelines on the place of supply of B2C supplies, because of the increasingly digital economy and wide spread of cross border B2C supplies.
• The EU 2015 changes are an example of VAT rules catching up with the fast growth of the digital economy. The US and its States are also considering how to address the impact of the digital economy on their sales and use taxes. For example, proposals for expanding sales and use tax nexus are discussed at the US federal level. These proposals include provisions that require remote sellers to collect and remit sales/use taxes on sales to in-state residents. There are also many other international examples of countries aiming to tax cross border B2C services, especially digital services.
• However, practical implementations of such taxation differ and cause sometimes disproportional business burdens or are complex to comply with for non-resident businesses. For example:
  o in Russia a liability to register and account for VAT may arise for a non-resident business. However, in order to register for VAT a business needs to have a legal entity in Russia.
  o In Kenya non-residents must appoint a fiscal representative in order to register for VAT. However, large multi-nationals are struggling to find a fiscal representative with enough liquidity to represent them.
• We therefore believe that it is important to finalise these Guidelines as soon as possible, in order to provide essential guidance to other countries that are currently thinking of similar tax reforms. Although due to their nature the Guidelines are non-binding, they do increase alignment of VAT systems and improve the current situation. Coherent place of supply rules decrease double taxation in cross-border trade. It is however essential to keep in mind also administrative burdens for both businesses and tax administrations.
• Regarding any future developments of the Guidelines, we would like to point out that the role of intermediaries (including app marketplaces or platforms and similar) remains unclear. As business models tend to move more and more towards situations where businesses act as intermediaries, particularly in a C2C-economy, there is an increasing need for guidance on that area. We would therefore recommend to add a clarification and recommendations on the role of intermediaries to the list of future work of the OECD.
The general rules
• The draft Guidelines contain two general rules (Guideline 3.5 and 3.6). Although we understand the logic of both rules, it has been confusing for businesses that they are presented as two equal general rules. This was indentified as one of three biggest concerns by the businesses attending both our EMEA and Asia-Pacific briefings.
• We understand that Guideline 3.6 is applied as a main rule for mainly remote supplies, but acts also as a fall back for Guideline 3.5 (on the spot supplies) in the sense that anything not covered in Guideline 3.5 would fall into the scope of Guideline 3.6. Businesses have found this application unclear when reading the draft. Assuming that our interpretation is correct, perhaps the relation between the two rules could be described more clearly in the text e.g. in paragraph 3.14 (or an additional paragraph after this).

Determining the jurisdiction of customer’s usual residence (Section C.3.1.)
• Paragraph 3.23 sets out some guidance to jurisdictions on issues which are very important for businesses, such as the flexibility to rely on the evidence collected through regular business activities. The paragraph says also that the jurisdictions could consider adopting the rule that, if they are satisfied that a business is following the main principles, this business should expect challenges only where there is misuse or abuse of such evidence. This element is key for businesses that have to take into account the VAT when presenting the price of their services to customers and are – when it concerns digital services – involved in a business with a high volume of low value services. We suggest therefore to strengthen the wording, changing it to a recommendation and allowing the issue to get the attention it deserves, e.g. ‘jurisdictions should consider adopting rules’ or ‘jurisdictions are encouraged to adopt rules’.
• Paragraph 3.24 highlights the potential challenges facing businesses that do not routinely collect any information from their customers. In the telecoms sector it is notable that, particularly in relation to prepaid services and one-off, or event-based telecommunications services, it may be practically impossible for businesses to identify the residence of their customers. In this respect, they agree that pragmatic use of several other indicia of residence by jurisdictions following the OECD guidelines will be important to ensure that the rules are workable for business.

VAT collection in cases where the supplier is not located in the jurisdiction of taxation (Section C.3.2)
VAT collection obligations unrelated to direct tax position
• The VAT/GST guidelines should expressly clarify that the obligation to register for VAT is unrelated to creation of a taxable presence (permanent establishment) for corporation tax purposes. Businesses are concerned that without this clarity some tax authorities may conflate a VAT registration requirement with a direct tax presence, which would lead to increased corporation tax disputes between tax authorities and potential double taxation for businesses.

Thresholds
• The overall conclusion reached in the Guideline 3.6 is that the place of taxation of any supplies falling under this rule should be in the jurisdiction where the customer has its usual residence. In general, we support this simple place of supply proxy. However many businesses we consulted consider that a place of taxation rule based on the customer’s usual residence would not be practical to apply in the absence of any simplification mechanisms, most importantly VAT registration thresholds in the country of taxation.
• Drawing parallels with related experience from the 2015 EU VAT changes, it is worth noting that there have been instances where some businesses have already been forced to close their business, offer products for free, decline to serve certain markets or have had to fundamentally change their business models (impacting consumer pricing and business margins) as from 1 January 2015. This is the case despite a very well designed “Mini One Stop Shop” simplification system. This is an evidence that forcing the non-resident suppliers to register in the jurisdiction of consumption can be extremely detrimental, especially for small and microbusinesses.
2.4 Section D – Specific Rules

The draft section D of the Guidelines provides for specific rules on the place of taxation describing what criteria jurisdictions should take into account when deciding whether or not to use a specific rule for a particular type of services.

Our comments:

General
- We believe that specific rules are necessary to deal with the particulars of some services and to strike a correct balance between, on the one hand, the need to tax services in the country of consumption and, on the other hand, administrative burdens for both taxpayers and tax authorities. We therefore welcome this draft section of the Guidelines. However we agree and strongly support the principle that the application of specific rules should be kept to a minimum as they make the VAT system more complex and place a burden on businesses as well as on tax authorities.
- Guideline 3.7 sets out the criteria for determining whether a specific rule is necessary. We understand that the aim for taxation in the jurisdiction of consumption is the key factor to consider here as well. This might be self evident in reading the Chapter 2, but we believe that referring to it in this section once more (e.g. in paragraph 3.36), might make the text clearer.

Examples – international passenger transport
- Paragraph 3.47 contains some examples on cases where specific rules may be required. Under the first bullet it is pointed out that when a physical performance occurs in multiple jurisdictions, for example on international passenger transport, a general rule based on the place of physical performance (guideline 3.5) might not be appropriate. We support this position.
- However, when considering an alternative rule, it is important to keep in mind that it should not cause unintended consequences for the taxation of national passenger transport (including customers who are residents of other jurisdictions), where taxation at the place of physical performance would be appropriate.
- Therefore an assessment of the criteria set out by Guideline 3.7 may result in different place of supply rules for international and national passenger transport. This would however make the rules complex and difficult to apply for businesses.
- Due to the complexities in determining the place of taxation of international passenger transport, this may be an area for specific further Guidelines work.

2.5 Annex 3 – Main features of a Simplified Registration and Compliance Regime for Non-Resident Suppliers

Annex 3 focusses on registration and compliance of non-resident suppliers.

Our comments

General
- We would like to stress the point that a clear, consistent set of simplification measures (in Annex 3) are of key importance for businesses. We understand the analysis leading to the conclusion that the most effective way to collect VAT from non-resident suppliers of cross-border B2C services is to require them to register in the country of taxation. However without the accompanying simplification measures it is likely to cause a disproportionate burden for businesses (as well as for tax authorities) and therefore result in widespread non-compliance or a
high compliance cost. So the place of supply rules are intricately linked with the simplification measures. This is unfortunately not so clear in the current draft, where the simplification provisions have been presented in the Annex rather than together with the Guidelines. Therefore we strongly suggest moving these together.

**Invoicing**
- We welcome the reference on eliminating invoice requirements and allowing the supplier to issue invoices in accordance with the rules of his own jurisdiction. We believe the latter rule would be as relevant also for B2B supplies in cases where the supplier is not resident in the country of taxation and the reverse charge mechanism applies.
- We appreciate that you are not currently consulting on the B2B part of the Guidelines, however perhaps in future it would be worth reviewing also simplifications for B2B supplies and recommend allowing the supplier to use invoicing rules of their own taxing jurisdiction.

**Availability of information**
- We welcome the encouragement for jurisdictions to make information on their VAT system available on-line and keep it up to date. In addition to the need for accessible information, it is also important for businesses that this information is binding on the tax authorities so that businesses can rely on it. We would welcome a further clarification and encouragement in the text on this regard.

**Use of third-party service providers**
- We agree that appointing a fiscal representative facilitates non-resident businesses to comply with their VAT obligations. However appointing a representative is often accompanied with obligations such as a fiscal/joint liability and the provision of a security, such as a bank guarantee. Although we understand the rationale of these obligations, the jurisdictions could be encouraged not to apply too stringent requirements, thus making the use of representatives virtually impossible, as the Kenya example above shows.

**Application in a B2B context**
- We welcome and support the reference that this guidance is meant to apply mainly for B2C supplies. This is important for businesses, as the reverse charge mechanism applicable on B2B supplies is significantly less burdensome and should be applied as widely as possible.

**Proportionality - thresholds**
- We welcome the reference to the use of thresholds, but this section needs more detail. Ideally the thresholds should be also consistently applied as far as practicable and possible across countries. To our eyes, the text does not currently read as a recommendation.
- Without the use of VAT registration thresholds, businesses and governments risk exposure to disproportionate compliance and audit burdens when countries move towards taxation of remote supplies on the basis of the place of customer residence. The question of proportionality is particularly important in the digital economy where the borderless nature of the internet means that businesses trading in one or a small number of countries may unintentionally acquire small numbers of customers resident in many other countries.
- Furthermore, threshold levels and related VAT regulations could be structured in such a way as to minimise any concerns relating to distortion of competition and non-taxation, thus striking an appropriate balance between minimising compliance costs for non-resident suppliers and ensuring that resident businesses are not placed at a competitive disadvantage.
- We believe that VAT registration thresholds are an essential part of any simplified VAT registration framework – without them, a simplified registration would not alleviate burdens on business and governments to a sufficient extent. Thresholds would ensure that businesses are
not forced to register for VAT and deal with the complexities of a different VAT system in relation to a small number of low value supplies and the tax authorities would not bear the cost of controlling a large number of non-resident taxpayers in order to collect small amounts of tax.

- Due to the significant impact and effect of the thresholds as a simplification measure, including the essential effect on increasing compliance and on reduction of tax collection costs, we would very much welcome some drafting changes to make it more visible and clearer as a recommendation to apply it. In our opinion exactly what the registration threshold benchmark is defined to be, is less important than having the benchmark itself.
3. Chapter 4 – Supporting the Guidelines in practice – Mutual Cooperation, Dispute Minimisation and Application in Cases of Evasion and Avoidance

3.1. Background

In Chapter 4, public comments were invited on:
- the draft supporting guidance on mutual cooperation;
- the draft supporting guidance on taxpayer services; and
- the draft supporting guidance on application of the guidelines in cases of evasion and avoidance.

3.2. Supporting guidance

In this section the existing instruments for mutual cooperation are set out followed by some examples of taxpayer services and remarks on the use of the Guidelines in cases of evasion and avoidance.

Our comments:
- We and our clients consider Chapter 4 useful, especially the references on the importance of taxpayer services and directing governments to the use of existing mechanisms on mutual cooperation. However the guidance is currently quite high level and it is not easy for businesses to understand how it would help them, what they could do or where to turn to (at international level) in case of double taxation. It may be too early to expect anything more precise for solving double taxation at a global level, but hopefully in the not too distant future businesses will have a clearer and more reliable mechanism for raising any cross border double taxation issues and getting these solved.
- As another general comment, we would like to point out that prevention of conflicts is at least as relevant as dispute resolution. Therefore, perhaps more attention could be given in this chapter to preventive measures and related cooperation between jurisdictions, such as coordinated exchange of best practices on simplification and compliance.
- We believe that effective mutual cooperation is the key for tax authorities for dealing with tax challenges raised by the digital economy. A country where the customer resides may easily amend its national tax legislation on digital services consumed in that country, but they must be able also to actually collect the tax from non-resident suppliers and will need the assistance of the tax authorities of the country of the supplier to do so. Therefore we believe that also from the perspective of the tax authorities it is a missed opportunity to keep this chapter at a such high level, focussing mainly on existing instruments.
Dear Mr. Battiau,

PUBLIC DISCUSSION DRAFT – INTERNATIONAL VAT/GST GUIDELINES - 18 DECEMBER 2014

EFAMA\(^1\) welcomes the opportunity to comment on the Public Discussion Draft "International VAT/GST Guidelines - Guidelines on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles".

Even if the focus of the consultation is on digital services rendered to private individuals, we believe that the question might have some unintended consequences on the financial industry including, but not limited to, the investment fund and asset management industry. Indeed, based on the very general language of the consultation paper, we understand that the envisaged changes should be applied to all services except those qualified as “specific” ones in the document (real estate, on the spot services). In particular, the proposed solution implying the VAT registration of service providers in the countries of their clients could be burdensome for the financial industry.

The financial industry, compared with digital services providers, is faced with some specific issues.

1. Qualification, identification and localization of clients

The current proposal is focused on digital services rendered to private individuals. The determination of the qualification of the clients is thus quite easy thanks to the direct relationship between the service providers and their clients.

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\(^1\) EFAMA is the representative association for the European investment management industry. EFAMA represents through its 27 member associations and 63 corporate members about EUR 17 trillion in assets under management of which EUR 11 trillion managed by over 55,000 investment funds at end September 2014. Over 36,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds. For more information about EFAMA, please visit [www.efama.org](http://www.efama.org).
This exercise in the financial industry might however be more complex:

- An individual could also have a business activity. It could thus be difficult to determine if he/she uses a service as a business or as a customer. In the European Union (“EU”), this difficulty has been solved by considering that an individual registered for VAT is always considered for cross border transactions as acting as a business. It is not sure that such an approach will be applicable in all OECD countries.

- The qualification of holding companies within the EU as business or customer could be a delicate exercise when the activities are not strictly limited to the passive holding of shares. These holdings could be used by private persons or in fund structures.

- The same remark could be made regarding investment funds. This could be the case, for example, for some unregulated alternative investment funds. Another example is the “fonds commun de placement” (common funds or unit trusts) which are treated differently within the EU.

- The uses of “omnibus” account, nominee account and collective safe custody account constitute an additional difficulty to determine the VAT status and the localization of the client. Such accounts are frequent in the financial sector and would make impossible or at least very difficult for a lot of services providers to identify their clients. This explains that investment funds will not need to report under the OECD Common Reporting Standard (CRS) with respect to those end investors whose units are held by or through a financial institution. This is clearly stated in the OECD CRS final document. Moreover, customer due diligence (CDD) rules generally do not impose to look through to the final investor for KYC purposes. There will thus be a contradiction between the VAT/GST rules and other regulations. The VAT/GST rules could thus harm the application of other rules.

The logic of the taxation in the country of the customer seems to favor the reference to the criterion of the country of the customer rather than the one of the supplier. This however implies that service providers should master the criterion of each of the different countries where it has clients. This could be particularly difficult in case of countries which have VAT or GST system that are very different from the EU one.

2. Taxation of the services

Another concern is the determination of the tax regime of the services.

A first concern concerns the qualification of services as digital services or as financial services. This question has been discussed at the level of the EU in the light of the change of localization rule applicable to Business to Customer digital services as from 1st January services: taxation at the place of the customer instead of taxation at the place of the service provider. It appears that the qualification as financial service or digital service of some highly automatic services provided on the internet could be delicate. Thus, even if financial services could not be captured as such by the proposed rule, some services provided by financial institutions could fall under these rules should they qualify as digital services. The importance of this issue could only increase as the result of the
increase of the use of internet. Moreover, solving such issue at the level of the EU could already be
difficult and will be even more difficult at the level of the OECD. This could thus lead to difficulty of
interpretation, absence of taxation or double taxation.

Moreover, while it could be reasonably assumed that digital services are generally taxable in any
country which has a VAT/GST regime; this is certainly not true for financial services in the EU, and
most probably in other OECD countries.

The definition of services subject to VAT and related exemptions may vary from country to country,
even within the EU. This is illustrated by the number of decisions of the Court of Justice of the
European Union in the field of financial services. It should also be reminded that the review of the
exemption applicable to financial services initiated a few years ago by the European Commission has
been unsuccessful despite lengthy discussions and a proposal of amendment of the Directive and a
proposal of regulation by the European Commission to the European Council in 2008. Considering
that VAT rules and related interpretations are not fully harmonized, this may lead to a situation
where VAT is not applied in a consistent manner in the two or more countries involved in the
provision of cross-border services.

The financial industry will not only be obliged to verify whether their clients qualify as businesses or
as private customer which could be difficult or impossible and impose obligations in contradiction
with other OECD rules (Common Reporting Standard) but also if their services are or not digital ones
and are or not subject to VAT or GST. This will thus imply burdensome checks for the financial
industry.

3. Discrepancies / double taxation / absence of taxation

Due to the difference of qualification between countries, discrepancies could appear.

For example:

- The country of the service provider considers a service as exempt and thus not opening the
right to recover VAT incurred on their costs while the country of the customer considers the
service as taxable. Such a situation (taxation in the hand of the customer, no deduction at
the level of the service provider) is contrary to the fundamental principles of indirect
taxation.

- The country of the service provider could apply on VAT exempt services alternative taxes
such as stamp duties, insurance tax, or some specific taxes such as the “taxe sur les salaires”
in France (French pay roll tax). The taxation of the services to VAT/GST in the country of the
customer could lead to a double taxation.

- In case the country of the customer does not consider the service as subject to VAT and GST,
the right to tax will be in the hands of the country of the service provider which could subject
the service to VAT/ GST or provide for an exemption thereof; this could lead to “tax
shopping”.

2 COM (2007°747 final and COM (2007) 746, respectively
- In case of complex services, the taxation of services could depend on whether these services are bundled or not and on the interpretation of the different countries and the intrinsic nature of some services could be seen differently by countries. This could lead to further difficulties. For example, in the Deutsche Bank case\(^3\), the Court of Justice of the European Union decided that transactions services, in principle exempt, is not a distinct service from the taxable private fund and asset management services while in the BGZ case\(^4\), the Court has decided that insurance services recharged by a leasing company could be VAT exempt. These two cases could be considered as contradictory and illustrate the complexity of the taxation of financial services. It is also clear that these two cases are not applied in the same manner by all EU Member States. It could be reasonably assumed that these differences and complexities also exist outside the EU.

4. **Registration/compliance**

The stated principle of simple and easy registration and compliance can only be welcome. However, if it could be reasonably assumed that the registration process could effectively be quite straightforward (when it has been determined that a registration is effectively required which could be a delicate question as mentioned above), the compliance will most probably be much more complex due to the differences of tax regimes mentioned above.

5. **Real estate services**

We agree and appreciate that real estate services are considered as specific ones and thus not subject to the envisaged changes. Furthermore, this is in line with rules currently applicable in the EU.

6. **Conclusion**

Based on the above considerations, we strongly believe that due to the lack of harmonized VAT treatment of financial services and the unlikeliness of such harmonization in a reasonable timeframe, financial services should be considered as “specific services” and thus not be subject to the proposed B to C general taxation rule.

We thus suggest to make clear that financial services are “specific services” excluded from the scope of application of the envisaged rules.

Yours sincerely,

Peter De Proft
Director General

\(^3\) C-44/11, 19 July 2012.
\(^4\) C-224/11, 17 January 2013.
Elisabeth Felgate

About me

I am a sole trader selling knitting patterns across the internet on a small scale and have been heavily impacted by the introduction of the new VAT regulations.

General concerns

The EU VAT regulations have added a huge additional administrative burden and competitive disadvantage for EU businesses in a global market.

My Specific issues with the regulations

• The costs involved in complying with the tax and administering it are minimal

I currently sell only through third parties and yet the impact on my ability to sell to the EU has been devastating. I have completely shelved any ideas of selling directly as it is technically and administratively far too challenging in the new environment.

• International neutrality is maintained

In 2014 I sold to 10 EU nations without issue through a third party. In 2015 so far my EU sales are negligible as consumers have abandoned the extra complication involved in checkout processes under the new tax rules as result of the burden of principle 3.1. I can only assume this in favour of dealing with non-compliant US/Rest of world sellers. Your point 3.28 requires such sellers to register in the nations where tax is due and yet many (most?) small suppliers with whom I directly compete are openly stating in online forums that they will not do so until their own governments require them to do so. Until such time as at least the major nations openly support this approach to taxation any nation that implements it is actively disadvantaging its own businesses in favour of those outside its jurisdiction. For digital supplies this is a critical disadvantage – there is no delay in delivery and no postal cost to offset the advantages in tax avoidance for the consumer.

On the other hand I have already, as an EU consumer, had the bad experience of being refused a purchase because small businesses in Canada and US will no longer sell to the EU due to the administrative burden of the new tax laws.

• Barriers to evasion and avoidance are sufficiently robust

It is also clear to me that the barriers to evasion by consumers are not sufficiently robust and I have already seen evidence from a colleague of consumers using alternative email addresses for example as a simple means of avoiding tax.

Conclusion

To mitigate the serious impacts outlined above:

1. Exempt small businesses from this legislation until measures are introduced to simplify compliance

2. Introduce a turnover threshold for small businesses.
OECD Discussion Draft on International VAT/GST Guidelines for Business-To-Consumer (B2C) Supplies

Dear Mr Battiau,

We write to respond to the OECD Discussion Draft on International VAT/GST Guidelines for Business-To-Consumer (B2C) Supplies (hereafter ‘The B2C Guidelines’), which was released for public consultation on 18th December 2014.

The ETNO-GSMA Tax Policy Committee (The Committee) appreciates the opportunity to provide its input at this stage of the process and provides the following comments.

In general, we applaud the work that the OECD is doing to bring greater consistency and certainty to the international VAT environment.

We have considered the draft in consultation with our members and have agreed on the following key points, which we feel should be made in relation to the content therein.

Firstly, we would like to comment on the overall conclusion reached by the guidelines on supplies of services which are not covered by Guideline 3.5 i.e. that the place of taxation of such supplies (including supplies of telecoms) should be the jurisdiction in which the customer has its usual residence. Paragraph 3.12 in particular states that ‘A place of taxation rule based on the customer’s usual residence is......reasonably practical for suppliers to apply, provided a simplified

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1 Please refer to Appendix 1 for general description of ETNO and GSMA
registration and compliance regime is available... and for tax administrations to administer, provided it is supported by effective international cooperation in tax administration and enforcement...’.

We would like to strike a note of caution in relation to this conclusion. We believe that implementing the destination principle as a solution for B2C supplies will bring significant challenges, which should not be underestimated. The compliance and administrative burden for business will be huge even with the possible introduction of appropriate registration thresholds and well-designed simplified registration frameworks. Furthermore, we believe that the enforcement of the destination principle will be incredibly difficult, if not impossible, across the board, with the consequence that a level playing field does not appear achievable via implementation of these guidelines. We therefore have doubts as to whether the ‘usual residence’ proxy can meet the OECD criteria of neutrality, efficiency, certainty and simplicity, effectiveness, and fairness in practice.

It is worth noting that the experience of the EU 2015 changes so far has been that many businesses have already been forced to close, offer products for free, decline to serve certain markets or have had to fundamentally change their business models (impacting consumer pricing and business margins) as from 1 January 2015. This is the case after less than two months and even in the presence of a very well designed, simplified Mini One Stop Shop system. Indeed the EU 2015 changes, introduced without a threshold, have only been made workable for even large business via extensive consultation with the affected sectors in order to arrive at defined and practical ‘presumptions’. Without these presumptions, it would have been practically impossible for the telecoms sector to apply the destination principle in the many cases where our customers are totally anonymous. This kind of extensive engagement with business will not be possible on a wider global scale, thus further jeopardising the application of the B2C Guidelines in practice. In general, we would have expected the OECD to have taken a longer time to evaluate the EU 2015 system to see how it works in practice, before recommending it on a wider scale.
If we accept the move towards the destination principle for a moment however, we would nevertheless suggest that the statement in paragraph 3.12 does not reflect the fact that, for the telecommunications industry, but also for many other small and micro businesses, a place of taxation rule based on the customer’s usual residence is still not at all practical to apply in the absence of per country VAT registration thresholds.

By way of further explanation, the use of VAT registration thresholds would serve at least to limit the exposure of business and government to disproportionate compliance and audit burdens as countries move towards taxation of remote supplies on the basis of the place of customer residence. The question of proportionality is particularly salient in the digital economy where the borderless nature of the internet means that businesses trading in one or a small number of countries may unintentionally acquire small numbers of customers resident in many other countries. A telecoms company operating in the UK and actively marketing only to UK customers may still be forced to register for VAT in many countries. Furthermore, we believe that threshold levels and related VAT regulations can be structured in such a way as to minimise any concerns relating to distortion and non-taxation, thus striking an appropriate balance between minimising compliance costs for non-resident suppliers and ensuring that resident businesses are not placed at a competitive disadvantage.

In this respect, it is worth stating here that we believe that a per-country threshold should be the aim. Setting thresholds on a per company basis would introduce far greater scope for distortion and potential abuse, whereas the per-country threshold strikes a better balance between ensuring a proportionate burden on business and the minimisation of competitive distortion.

We note that some countries, such as Norway, South Africa and Switzerland have already introduced regimes such as that which is foreseen by the B2C Guidelines, and have introduced welcome registration thresholds as part of the regime. The EU stands out as an exception in not having introduced thresholds, something we believe is an error, for the reasons set out within this letter. We appreciate that the OECD may feel that the introduction of domestic registration thresholds is not a matter on which it can make recommendations, however we feel that consideration of appropriate thresholds is a necessary part of any move to
implement the destination principle for B2C supplies, such that the point cannot be divorced from the guidelines on the place of taxation.

We agree with the comments made in section C.3.2 that it is complex and burdensome for non-resident suppliers to comply with such obligations abroad and that simplified registration and compliance regimes are important in alleviating this. However, as stated above, we believe that VAT registration thresholds are an essential part of any simplified VAT registration framework – without them, simplified registration does not of itself alleviate burdens on business and governments to a sufficient extent. In fact, registration thresholds are arguably the more important element. As an example, the following parts of a compliance burden would not be alleviated in any way by a simplified registration framework, but would be mitigated via the use of registration thresholds:

- The need understand VAT rates, invoicing rules and complex specific local VAT rules
- The need to understand time limits or procedures for making corrections
- IT costs in relation to systems changes required to cope with charging the local rate of VAT
- To actively monitor legislative updates and periodically refresh advice received
- To deal with tax authority audits, taking advice and obtaining local support where necessary
- Dealing with disputes, foreign court systems (including gaining knowledge of time limits, procedures and protocols)
- To store and retain documents in line with local legislation

Thresholds are therefore important to ensure that businesses are not forced to register for VAT and to deal with all the complexities of a different VAT system in relation to a small number of supplies (and tax authorities are not forced to collect small amounts of tax). We believe that they will continue to be important for businesses even if there is increased, or even total, harmonisation of VAT place of taxation rules, coupled with simplified registration procedures.
We therefore believe that the ‘Proportionality’ section within Annex 3 of the guidelines does not currently reflect the important part that thresholds can and should play in making a success of these guidelines. We believe that the importance of thresholds and the role they can play should be made explicit in the guidelines within section C.3.2. We agree with paragraph 16. of Annex 3 which states that ‘Jurisdictions should aim to implement a registration-based collection mechanism for business-to consumer supplies of services and intangibles by non-resident suppliers, without creating compliance and administrative burdens that are disproportionate to the revenues involved or to the objective of achieving neutrality between domestic and foreign suppliers.’

We support the comments at paragraph 3.23 which encourage jurisdictions to permit suppliers to rely on information that is readily available in the course of their normal business activity, as long as this evidence provides reasonably reliable evidence of the usual residence of the consumer. We also feel that the recommendation to adopt a principle whereby the taxpayer can rely on evidence collected in line with these principles in all cases but those involving any misuse or abuse, reflects a good balance between achieving the correct taxation result, and providing businesses with adequate certainty.

Paragraph 3.24 highlights the potential challenges facing businesses which do not routinely collect any information from their customers. In a telecoms context, particularly in relation to prepaid services and one-off, or event-based telecommunications services, it is worth noting that it may be practically impossible for businesses to identify the residence of their customers. In this respect, we feel that the B2C Guidelines can only be workable for the telecoms industry if they are introduced with clear and defined presumptions – for this reason, we believe that the B2C Guidelines should include examples of workable presumptions and should take steps to formalise these as far as it possible.

We believe that in order to make the B2C Guidelines at all workable for the telecoms sector therefore, a combination of presumptions and per-country thresholds will be essential.
In section D.2.2, the guidelines consider examples of where a specific rule could be desirable in a B2C context. In paragraph 3.47, we note that in the second bullet it is stated that, ‘the general rule based on the place of usual residence of the customer...may not be sufficiently accurate in predicting the place of final consumption in cases where this consumption is most likely to occur somewhere other than in the customer’s usual place of residence’. We would like to point out that there are certain types of telecoms supply which we believe would fall into this category, such as local break out services, and other telecoms business models where consumption is unlikely to align with the place of residence of the customer. We would recommend that the application to certain telecoms business models should be made clear here, with specific examples being mentioned.

Finally, we note the guidance provided in respect of input tax recovery for businesses which are registered for VAT under a simplified regime i.e. that jurisdictions may wish to remove the right to input tax recovery in this case. While appreciating the reasons for this and that it is likely to be a necessary compromise, we note that it is potentially contrary to the neutrality guidelines and would suggest that jurisdictions be encouraged to allow input tax recovery up to the value of output tax included on the returns.

We would be pleased to discuss our responses with the OECD further and look forward to participating in this work as it progresses.

Yours sincerely,
Appendix 1

About ETNO
ETNO (the European Telecommunications Network Operators’ Association - www.etno.eu, @ETNOAssociation) represents Europe’s telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO’s primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses. ETNO members account for 60% of the total investments in European networks.

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About the GSMA
The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with more than 250 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and Internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai and the Mobile 360 Series conferences. For more information, please visit the GSMA corporate website at www.gsma.com. Follow the GSMA on Twitter: @GSMA.
Mr Piet BATTIAU
Head of Consumption Taxes Unit
Centre for Tax Policy and Administration
OECD

Email: piet.battiau@oecd.org

Subject: EBF Comment Letter on the OECD International VAT/GST Guidelines on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles

Dear Mr Battiau,

The European Banking Federation (EBF) welcomes the opportunity to comment on the OECD Discussion Draft on two new draft elements of the International VAT/GST Guidelines.

As a European organisation, the EBF would like to first recall the particular situation for EU member states arising from the fact that there is a competency of the EU in matters of indirect tax law, notably VAT. According to settled EU case law (beginning with the seminal van Gend en Loos judgement in 1962), EU law is hierarchically superior to bilateral or multilateral agreements between EU member states. As a large majority of the EU member states are also members of the OECD and represent a significant portion of the OECD members, this consequently leads to the situation that changes affecting the EU VAT regime need also to comply with the legal rules enshrined in the EU Treaty, in the first instance the fundamental freedoms of the EU internal market.

The EBF could theoretically agree that, if one follows the premise set forth in the Discussion Draft that tax on services and intangibles is ultimately levied in the jurisdiction where the final consumption takes place, such a reasoning would even be more straightforward in B2C than in a B2B context.

In fact, the two step rule for B2C should lead to taxation at the place of consumption, by ensuring, under ‘guideline 3.5’ that the place where the service is physically performed, with the fall back under ‘guideline 3.6’ being where the customer has its usual residence. From the outset, requirements for a business to verify the usual residence and the status (VAT taxable person or not) of consumers who are mainly individuals must, however, be based on readily available information that they will collect in the normal course of events under normal commercial circumstances. At least within the EU, where the fundamental freedoms of the EU internal market ought to be respected, there is thus a clear need to avoid creating onerous requirements for customer residence verifications.
For the purposes of the application of the B2C place of supply rules suggested in the OECD Discussion Draft, readily manageable definitions of the key concepts (e.g. "consumer", “usual residence of the customer”) are of particular importance. For instance, an individual entrepreneur might act as a consumer or as a business, depending on the circumstances.

Furthermore, under the EU VAT law businesses that do not qualify as taxable persons for VAT purposes should be considered as consumers for the purposes of the place of supply rules as well. The latter is often a relevant point for holding companies and investment vehicles.

Also, the principle of taxation of the services where the customer is established in combination with the non-application of the reverse-charge mechanism in the case of B2C supplies would likely result in the supplier’s obligation to determine the applicable VAT treatment of the supply of services under review in accordance with the applicable local VAT laws.

It is however a known fact, that – despite the harmonisation of VAT law – EU member states often have diverging interpretations of the EU VAT Directives. This is especially true in the financial and insurance sector, where VAT is not neutral, as part of the activities are VAT exempt. Thus, the combination of

- different delimitations established by EU member states between exempt and non-exempt services,
- sensibly diverging qualifications attached to the (same) services provided in different member states leading to the application of different VAT rates to the same services in different EU member states and,
- a vast array of commercial possibilities for businesses to combine services and fees invoiced,

is at risk of creating disproportionate requirements on the part of business in terms of knowledge of the local VAT rules and interpretations in the destination country. For an entrepreneur looking at the bottom line, such extensive requirements may lead to the conclusion that providing cross-border services to a multitude of countries might become too onerous. It follows that, for the case of financial services, determination of the VAT treatment applicable in the customer’s country (and thus the application of the destination country principle in B2C relations within the EU) might be not only particularly challenging due its complexity, but also conflict with the (legally higher ranking) fundamental freedoms of the EU Treaty, such as the freedom to provide services, the freedom of movement of capital and the freedom of establishment. As the majority of EU member states are also OECD members, we feel that appropriate consideration should be paid to this point at OECD level.

Finally, we note that there is an underlying assumption in the guidelines that countries will be encouraged to implement a simplified registration and compliance regime. In practice, and especially outside the EU, a key risk will be on what basis countries adopt and apply this principle. It is imperative that business cost is not increased through tax jurisdictions’ failure to implement and allow for a simplified registration process and also simplified compliance regime.
The European Commission’s implementation of the VAT Mini One Stop Shop is one option that could be considered as part of the simplification aim and could enable businesses to potentially run all non-established VAT registrations through one central hub. It is acknowledged that any move towards the consumer location on a global uniform basis will require uniform implementation to avoid double, and potentially, no taxation if there is piecemeal implementation.

Another key consideration is ensuring that compliance requirements are also simplified and applied consistently on a global basis to minimise unnecessary compliance burdens. The main two areas for concern here are VAT return filing procedure and invoice requirements. Firstly looking at the VAT return filing procedure, the reduced list of information to be provided Annex 3, item 7, seems reasonable and provides tax jurisdictions with the key information required. Tax authorities must be discouraged from introducing data requirements over and above this. The guidelines state that electronic filing is essential, which we would see as a fundamental requirement to support global VAT registrations. The guidelines recognise that invoicing requirements for VAT purposes are one of the most burdensome requirements and therefore the recommendation that tax authorities should consider eliminating invoices for B2C transactions is encouraged. The fact that some tax jurisdictions will still require to see invoices with VAT amounts shown will create a significant burden for companies where VAT invoices are not required on a domestic basis for B2C supplies and this point must therefore be addressed to avoid the unnecessary burden, which could also result in companies deliberately avoiding making supplies to consumers in those jurisdictions, which is clearly not the objective of this proposal.

We appreciate your consideration of our comments and remain at your entire disposal to provide clarity on any of the points raised within our response or participate in any future discussions in respect of this initiative.

Yours sincerely,

Wim Mijs
Mr Piet Battiau,
Head of Consumption Tax Unit,
OECD,
2 rue André Pascal,
75116 Paris
piet.battiau@oecd.org

11 February 2015
Ref.: TPG/PKR/PGI

Dear Mr Piet Battiau,


(1) FEE (the Federation of European Accountants, www.fee.be) is pleased to provide you below with our comments in respect of the above named discussion drafts proposing revisions to the International VAT/GST Guidelines.

(2) FEE represents 47 professional institutes of accountants and auditors from 36 European countries, including all 28 European Union (EU) Member States. It has a combined membership of over 800,000 professional accountants, working in different capacities in public practice, small and big accountancy firms, businesses of all sizes, government and education. Adhering to the fundamental values of their profession – integrity, objectivity, independence, professionalism, competence and confidentiality – they contribute to a more efficient, transparent and sustainable European economy.

(3) FEE broadly supports the revisions to the Guidelines proposed in the Discussion Drafts that address issues identified from the Report on Tax Challenges in the Digital Economy, produced under Action 1 of the OECD’s BEPS project.

(4) We support in principle the concept that VAT neutrality is generally achieved through the implementation of the “destination principle”. In respect of B2C supplies of consumables and intangibles, we support the two general rules recommended for determining the place of supply; namely that on-the-spot supplies should be taxed based on the place of performance and for other supplies that the rule should be based on the customer’s usual residence.

(5) We also support the framework for assessing the desirability of introducing specific rules where it is believed that the general rules described above do not produce an appropriate result under the criteria contained in Guideline 3.7.

(6) We have a number of specific comments on several sections, as set out in detail below.
Section C3.2 VAT collection where the supplier is not located in the jurisdiction of taxation – para. 3.30 and Annex 3 para. 6

(7) In paragraph 3.30 and Annex 3 paragraph 6, the draft suggests a simplified registration and compliance regime “without the same rights (e.g. input tax recovery) and obligations (e.g. full reporting) as a traditional regime”.

(8) FEE supports the concept of this simplified registration and compliance regime but has identified circumstances where the compulsory imposition of this regime could produce an unfair result. In particular, there may be situations in which a non-resident provider of services incurs domestic input VAT, both with respect to "on-the-spot" transactions and supplies falling under a special rule, mainly in relation to immovable property.

(9) As an example, a travelling entertainer touring in various countries and cities may rent venues in which he stages his performances (such as concert halls) in his own name, without using an organising agent. The collected entrance fee will be subject to domestic VAT as an “on-the-spot” supply, but the VAT charged on the rent for the location would not be deductible (but would be recoverable on application of the B²B General guidelines adopted by the OECD in April last year) under the simplified regime as suggested by OECD.

(10) As another example, take the situation of a non-resident who owns a house in Brussels, divided into apartments, which the owner rents for short-term accommodation. He contracts with local businesses for maintenance and cleaning. The non-resident does not live in Brussels nor has he established a home there (cf. 3.22). However, since maintenance and cleaning of the building may fall under a specific rule (3.53), these services will in principle be charged with the VAT of the country where the property is located. The collected rental payments may equally fall under a specific rule and, taken separately, would qualify for a simplified regime. Under the simplified VAT filing procedure, however, the input VAT would not be recoverable. That would violate the general principle that a business should not be burdened with VAT unless the legislator has decided differently.

(11) As a result, FEE suggests that a phrase should be added stating that jurisdictions should permit non-resident businesses to opt for the traditional regime (i.e. to register for VAT and file VAT returns in the normal manner), at least if the businesses otherwise would be burdened with non-recoverable VAT despite their taxable transactions in that jurisdiction.
Section C3.1 Determining the jurisdiction of the usual residence of the customer – para. 3.22

(12) The operation of the fundamental freedoms within the European Union has led to a considerable mobility in the population and this could lead to practical problems in establishing the usual residence of the customer. It is not unusual for individuals to have residences in more than one Member State in which they spend an equivalent period of occupation. The high degree of mobility of labour also means that it is common for workers to spend short periods of time working in Member States other than that in which they reside.

(13) Taking the case of travelling workers, they may live temporarily in another country other than that in which they have a home. This may or may not be in connection with a construction site that, under OECD tax treaty rules, qualifies as a permanent establishment. We wonder how such workers would be affected by the second sentence in 3.22 and whether such workers are to be considered "transitory visitors (e.g. as a tourist or as a participant to a training course or a conference)".

(14) Consequently, we believe that it may be beneficial for the OECD to provide some additional guidance as to how to determine the place of usual residence regarding the treatment of travelling workers. It may also be beneficial if a form of "tie-break" clause could be drafted for inclusion in the Guidelines to deal with situations where individuals could be deemed to be usually resident in more than one country.

For further information on this letter, please contact Paul Gisby, Manager, from the FEE Team on +32 2 285 40 70 or via e-mail at paul.gisby@fee.be.

Yours sincerely,

Petr Kriz
President

Olivier Boutellis-Taft
Chief Executive

Page 102 of 237
By email: piet.battiau@oecd.org

Re: Draft guidelines on Place of taxation for business-to-consumer supplies

Dear Sir,

As a preliminary and general remark, we would like to stress that we welcome the VAT Guidelines’ initiative which will, once the work is completed, undoubtedly help to define an essential framework ensuring the place of taxation in international business-to-consumer exchanges and in tax collection.

The place of taxation for business-to-consumer supplies of services and intangibles presents many challenges for the VAT system in general. The chosen guidelines seem coherent to us and provide for concrete key elements in order to assess the place of taxation which should correspond as much as possible to the actual place of consumption of the services (i.e. destination principle).

Given the pleasant opportunity offered to us in order to provide OECD with our comments, we take the freedom to submit the following elements for your consideration.

I. GENERAL COMMENTS

- Guideline 3.6: “For the application of guideline 3-1, the jurisdiction in which the customer has its usual residence has the taxing rights over the business-to-consumer supplies of services and intangibles other than those covered by guideline 3.5”.

The draft guidelines (para. 3.21) provides examples of supplies of business-to-consumer services which could be subject to a place of taxation at the customer location. Financial and insurance services are part of this list.

Although a number of such services are likely exempt from VAT or similar taxes in a number of countries, there could be some cases where VAT might apply to specific services in the consumer country, given the wide spectrum of VAT treatment of financial products. The management of the various regimes in customers’ location should likely be assessed in terms of administrative cost.
Further, when considering the recovery rights relating to these operations, the draft favours to determine such rights at the provider location, since it is felt that a simplified registration and compliance regime for non-resident supplier should relieve them from full registration and compliance regime (see para. 3.30). In order to achieve neutrality for suppliers involved in such services, it would be therefore decisive to provide recovery rights in the supplier countries in all situations where the financial service is actually taxed in the customer country.

- **Point 3.7:** “*For the purposes of these Guidelines business-to-business supplies are assumed to be supplies were both the supplier and the customer are recognised as businesses, and business-to-consumer supplies are assumed to be supplies where the customer is not recognised as a business.*”

Although this starting assumption seems to be a prerequisite to the OECD’s work, we would nevertheless like to make the following comments.

The concept of “business” is as such not defined in the OECD’s guidelines which may lead to some difficulties when assessing whether a recipient of a service is to be regarded as a business or as a consumer, depending on the jurisdiction concerned and its tax legislation.

Since the VAT status is of the utmost importance so as to determine the place of taxation, we believe that it would be worthwhile to add a kind of common definition of “business” in the meaning of the OECD’s guidelines.

As far as we are concerned, a business is a broad concept which implies for a person to carry out an economic activity, regardless which kind of activity and whatever the purposes of such activity. A business is therefore a “worldwide” concept since there is no territorial limit neither limits in terms of turnover or nature of the activities.

One could for instance refer to the definition of business laid down in the directive 2006/112/EC or to the definition built by the European Court of Justice or domestic jurisdictions over the time.

In particular, a definition could be the following: ‘*Taxable person* shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity*’.

As equally important, we are of the opinion that the concept of “consumer” should also be defined. As from the moment the OECD’s guidelines would provide for a definition of business, one may for instance define, for the sake of simplification, the consumer as any person which does not qualify as a business.

- **Point 3.8:** “*Jurisdictions (...) are encouraged to provide clear and practical guidance on how suppliers could establish the status of their customer*”

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1 Art. 9, (1), of the directive 2006/112/EC.
We fully agree with OECD’s approach that jurisdictions should as much as possible facilitate the recognition of the VAT status of customers. Indeed, it remains often difficult in practice to determine whether a customer qualifies as a business or a consumer since the "recipient" does not have a VAT/tax number whilst it should likely qualify as a business in its country from the supplier’s perspective.

We are therefore wondering about the OECD’s guidelines proposing jurisdictions, based on the definition of business, to grant a tax/VAT number to a business established in its country or non-established while performing supplies (regardless the nature of the supplies).

Indeed, the reference to a tax/VAT number is likely to strengthen the status of business in a determined jurisdiction in comparison to other criteria (e.g. commercial register). In addition, the use of a tax/VAT number is likely to reduce the risks of fraud and non-taxation at the level of the international trade exchanges.

In the day-to-day management of a business, this solution could ease the assessment at the level of the supplier, whatever its place of establishment, to determine whether the customer purchasing the service is a business or not. The validity of such tax/VAT number could be verified by a supplier through a public website for instance which would be populated by each jurisdiction on a periodical basis.

We are however aware of the difficulties that such way of recognition of the VAT status can trigger in some jurisdictions where the tax legislation does not foresee any numbering for businesses. The integration of a numbering can however be done step by step.

Nonetheless, other criteria can be used.

For instance, in France, the VAT status of a customer established outside the EU territory can be evidenced by way of different elements such as the website of the customer, information provided by the tax authorities of the customer’s country, purchase orders, commercial register, etc.

- **Points 9 of Annex 3:** “(...) Jurisdictions could consider accepting payments in the currencies of their main trading partners.”

In the VAT system, the refund of VAT as well as the payment of VAT has a key role to play. However, unfortunately, businesses are often confronted to several issues in terms of processing with payments and refunds because the latter are for instance requested to have a domestic bank account whilst not being established in the country.

It would therefore be advisable to privilege the use of international electronic payment possibilities and avoid as much as possible obliging businesses to open a local bank account, which triggers administrative burdens.

- **Guideline 3.8:** “For internationally traded supplies of services and intangibles directly connected with immovable property, the taxing rights may be allocated to the jurisdiction where the immovable property is located.”
According to this specific rule, taxing rights are allocated to the jurisdiction where the immovable property is located. We appreciate that the OECD’s guidelines are not willing to provide for a rigid and locked definition of immovable property by, instead, referring to common features that could fall under a service linked to an immovable property.

However, in practice, the definition of services “directly connected with immovable property” that are “very close, clear and obvious link or association between the supply and the immovable property” often leads to difficulties because of the lack of harmonization in the interpretation of such the criteria between the jurisdictions.

Based on our experience, the interpretation of the criteria to qualify a service as being directly linked with immovable property is not harmonized at the EU level which gives rise to strong difficulties in practice.

Therefore, we are wondering whether it would be worth establishing categories of supplies that are directly connected with immovable property. One may refer to the EC regulation as well as works performed by the VAT committee in this respect. Even though it could not be regarded as an exhaustive list, it would rather enable businesses to have a concreter view.

II. MUTUAL COOPERATION

Points 4.10: “Jurisdictions nevertheless are encouraged to utilise existing mechanisms for mutual cooperation, information exchange, and mutual assistance, which provide tax administrations with a means of communicating and working together, to facilitate a consistent interpretation under national law (…)”

Even though we appreciate the importance of the mutual cooperation between tax administrations with regard to the exchange of information in order to prevent potential double taxation and unintended non-taxation, we would like to stress the following.

The purpose of exchanging information between tax authorities can be achieved by means of a bilateral tax treaty and other international regulation (notably on the basis of Article 26 of the OECD tax model). However, one should always bear in mind that our developments are based on the assumption that parties involved act in good faith and that all transactions are legitimate and with economic substance.

Therefore, one should also carefully pay attention to businesses’ interests and data protection. On the one hand, if the tax authorities are encouraged to share the information concerning taxpayers, one should also guarantee, on the other hand, the possibility for a taxpayer to be always in position to have access to the information and to be able to defend itself.

In addition, the exchange of information between tax authorities should not lead to unnecessary pressures on the businesses throughout the multiple jurisdictions in which the latter are established or are present. The economic development of the businesses should not be jeopardized by excessive queries from the tax authorities because of the exchange of information.
III. ADDITIONAL COMMENT

- **Points 3.26:** “The [reverse charge] mechanism shifts the liability to pay the tax from the supplier to the customer. The application of the reverse charge mechanism should thus relieve the non-resident supplier of any requirement to be identified for VAT or to account for tax in the customer’s jurisdiction. If the customer is entitled to full input tax credit in respect of this supply, it may be that the local VAT legislation does not require the reverse charge to be made”.

In comparison to business-to-consumer supplies of services, the place of taxation in the frame of business-to-business supplies of services is deemed to take place where the customer is located. In this respect, the jurisdiction where the customer is located may foresee an obligation to self-account for local VAT through the reverse charge mechanism.

In its European meaning, the concept of reverse charge consists of self-accounting for VAT on the taxable basis while VAT is simultaneously deductible in the hands of the recipient (depending on its VAT deduction right). As such, the reverse charge mechanism is in principal neutral for taxpayers.

In this context, we believe it would be worthwhile to ascertain whether jurisdictions are applying the concept of “reverse charge mechanism” and, where it is applicable, whether the reverse charge is applied in an equal manner so as to guarantee the neutrality of VAT as well as the avoidance of double taxation or non-taxation.

- **Guideline 3.7, point D.3:** “Special considerations for supplies of services and intangibles directly connected with tangible property”.

We fully agree with OECD’s point of view with regard to the developments about the supplies of services and intangibles directly connected with tangible property.

As stressed by OECD’s comments, services or intangibles connected with movable tangible property supplied to final consumers, such as repair services, will generally be consumed in the jurisdiction where the property is located. Movable tangible property that is shipped abroad after the service is performed will generally be subject to import VAT under standard customs rules when crossing the customs border. In that regard, we would suggest, in order to avoid double taxation, the OECD’s guidelines to refer to the World Customs Organization’s comments on the customs’ value in respect of intangibles.

* * *

Yours sincerely,

Laurent Chetcuti
Attorney-at-law, registered at the Hauts de Seine Bar
Partner
Dear Mr. Battiau,

On behalf of IFA Grupo Mexicano, A.C. (Mexican Branch of the International Fiscal Association) kindly find below some comments on the “Public Discussion Draft on the Provisions on Supporting the Guidelines in Practice” regarding the “Guidelines on Place of Taxation for Business-to-Consumer supplies of Services and Intangibles” (the VAT Guidelines) issued by the OECD.

Background

On December 18, 2015, the Committee on Fiscal Affairs (CFA) of the OECD released for public comments, two new draft elements of the VAT Guidelines. This discussion draft relates to:

(i) the place of taxation of business-to-consumer supplies of services and intangibles (B2C Guidelines);
(ii) the main features of a simplified registration and compliance regime for non-resident suppliers; and
(iii) the guidance to jurisdictions in developing practical legislation to facilitate a smooth interaction between national VAT systems.

General Comments

First

The Guidelines are apparently intended to be implemented among jurisdictions that have a somewhat already homogenous understanding and application of the VAT “destination principle”, such as the European Union (“EU”). In that regard, it caught our attention that implementing the VAT Guidelines would be extremely challenging in jurisdictions such as Central and South America. In these jurisdictions, the destination principle is not equally applied and generally contrasts with the VAT regimes of European countries.
Hence, we consider that the CFA, in addition to the analysis of the EU VAT system, should look more deeply into the VAT systems of these developing nations.

Related to the above, we consider that it should be included as a best practice for the implementation of the VAT Guidelines, recommendations to keep tax administrations from “cherry picking” attractive proxies to promote taxation in their jurisdiction. This comment is based on the fact that no binding document would regulate the implementation of the VAT Guidelines, as discussed below.

Second

Regarding the simplified registration for non-resident B2C suppliers, it is very important that the VAT Guidelines clarify that the registration per se will not give rise to a permanent establishment for income tax purposes.

We consider that this specific topic should be analyzed in great detail together with Action 7 of the BEPS Action Plan.

Third

Also, we consider that the main shortcoming of the VAT Guidelines is to propose that the destination principle should be implemented through the cooperation of tax administrations without a binding document approved by the local legislative branches of governments (i.e. a tax treaty). This approach may lead to uncertainty for taxpayers. Also, in countries where substance over form provisions have few to none significance, namely Mexico and other South American and Asian jurisdictions, implementing the VAT Guidelines merely through administrative cooperation may lead to the local calls for the unconstitutionality of the VAT Guidelines.

Fourth

Jurisdictions with a similar VAT treatment for these digital transactions, should consider also the non-tax implications of such approach, such as impact on copy-right infringement situations and deepen the digital breach between developing and developed nations. In these jurisdictions, usually developing nations, the access to digital content and resources is in general expensive. Thus,
implementing the VAT Guidelines would impact directly the cost of the services and intangibles and consequently the development of certain economies.

* * *

The participation of IFA Grupo Mexicano, A.C. is made on its own behalf exclusively as an IFA Branch, and in no case in the name or on behalf of Central IFA or IFA as a whole.

We hope you find these comments interesting and useful. We remain yours for any questions or comments you may have.

Sincerely,

IFA Grupo Mexicano, A.C.
Discussion Draft on International VAT/GST Guidelines
Guidelines on the Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles
Provisions on Supporting the Guidelines in Practice

Dear Sir or Madam,

We would like to thank you for the opportunity to respond to the OECD Public Discussion Draft regarding Discussion Draft on International VAT/GST Guidelines, Guidelines on the Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles, Provisions on Supporting the Guidelines in Practice.

We support in principle the concept that VAT neutrality is generally achieved through the implementation of the “destination principle”. In respect of B2C supplies of consumables and intangibles, we support the two general rules recommended for determining the place of supply; namely that on-the-spot supplies should be taxed based on the place of performance and for other supplies that the rule should be based on the customer’s usual residence.

We also support the framework for assessing the desirability of introducing specific rules where it is believed that the general rules described above do not produce an appropriate result under the criteria contained in Guideline 3.7.

We would like to comment on specific sections of the discussion draft as follows:
Section C3.2: VAT collection where the supplier is not located in the jurisdiction of taxation – para. 3.30 and Annex 3 para. 6

In paragraph 3.30 and Annex 3 paragraph 6, the draft suggests a simplified registration and compliance regime "without the same rights (e.g. input tax recovery) and obligations (e.g. full reporting) as a traditional regime".

We basically support the concept of a simplified registration and compliance regime but have identified circumstances where the compulsory application of such regime could produce an unfair result. In particular, there may be situations in which a non-resident provider of services incurs domestic input VAT, both with respect to "on-the-spot" transactions and supplies that fall under a special rule, e.g. in relation to immovable property.

As an example, a travelling entertainer touring in various countries and cities may rent venues in which he stages his performances (such as concert halls) in his own name, without using an organizing agent. The collected entrance fee will be subject to domestic VAT as an “on-the-spot” supply, but the VAT charged on the rent for the location would not be deductible under the simplified regime as suggested by OECD.

As another example, would be the situation of a non-resident who owns a house in Berlin, divided into apartments, which the owner rents for short-term accommodation. He contracts with local businesses for maintenance and cleaning. The non-resident does not live in Berlin nor has he established a home there (cf. 3.22). However, since maintenance and cleaning of the building may fall under a specific rule (3.53), these services still will trigger German VAT. The collected rental payments may equally fall under a specific rule and, taken separately, would qualify for a simplified regime. In this case, however, the input VAT would not be recoverable. That would violate the general principle that a business should not be burdened with VAT unless the legislator has decided differently.

As a result, we suggest that countries should always grant an option to the traditional regime for non-resident businesses, at least if the businesses otherwise would be burdened with non-deductible input VAT despite their taxable transactions in that jurisdiction.

Section C3.1: Determining the jurisdiction of the usual residence of the customer – para. 3.22

The considerable mobility in the population could lead to practical problems in with criteria using the residence of a customer. It is not unusual for individuals to have residences in more than one Member State in which they spend an equivalent period of occupation. The high degree of mobility of labor also means
that it is common for workers to spend short periods of time working in Member States other than that in which they reside. Such a short presence of a travelling worker may or may not happen in connection with a construction site that, under OECD tax treaty rules, qualifies as a permanent establishment. We wonder how such workers would be affected by the second sentence in 3.22 and whether such workers are to be considered "transitory visitors (e.g. as a tourist or as a participant to a training course or a conference)".

Consequently, we believe that it may be beneficial for the OECD to provide some additional guidance in how to determine the place of usual residence and regarding the treatment of travelling workers. It may also be beneficial if a form of "tie-break" clause could be drafted for inclusion in the Guidelines to deal with situations where individuals could be deemed to be usually resident in more than one country.

Should you have any questions regarding our comments please do not hesitate to contact Jörg Peter Müller from the IDW Team on +49 (0)211 4561 403 or via e-mail at mueller@idw.de.

Yours sincerely,

Hamannt Rindermann
Technical Director Taxes and Law
VAT/GST GUIDELINES ON PLACE OF TAXATION FOR BUSINESS TO CONSUMER SUPPLIES OF SERVICES AND INTANGIBLES

ICAEW welcomes the opportunity to comment on the consultation paper Guidelines on Place of Taxation for Business to Consumer Supplies of Services and Intangibles published by the OECD on 18 December 2014.

This response of 19 February 2015 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty’s Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW’s regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 144,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
MAJOR POINTS

1. Any guidelines should provide consistency, simplicity and certainty, as these qualities are essential to the smooth operation of businesses trading in countries outside of their own national borders.

2. Many businesses, particularly small businesses, will choose to charge the same, tax inclusive, amount for a particular service. It will then calculate the amount of VAT included in this charge for each country in which it has a customer at the end of the VAT accounting period. A requirement to include the amount of local VAT on any invoice at the time of supply should be avoided, as it would be a considerable administrative burden in these circumstances.

3. Many businesses have websites for which they charge a fee for access to some or all of the content. Such fees will commonly take the form of a charge for the download of a particular item or a subscription to provide access for a specified period. The majority of such businesses will set up their websites with the expectation that only customers from their own country will want access to the information. If a customer from another country decides to pay for access, the supplier may not be aware that it has an overseas customer and that the corresponding receipt of payment has created a liability to register and account for VAT in the country of the unexpected customer. We believe that it would be appropriate to establish a de minimis turnover threshold to avoid the requirement to register for VAT in countries where the turnover was small. The threshold should not on the other hand be too high, to avoid distortions of competition between established and non-established suppliers.

4. In circumstances such as those in 3 above, it may be some time before the supplier becomes aware of the need to register for VAT in its customer’s country. We believe that a period of up to one year should be allowed to apply for a backdated registration in such circumstances, without the automatic imposition of penalties and interest.

ADMINISTRATIVE POINTS

5. If small businesses are to comply with any new rules that are established, it is essential that they are made as simple as possible and do not create a disproportionate administrative burden. The EU requirement to gather at least two pieces of evidence of customer location and status and for this information to be retained for ten years is regarded by many small businesses as too onerous, if not impossible. If the requirements are not simple to operate, it is inevitable that many small businesses will cease to trade internationally because of the barriers created. Alternatively, they will continue to trade illegally, either through ignorance or because they do not expect to be caught.

6. Some small businesses trade below the VAT registration threshold in their own country and may therefore be unfamiliar with VAT requirements in other countries where their customers are located. It would be a considerable administrative burden for such businesses to register and account for VAT in other countries, so a mechanism to avoid this requirement is needed by applying a minimum registration threshold for established and non-established suppliers.

7. As with any new regime, it will be important to protect VAT revenue against fraud, such as non-resident businesses deliberately failing to register for VAT in countries where they have a domestic customer. However, we believe that there should be protection for genuine businesses from excessive penalties that are simply unaware of the requirements in a particular country. In some cases, a business may be completely unaware that it has a customer in a country, particularly if it merely receives payment for website access or an electronic download of information.
8. We believe that it is fairly clear within the EU that a fixed establishment for VAT purposes does not necessarily create a permanent establishment for direct tax purposes. However, it may be less clear where the customer is outside the EU. Consequently, we recommend that the guidelines include a statement to the effect that a VAT registration for B2C supplies, and/or the existence of a fixed establishment for VAT purposes, in the country of the customer, should not of itself create a permanent establishment for direct tax purposes.

9. If businesses are to comply with non-domestic legislation, it is essential that adequate worldwide publicity is given to a country’s requirements by its tax authority and that adequate notice is given of any changes. For example, we understand that Albania introduced new requirements with effect from 1 January 2015 at very short notice and with minimal publicity.

10. The suggestion of a simplified registration scheme for overseas businesses is welcome. However, a normal VAT registration should also be available to a non-established business if it incurs input tax in the customer’s country that it wishes to recover. Ideally, a simplified registration system should allow a limited amount of input VAT recovery where feasible.

11. Within the EU, a Mini One Stop Shop has been created, to enable businesses to declare overseas VAT to its home country’s tax authority. The creation of a similar system on a worldwide basis would be difficult to establish, but would probably be of long term benefit in the interests of simplification and encouragement of compliance. Evidence to emerge from the experience of users of the EU MOSS system will provide indicators of how such simplified systems can be enhanced further.

12. The guidelines should provide guidance as to how a business might comply. Some countries, such as Kenya, require a fiscal representative to account for the VAT on supplies made by non-established businesses, where most do not. This can cause difficulties for businesses that are unable to find a local business that is prepared to act as a fiscal representative. We recommend that the guidelines suggest that fiscal representatives should not be required.

TECHNICAL POINTS

13. In any guidelines, it is always a concern that double taxation or unintended non-taxation could arise if the guidelines are not consistently adopted. For example, one country may regard a particular service as an ‘on the spot’ service, whereas another country may not. The guidelines should therefore be as specific as possible to minimise the risks of double and unintended non-taxation. The OECD’s work on mutual assistance in Chapter 4 is clearly relevant at this point.

14. In some circumstances, there are considerable difficulties in determining whether or not a particular supply of services should be treated as a supply of electronic services, particularly when tax authorities throughout the world regard similar services differently. For example, a live webinar is not considered to be an electronic service in the UK and most of the EU, but South African VAT legislation specifically includes webinars as electronic services. If B2C services are to be taxed in the country of the customer, we therefore recommend that the same treatment be given to all supplies of services, to avoid the difficulties created when trying to establish under which set of rules a particular service should be treated.

15. Section 3.22 includes training courses and conferences as examples of temporary locations that do not create a place of residence. This section can be read to imply that if an overseas participant attended a conference, VAT should be charged in the normal country of residence of the participant, as opposed to the country in which the conference takes place. In practice, this would cause significant difficulties for conference organisers where most, if not all, other participants were resident in the same country as the supplier and conference location. We therefore suggest that the place of supply for individual consumers attending training courses and conferences be where they take place, in line with the guidance for ‘on the spot’ supplies.
APPENDIX 1

ICAEW TAX FACULTY’S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.

2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.

3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.

4. Easy to collect and to calculate: a person’s tax liability should be easy to calculate and straightforward and cheap to collect.

5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.

6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.

7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.

8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.

10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see icaew.com/en/technical/tax/tax-faculty/~/media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)
INTERNATIONAL ALLIANCE FOR PRINCIPLED TAXATION

February 20, 2015

VIA E-MAIL

Mr. Piet Battiau
Head of Consumption Taxes Unit, Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
2, rue André-Pascal
75016 Paris
France
piet.battiau@oecd.org

Re: Comments on Discussion Drafts on International VAT/GST Guidelines: Guidelines on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles / Provisions on Supporting the Guidelines in Practice

Dear Mr. Battiau:

The International Alliance for Principled Taxation ("IAPT" or "Alliance") is a group of major multinational corporations based throughout the world, and representing business sectors as diverse as consumer products, media, mining, telecommunications, oilfield services, transportation, computer technology, energy, pharmaceuticals, software, beverages, IT systems, publishing, and electronics.¹ The current membership of the IAPT is made up of the following companies: Adobe Systems, Inc.; Anheuser-Busch InBev SA/NV; A.P. Møller-Mærsk A/S; AstraZeneca plc; Baker Hughes, Inc.; Barrick Gold Corporation; British American Tobacco plc; Chevron Corporation; Cisco Systems, Inc.; The Coca-Cola Company; Exxon Mobil Corporation; Hewlett-Packard Company; Johnson Controls, Inc.; Juniper Networks, Inc.; Microsoft Corporation; Procter & Gamble Co.; Reed Elsevier plc;

¹
group’s purpose is to promote the development and application of international tax rules and policies based on principles designed to prevent double taxation and to provide predictable treatment to businesses operating internationally.

The Alliance appreciates the opportunity to provide input to the OECD with respect to the aforementioned Discussion Drafts released on December 18, 2014 on International VAT/GST Guidelines on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles. Our comments are set forth in the Annex to this letter.

In our comments below, we identify areas of our support for, and of concern with, the proposals put forth in the Discussion Drafts.

In short, we do agree that guidelines for international B2C transactions should follow the destination principle and aim at VAT neutrality. We also agree that compliance in events where non-resident entrepreneurs would have to comply outside their jurisdiction of establishment/residence should be made as simple as possible. We do express some concern though regarding the broad base of B2C transactions that is currently proposed to be subjected to those principles.

Once again, the Alliance appreciates the opportunity to comment on this important project and stands ready to respond to any questions or to provide further input as the work of the OECD on this item continues. We would appreciate the chance to speak on this topic on behalf of the IAPT at the public consultation to be held on February 25, 2015.

Sincerely yours on behalf of the Alliance,

Jan L.N. Snel
Baker & McKenzie Amsterdam N.V.
Counsel to the Alliance


Repsol S.A.; TE Connectivity Ltd.; Texas Instruments, Inc.; Thomson Reuters Corporation; Transocean Ltd.; Tupperware Brands Corporation; and Vodafone Group plc.
ANNEX

INTERNATIONAL ALLIANCE FOR PRINCIPLED TAXATION

COMMENTS ON DECEMBER 18, 2014 DISCUSSION DRAFTS ON INTERNATIONAL VAT/GST GUIDELINES: GUIDELINES ON PLACE OF TAXATION FOR BUSINESS-TO-CONSUMER SUPPLIES OF SERVICES AND INTANGIBLES / PROVISIONS ON SUPPORTING THE GUIDELINES IN PRACTICE

FEBRUARY 20, 2015

1. Introduction

Set out below are the IAPT’s comments on the aforementioned OECD Discussion Draft.

Points of agreement:

1. The IAPT generally agrees that the collection of VAT in business-to-consumer (B2C) transactions is a pressing issue that needs to be addressed to protect tax revenue and to level the playing field between foreign suppliers relative to domestic suppliers.

2. The IAPT generally agrees that determination of the place of taxation for business-to-consumer supplies of services and intangibles in accordance with the destination principle is a proper approach to achieve a level playing field in the case of cross-border B2C services.

3. The IAPT generally agrees that collection of VAT in the case of cross-border B2C service transactions, by the non-resident supplier of such services, would best ensure that tax on cross-border B2C supplies of services is indeed collected and remitted.

4. The IAPT generally agrees that the functioning of such a non-resident collection obligation is best served by implementation of a simplified registration and compliance regime to facilitate compliance by such non-resident suppliers.

Main Points of Concern

5. The IAPT believes that the proposed interaction between Guideline 3.5 and Guideline 3.6, which allocates taxation rights to the jurisdiction of “usual residence” for transactions not covered by the “on-the-spot” rule, and which then is subject to a further exception for “specific rules” based on Guideline 3.7, may lead to substantial divergence of classification of B2C services among various jurisdictions. Divergent treatment would increase the possibility of double or no taxation, and will not create level playing fields in those areas where a consensus has not been achieved on the scope of the “on-the-spot” category and the “specific rules”.

6. We believe that the better way to achieve the policy goals of this project would be to identify those specified services that materially endanger tax revenues, create market distortions, and compromise VAT neutrality in cross-border settings. The obligation to collect and remit residence country VAT then would apply to cross-border providers of those specified services.

7. Defining the covered services directly by an inclusive list is much simpler from the perspective of clarity and administrability, as only one definition need be applied. In contrast, under the draft proposal, a taxpayer which seeks to understand whether the “usual residence” rule applies to a supply, must first
determine whether the supply is covered by the “on-the-spot” rule and then is not covered by a “special rule” or the rule regarding services connected with immovable property. It is likely the case that the volume of services covered by the “on-the-spot” rule, “specific rules”, and rules related to immovable property, will exceed the volume of those left to be covered by the “usual residence” rule.

8. Despite the existence of the ESS regime in the EU for several years now, the imposition of an extraterritorial obligation to register, collect and remit taxes remains an extraordinary legal imposition and is still an unusual requirement in international relations. The IAPT therefore believes that this extraterritorial jurisdiction should not be exercised lightly. Despite the welcome commitment in the Discussion Draft to suggest simplified registration and compliance procedures, these compliance requirements will impose significant novel burdens on business, in particular those outside the electronically supplied services (“ESS”) sectors.

9. In various jurisdictions, notably the EU but with other countries preparing to enact similar requirements, ESS are already subject to VAT according to the “usual residence” rule. This obligation is justified on the basis that such services do not have geographic boundaries (a consumer can switch from any e-shop in the world to another with a few mouse-clicks) and the consumer will generally buy and use such services when present in his country of residence, just as if he would have bought the ESS from a local service provider in his country of residence. In the IAPT’s opinion, applying the “usual residence” rule to services such as ESS and broadcasting or telecommunication services generally does create a more level playing field.

10. One could question, however, whether cross-border B2C trade in the other services mentioned in the Discussion Draft at paragraph 3.21, such as consultancy services, accountancy, or legal services, are sufficiently distorting to justify a decision to use the “usual residence” rule to obtain absolute VAT neutrality. The same applies to other examples of services mentioned in paragraph 3.21, such as financial and insurance services, which in many jurisdictions are often VAT exempt in any event. In light of the need to balance efficiency and effectiveness with neutrality, a service should be subject to an extraterritorial VAT collection obligation only if the category of service in fact creates VAT distortions.

11. Guideline 3.7 intends to limit the impact of the broad-based application of the destination principle as provided by the preceding guidelines. The criteria used there, however, are quite broad and diverse, and may in practice therefore lead to conflicting classification distinctions as each jurisdiction seeks to determine what services to cover through a “specific rule”. We note that jurisdictions may respond to the incentive to retain tax jurisdiction over various categories of B2C services by creating multiple “specific rules” in order to override the application of the destination principle as applied to their resident businesses. We doubt that it will be easy to achieve international consensus on when “specific rules” should apply as exceptions to the general rules.

12. Our proposal to apply the “usual residence” rule only to clearly defined categories of services avoids this problem. The designated services should be those for which geographic boundaries play no or only a minimal role and that thus do indeed impact VAT neutrality and a level playing field for all suppliers. We prefer this precise and specific approach rather than a broad application of the destination
principle which requires defining multiple lines of division between categories of services, since the more complex classification system compromises the clarity and harmonization that the OECD proposal intends to achieve regarding the application of VAT on international services.

13. We believe that it is possible to propose a carefully selected list of services that would be the most appropriate types of services to be subject to an extraterritorial compliance obligation. The list would include, for example, ESS, telecommunication services, and broadcasting services. The covered services should be those where geographic distance between supplier and consumer truly plays no role and which create distortions in domestic markets. The list of services should be clear, but also should be allowed to evolve with new developments in the delivery of cross-border services. As you know, large jurisdictions such as India and the EU have already followed this approach of listing services.

14. In addition to the above, the IAPT would like to call attention to the fact that identifying (VAT/GST collection) indicators to determine the customer location often requires substantial adjustment of a company’s business systems. It is a burden and often costly. For ESS, the EU, for example, has provided guidance as to what indicators could prove the customer’s location. A similar indicative list may be considered by the OECD to avoid countries requiring different indicators of proof about a B2C customer’s place of residence. The compliance burden on business will increase considerably if there is no uniform list of indicators which can be applied globally. As a practical matter, only the OECD will be able to provide the necessary guidance to harmonize these requirements. A lack of harmonization will create barriers for businesses to expand into other jurisdictions, create unintentional noncompliance and thus would impede international trade. Special attention needs to be given to services which will become subject to the destination principle for the first time under these proposals, that by their nature do not already produce indicator information such as e.g. an IP address by an ESS provider.

15. In light of the need to assess these proposals by weighing VAT neutrality versus proportionality, the Alliance believes that realistic revenue thresholds must be applied before imposing extraterritorial VAT registration and compliance obligations.

16. Registration should be easy and simple and preferably available online. Requirements such as the appointment of local fiscal representatives in the country of consumption or issuance of a bank guarantee should be prevented. Furthermore, a registration should merely be a VAT/GST registration and not trigger consequences for other taxes, or lead to the conclusion that an establishment of any kind exists for the service provider in the country of registration.

17. Use of local bank accounts to make a VAT payment to the tax administration of the country of consumption or to obtain VAT refunds should not be required. Internal wire payments should be allowed.

18. Taxpayers should be able to correct previous VAT/GST filings in the same simple manner as the initial VAT/GST reporting, for example, to take into account bad debts for which the VAT was already reported and remitted.
19. In respect of invoicing, the Alliance believes that, when taking into account proportionality of the suggested measures, there is no justifiable need to impose B2C invoicing requirements on non-resident suppliers selling to consumers in other jurisdictions.

20. Thought should further be given to the status of B2B customers that are businesses but generate revenues below their domestic VAT/GST threshold (i.e. small entrepreneurs). The IAPT suggests taking the approach that anyone without a VAT ID number in a specific B2B format, should be presumed to be a B2C customer and thus VAT should be charged by the supplier of the service. A general rule like this creates clarity for suppliers of services but also for their customers, who know they will be charged VAT if they are not able to show the service provider a proper VAT ID number.

21. Similar consideration should be given to legal bodies that often may not be, or may only partially be, VAT entrepreneurs, such as e.g. government bodies.

22. In respect of Guideline 3.8 we believe that services related to immovable property are not services that have shown any significant changes in their nature throughout the years. We therefore recommend including an exclusive list in relation to this third category of services. This list should mention typical services falling within the scope of this category in order to ensure clarity in relation to the application of this guideline. Note that such list may obviously nevertheless be reviewed on a regular basis in order to ensure it stays up-to-date.
Comments to the OECD Discussion Draft on OECD draft guidelines on VAT/GST Guidelines

ICC welcomes the opportunity to provide comments on the OECD Discussion Draft on the two new draft elements of the International VAT/GST Guidelines (“the Guidelines”): (1) the B2C Guidelines on the place of taxation of B2C supplies of services and intangibles, and (2) the supporting provisions to support the application of the Guidelines in practice. ICC notes that the OECD’s work on the Guidelines provides an excellent foundation on which to build future work on VAT/GST.

Comments on Chapter 3
The development of the Guidelines by the OECD aims to provide a global VAT/GST framework based on two fundamental principles – the neutrality principle and the destination principle – while at the same time safeguarding the VAT revenues for governments and achieving a level playing field. This is fundamental for businesses too. However, in order to operate in a global environment, the following criteria are of equal importance to businesses:

- neutrality;
- efficiency of compliance and administration;
- certainty and simplicity;
- effectiveness; and
- fairness.

ICC would like to emphasize the importance of focusing on the ultimate objective of a VAT/GST framework: taxing final consumption, rather than ineffectively taxing businesses. In this context, businesses ought to serve as collectors of the tax and in that capacity play a key role. Consequently, ICC encourages the OECD to consistently balance the conceptual and practical aspects of VAT/GST encompassing the above-mentioned conditions. ICC notes that the destination principle as applied to tax B2C services and intangibles is a useful starting point – the same applies to B2B supplies which are also mentioned in the Guidelines. To strike a balance between safeguarding VAT revenues and ensuring certainty and simplicity for businesses, requires cooperation between governments and equally between governments and businesses, as well as a global rather than a jurisdictional mindset. An example, would be Cooperative Compliance Agreements established consistently in different jurisdictions.

ICC notes that the Guidelines currently draw on elements of the EU VAT system – e.g., the Guidelines adopt a similar approach to the EU’s newly implemented B2C telecoms, broadcasting and e-service place of supply rules. As with every tax system, the EU VAT system has both positive aspects (e.g., the application of the reverse charge mechanism in B2B cross-border services scenarios which is simple and effective) and also areas for improvement (e.g., as yet there is little consistency in the definition and treatment of immovable property and related services). It is therefore fundamental that the Guidelines continue to take up only those elements of established VAT systems which are considered to be genuine best practices.

Comments on Annex 3
Annex 3 is a completely new, unique and significant piece of work and deserves to play a key role in the Guidelines. It stresses the importance of a simple registration and compliance regime for non-resident
suppliers. This is crucial in order to balance the safeguarding of VAT/GST revenues for governments while at the same time enabling businesses to act as collectors of the taxes without distortion of their core business activities and loss of flexibility. This being a novel feature, it is very crucial that the VAT legislations as well technology infrastructure across borders uniformly support such initiative. In short, for successful implementation, it is crucial that there is a high level of concerted efforts by countries towards alignment of national legislations (including reporting compliance) amongst others. In general, ICC would like to encourage the OECD to remain focused on simplicity and flexibility in a wider context than B2C supplies and to use best practices shown in jurisdictions around the world – resulting in efficiency gains for everyone for future work done by the OECD on VAT/GST.

Comments on Chapter 4
ICC underlines that prevention is the best way to minimize disputes: the more consistently interpreted and implemented the Guidelines are, the fewer disputes on the place and collection of taxation will occur. The Guidelines were developed with the understanding that the parties involved will act in good faith, and that all transactions are legitimate and have economic substance. At the same time, it needs to be understood that VAT/GST is a transactional tax dealing with massive volumes of incoming and outgoing transactions. In this context, genuine mistakes can occur. That does not in any way mean they relate to tax evasion or avoidance. Often genuine mistakes do not even impact the governments’ VAT/GST revenues, particularly where parties have full input VAT recovery. Nevertheless, in case of disputes/mistakes, ICC understands governments should take appropriate measures but with this kept in mind it is crucial that they apply these measures responsibly and proportionately in line with the neutrality principle of the Guidelines. Chapter 4 supports the resolution of disputes where they arise. Consequently, it is vital that governments cooperate, exchange information and agree on correct tax treatment. This equally applies to keeping the compliance and administration simple and efficient as mentioned above under ICC comments on Chapter 3. However, it is debatable if the government machineries across borders are equipped up to undertake the required level of co-operation in this regard.

Comments on BEPS related aspects
Although not specifically highlighted in the Guidelines, there is a clear link to the OECD’s BEPS action plan. ICC would like to highlight a few BEPS-project issues with potential VAT/GST implications:

- *Permanent establishment status*: If there is greater application of force of attraction rules, this could lead to increased VAT compliance obligations which conflicts with the aim of keeping compliance for (non-resident) business simple, efficient and certain. Furthermore, it increases the risk of double taxation if the establishment definitions are applied differently in jurisdictions. Consequently, this would impact the principle of neutrality.

- *Transfer Pricing (TP)*: Increased risk of transfer pricing adjustments creates uncertainties and potential double taxation on how TP adjustments will be treated from a VAT/GST perspective. Similar as mentioned under the previous bullet, this would impact the principle of neutrality.

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A ground rule that cannot be emphasized enough is that a registration for VAT purposes does not in itself constitute a permanent establishment. If this rule is not followed it contradicts with all the conditions mentioned under Chapter 3.
The International Chamber of Commerce (ICC) Commission on Taxation

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy. Founded in 1919, and with interests spanning every sector of private enterprise, ICC’s global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.
Piet Battiau  
Head of Consumption Taxes Unit  
OECD Centre for Tax Policy and Administration  

By email to: piet.battiau@oecd.org

22 February 2015

Dear Piet,

BEPS Discussion Drafts: Two new elements of the OECD International VAT/GST Guidelines

We welcome these further Guidelines which, when applied globally, will increase business certainty and restore at certain levels fair business competition and in principle will eliminate double taxation and unintended non-taxation. We attach, as an annex, a number of detailed points raised by our members.

This response reflects the views of the International VAT Association, and we offer our observations on several key aspects of the Discussion Drafts for inclusion in the OECD International VAT/GST Guidelines.

The OECD states that “The collection of VAT in business-to-consumer (B2C) transactions is a pressing issue that needs to be addressed urgently to protect tax revenue and to level the playing field between foreign suppliers relative to domestic suppliers”.

This positions it as a key part of the BEPS Action Plan that is of critical importance to a number of countries due to the consequent significant budgetary impacts.

I. Place of taxation of business-to-consumer supplies of services and intangibles (B2C Guidelines)

The OECD proposes that most services supplied B2C should be taxed on the basis of the destination principle, ie based on the customer's usual residence, as being the best proxy for identifying the place of consumption (General rule).

The IVA supports this position. However, there is a need for clarity in the guidance as to whether there is a hierarchical test to determine which rule applies, ie firstly 'destination', and then secondly the place where the supply is 'enjoyed' as it requires both supplier and customer to be physically present, or the opposite way round?

www.VATassociation.org  
info@VATassociation.org  
office@VATassociation.org  

Kleine Moerstraat 5b  
8000 Brugge  
Belgium
The IVA and its members agree that there is an urgent need for clarity and also simplification of the VAT rules globally, which we agree is difficult to achieve where consensus is required and in an environment where the OECD’s role is to propose ‘soft-law’ and not binding legislation.

II. Communication

The OECD’s proposal on exchange of information and the use to be made of the existing Treaty provisions (OECD Model Tax Convention, in its article 26) is important to make a destination based system function. Experience shows, however, that even within the EU the 2010 Council Regulation on Administrative Cooperation (904/2010) is still not used effectively in all cases – see the Commission’s report COM(2014) 71 final of 12 February 2014.

Nonetheless, in attempting to provide a balance between taxpayers and governments, the OECD correctly insists that governments provide more attention to the provision of data and information to taxpayers such that the latter find it easier to comply with their reporting obligations. This point is critical. Governments cannot expect businesses to comply if they (governments) do not provide simple compliance systems and a detailed level of information in the language of the taxpayers to ensure that compliance is effective and as simple as possible.

For any clarification of this response, please contact the undersigned.

Yours sincerely

[Signature]

Stephen Dale
President
Annex to Letter re the B2C Guidelines – comments from members.

Chapter 3.

3.3 The preliminary issue, other than the determination of the place of taxation, is to qualify exactly which are the supplies at stake, and to differentiate them in categories.

Within the list of recommended approaches the effectiveness of the VAT system must be considered in particular under the taxation at destination principle and to ensure the correct exercise of the right to deduct.

3.8 The supplier must not be required to make unreasonable efforts to determine the place of taxation. It is the recipient of the supply that must provide elements of proof of his status. The supplier has to make reference to the situation of the taxable person which is acting as such or not. The same customer can be a business although he is purchasing a service as a consumer. We suggest using the presumptions as per the EU rules concerning TBES supplies (see art. 24b Reg. 2011/282/EU).

3.13 It is not clear if the place of performance rule is the same concept as the use and enjoyment rule, or if for digital supplies it represents just the place “of download” of the service. Could this be clarified?

3.24 The information provided by the customer generally may be considered as important ‘evidence’ bearing on the determination of the jurisdiction of the customer’s usual residence, but this criteria does not appear to comply with the use and enjoyment rule. So it would be better to establish a hierarchy of the principles that have to be applied to the supply (e.g. first the use and enjoyment, second, where the use and enjoyment is not possible to determine, the usual residence) with the aim to avoid double taxation or non-taxation.

3.25 In the EU there is the MOSS for that purpose (Mini one stop shop), which allows a taxable person that supplies digital services to be registered in only one country for supplies made in multiple countries.

3.27 Such a reverse charge mechanism does not offer an appropriate solution for collecting VAT on business-to-consumer supplies of services and intangibles from non-resident suppliers. This mechanism cannot be applied to B2C transactions, because it provides for the shift of the tax liability onto an individual consumer.

3.28 For non-resident suppliers the best solution (simple and effective) is to be registered within the MOSS.

3.33 The use of spontaneous exchanges of information is not, in our view, sufficient. The principle to be applied for the exchange of information must be reciprocity.
3.34 It is a clear requirement that the Tax Authorities identify the information they are going to exchange according to their national law (e.g. bank details). It has to be determined for each country the value as a ‘proof’ (of the residence of the customer) of each piece of information that the supplier can rely upon.

3.36 The problem is still the acceptance of the same rules/proxies for all countries.

3.37 Referring to the second step, it is to be recalled that the only common result that has to be achieved is the taxation at the place of consumption, so the specific rule can be applied for cases in which the general rule does not provide that effect.

3.57 The terms have to be understood narrowly within the meaning of national civil laws, because it is the only criteria which provides legal certainty and avoids conflicts of interpretation as these terms are already consolidated in our legal systems.

3.59 Referring to the utilisation of immovable property, the OECD is proposing that each jurisdiction would be able to choose whether or not to apply a specific rule; but this possibility doesn’t provide legal certainty. Moreover, each country can use this ‘freedom’ as an instrument of tax policy, and the application of the rule would potentially vary based on the characteristics of the state concerned (population, and turnover of transaction).

ANNEX 3 [TO CHAPTER 3] - MAIN FEATURES OF A SIMPLIFIED REGISTRATION AND COMPLIANCE REGIME FOR NON-RESIDENT SUPPLIERS

Invoicing

11. It is not possible to consider eliminating invoice requirements, because with the invoice the supply is proved and traceable for the supplier. This requirement must be maintained.

Use of third-party service providers

14. It is necessary to establish a joint and several liability between the non-resident supplier and the third party with the aim of tackling VAT fraud and tax avoidance.

Application in a business-to-business context

15. The reverse charge provides a sort of shift mechanism which does not impact the principle of taxation at the place of consumption – but changes the ‘taxpayer’.

Jurisdictions must adapt local laws where their general rules do not differentiate between business-to-business and business-to-consumer supplies in their national legislation.

17. Implementing a threshold to digital supplies to require the registration of the supplier may cause distortion of competition – but maybe justified in particular where countries have high thresholds for local businesses.
Chapter 4 - Mutual Cooperation, Dispute Minimisation, and Application in Cases of Evasion and Avoidance

4.5. It is not clear what is intended in relation to the ‘economic substance’ of a transaction, because a transaction is economical in itself. Maybe a term such as "legal substance" could convey the notion of the coincidence between the economic substance and the legal form.

4.20 Advance ruling procedures in that field, unless they were public, available to all taxpayers on an equal basis, could produce an undesirable effect such as the distortion of competition in cross border trade due to the tax policy of any one particular State.
11th February 2014

Dear Sir,

Re: The extension of VAT to all physical goods

I run a small non-VAT mail order business that sells used music and music related goods directly to the public.

I read with concern about the new EU VAT changes that have come into place and that there is much speculation this will apply to physical goods.

The average price of an LP record I sell is £11, the postage and packing I charge £7. If I charge VAT @ 25% the price will increase by £4.50, which as the customer will regard the increase to be on the cost of the record that will equate as an increase to them of over 40% on the price, which will mean I will lose almost all business.

As my business will make approx. £15000 - £16000 profit this financial year, of which £7500 - £8500 will be derived from European sales, if I am forced to charge VAT on these I expect to lose almost all sales to Europe, therefore can’t justify running the extremely complicated and expensive to implement (will require considerable software development) for a few hundred pounds profit a year, I will have to exclude sales to the EU, and without these sales the business won’t be profitable enough to continue.

Either way my business will have to close and I will be unemployed. I know others in the same position.

This will stifle new business development, increase unemployment and greatly restrict trade, all disastrous for economic growth.

Regards

John Esplen
Karen Butler

I am Karen Butler, a self-employed sole trader based in the UK. My business involves designing and selling pdf knitting patterns, technical editing knitting patterns for other designers and hand dyeing yarn.

I have concerns about the new EU regulations regarding VAT being paid on destination principles directly as a:

- customer;
- seller of electronic documents;
- hand dyer because the EU plan to bring the legislation in on physical goods next year;
- technical editor as the effects on other designers' businesses has the potential to have major impact on a profitable part of my business.

The new EU VAT regulations involve major costs in both time and money to be VAT compliant as a sole trader with a small but growing business, and also put me at a huge disadvantage in an international market. In addition, the complexity and costs of complying as a micro-business are prohibitive.

**Paras A:3.3 and C3.29 International neutrality is maintained**

Within the knitting business sector, there are a number of business outside the EU who refuse to comply with the regulations. It is also apparent that some businesses in the EU are ignorant of the new regulations, or are aware but have been told by their country's tax authority that it does not apply to them and they do not need to register for VATMOSS. This means that as a business who has chosen to make sure I am VAT compliant, I am at an economic disadvantage in having to cover the cost of that VAT compliance.

It also appears that businesses outside the EU do not grasp the fact that selling to an EU business which is not VAT registered is a B2C transaction, so they are undercutting the prices of EU businesses.

In addition, the marketplace I receive most of my sales through (Ravelry) put in emergency steps to allow sales to the EU to continue. Ravelry’s site owner’s preferred option for designers was to divert EU sales to a UK based, VAT MOSS registered site. Apart from major problems related to the speed with which software changes were made, this meant the EU customers diverted in this way could not benefit from any special offers or discounts on pdf knitting patterns, and in addition could not purchase them as gifts for others.

I myself have had to block sales of certain individual pdf patterns to EU customers, as the increased charges made them uneconomic to sell in the VAT registered online store I direct my EU sales from Ravelry too.

I have also encountered discrimination as a customer in not being able to purchase from businesses which have chosen to block sales to the UK and other EU countries.

**Paras A:3.3 and C3.23 Compliance by businesses involved in these supplies is kept as simple as possible**

The complexity of VAT compliance has lead to my plans to develop a direct sales website this year being put on hold. Some of the compliance issues also affect me when selling on platforms, reducing the number of sales.

As a micro business, the only cost effective suitable international option for accepting
payments is Paypal. Paypal do not provide the required location data required by the regulations, only an indication of country.

Customers have reported terminating purchases when asked for the extra information (full address, phone number etc) now required for a digital download. They do not want to share this extra information with small businesses.

The increase in price due to VAT being added during transactions also leads to sales being lost.

With wide variations in VAT rates across the EU, systems aren't available to provide an accurate VAT inclusive price before the customer purchases. The only option for micro businesses is to set a single price: and this needs to be worldwide, not just for the EU. Essentially, increasing prices to cover this means a loss of sales outside the EU. Customers in the USA particularly object to VAT inclusive pricing and will boycott sellers for this, even if the prices have not changed and sellers are taking the loss on the VAT payable to individual countries. There is then extra work calculating the VAT according to the customer's location, and chasing up where there are enough agreeing separate pieces of data to confirm location for tax authorities.

**Paras A:3.3 and C3.31 Clarity and certainty are provided for both business and tax administrations**

As a micro business handling my own tax responsibilities, UK's HMRC did not notify me of any changes to the regulations. I became aware completely by chance in late October last year due to Twitter. Information provided by both the EU and HMRC was both confusing and ambiguous. Having contacted the UK based HMRC for information, I was told conflicting things about who was responsible for the VAT in a supply chain in the same phone call. Writing to HMRC for information produced quotes from the very information I stated I had read and didn't understand, without the clarification I needed. In addition, it is apparent from talking to others in the industry, that other countries' tax authorities have told designers very different things regarding who is responsible, and in some cases they have been told that their income is below the national threshold for registering for VAT, and they do not need to register for VATMOSS.

In addition, while HMRC have told UK businesses that manually emailing a pdf is outside the regulations, other countries have clearly stated they are VAT liable. There is no clear definitions of what is considered an electronically supplied service across Europe; individual countries are interpreting things differently. How can small businesses operate legally when the tax authorities across the EU are applying the regulations in different ways? Will a small business be considered liable by another EU country, even if following the guidance provided in their country.

**Para A:3.3 The costs involved in complying with the tax and administering it are minimal**

Just researching and making sure my business was not liable for VAT has taken several weeks of work time, reducing income generating work. Time consuming work has involved putting patterns on less popular sites, where it was clear I was not liable for VAT and making sure all patterns redirect EU customers appropriately. There has also been the worry that Ravelry would rather stop pattern sales than deal with VAT (based on responses about EU VAT from the site owner): so placing patterns on more expensive sites has been essential from the point of view of ensuring they would continue to be available.

Having to divert EU sales from my main site has increased the selling fees alone per sale
from 5% of pattern price to 32.5% (50p plus 20% of pattern price). So for a £4 pattern, costs have increased from 20p to £1.30. As £4 is the maximum price of my patterns, for some the increased costs are a larger proportion of the selling price. Note that these figures do not include Paypal costs. My £1.50 individual patterns are no longer worth selling to the EU because of the costs involved. Fees on another marketplace I use are 40% of pattern price.

As a customer, I am additionally aware that writers have had to switch to selling e books through Amazon, rather than direct. This essentially makes Amazon a global monopoly: with the power to control worldwide pricing, availability, charge huge fees and reduce the profitability of the authors I wish to support.

Being forced into using 3rd parties who deal with the VAT compliance because I cannot deal with the VAT compliance myself, I am unable to take advantage of being under the UK VAT threshold for any of my sales. My business is well below the UK VAT threshold. As increasing the prices of knitting patterns leads to a major reduction in sales, I have opted for VAT inclusive pricing, which means the VAT expense is taken out of my income. While having to pay extra charges as well as losing the VAT for sales to the EU, I cannot offset the VAT against my expenses. As a sole trader well below the UK VAT registration threshold and doing my own accounts, spending time on VAT returns would reduce my ability to do income generating work.

Adding VAT on to the international price is of course an alternative, but adding even 20% to prices will reduce sales in the EU dramatically, and some VAT rates are considerably higher.

In order to set up the website I had planned this year, I will have to contract out to a 3rd party to deal with the VAT compliance. As most of my sales for the first year are likely to be through the marketplaces I already use, the cost and time involved means this is no longer an option.

Well known yarn companies have opted to offer pattern downloads for free, rather than deal with EU VAT. As well as reducing the VAT income for individual countries, the professionally produced patterns they give away compete with those from designers still selling their patterns. This has a devaluing affect on the pattern market and reduces sales.

In addition, I don't think anyone in the EU has taken into account the cost of processing tiny amounts of VAT from micro businesses. As a small, growing business, last year I had single sales to a number of EU countries in a quarter; a single sale could be for as little as £1.50 to £2.

**Paras A:3.3 Barriers to evasion and avoidance are sufficiently robust**

Fellow designers are already reporting sales through marketplaces from countries which should be redirected, where customers have deliberately used IP proxies to change their apparent location. This will happen more and more when customers are frustrated at being blocked from purchasing, or having to paying more than from other locations due to VAT.

There is also a particular problem with knitting patterns with sites based in China and Russia hosting pirated copies of patterns. They usually target free patterns, but with reduced availability in some countries pattern pirating of paid for patterns is likely to increase dramatically.

**ANNEX 3 paras 16 and 17 Principle of proportionality (para 16) and the simplified registration and compliance objectives (para 17)**
EU VAT regulations with a zero threshold for registration cause major problems for micro businesses. The compliance and administrative burdens on micro businesses are completely disproportionate, especially when the amount of revenue from individual micro businesses to individual countries is considered. In order to avoid having to deal with VAT compliance themselves, micro businesses are stopping trading or being forced to use platforms, losing a large proportion of their income in the process. The fact that micro businesses are taking such actions is a strong indication that something is very wrong. In my case, the increase in costs mean that I run the risk of the newest part of my business (pdf pattern sales) making a loss, when even in the first 6 months it was financially viable.

Considering that additional countries plan to set up destination based taxation, steps need to be taken in order to allow international trade by micro businesses to flourish, and not impose burdens aimed at multimillion multinational companies on them.

To allow micro businesses to continue trading without being dependent on platforms, we need an exemption from the regulations for micro businesses until a suitable EU wide threshold for VAT registration; and compliance issues and administrative burdens are both identified and reduced.

In addition, strict guidance needs to be provided to all countries considering destination pricing regarding compliance and admin, and to ensure that suitable registration thresholds are in place.
Mr. Piet Battiau  
Head of Consumption Taxes Unit  
Centre of Tax Policy & Administration  
OECD  
2, rue André Pascal  
75775 Paris Cedex 16  
France  

By email: piet.battiau@oecd.org

19 February 2015

Re: Discussion Draft for Public Consultation – International VAT/GST Guidelines on Place of Taxation for Business-To-Consumer Supplies of Services and Intangibles and Provisions on Supporting the Guidelines in Practice

Dear Mr. Battiau:

On behalf of the member firms of KPMG International, we are pleased to provide our comments and suggestions on the draft International VAT/GST Guidelines on the place of taxation for business-to-consumer (B2C) supplies and the provisions on supporting the Guidelines in practice.

We strongly support the ongoing work of the OECD in its development of international guidance on VAT/GST matters and recognise the importance of this work in achieving greater harmonisation in the taxation of international trade. We believe that international guidance on the taxation of B2C supplies is particularly important at this time given the concerns recently expressed in Action 1 of the BEPS Action Plan (Digital Economy) regarding the collection of VAT/GST on such supplies and the potential distortions of competition between domestic and foreign suppliers.

Although the OECD Guidelines in tax matters do not purport to be legally binding, experience shows that they have strong persuasive standing with the governments of both OECD members and non-members. The consequences of the current exercise are likely to include a significant reallocation of taxing rights between countries and extensive new compliance obligations for businesses engaged in international B2C commerce. Accordingly, the Guidelines and any eventual commentary on the Guidelines must be sufficiently clear and comprehensive so as to minimise the risks of mismatches in taxation, particularly when these might lead to double taxation of the same transaction. Application of
these Guidelines may impact a large number of businesses (e.g., by increasing the cost of regulatory compliance) and we believe it is incumbent on the OECD to ensure that the draft guidelines do not create new barriers or disincentives to trade. As is the case elsewhere with the OECD’s output on international taxation issues, it should be recognised from the outset that the Guidelines will require constant review to cover new tax issues that will arise with the evolution of global B2C commerce.

**General Observations**

The proposal to tax B2C supplies based on the place of consumption and to require non-resident vendors to collect tax represents a significant shift for many countries. Implementing these rules on a global basis will bring about significant challenges for businesses and will only be feasible, in our view, if the following objectives are prioritised:

1. The rules should be applied globally in a clear and consistent manner, and
2. The registration and compliance obligations imposed on businesses must be uniform, measured and simple.

The guidance included in the International VAT/GST Guidelines has an important role to play in ensuring that these rules are implemented and applied by jurisdictions uniformly. Clear and timely Commentaries on other detailed guidance on interpreting the Guidelines should also provide much needed certainty for both businesses and governments when planning for change and should go a long way to ensuring that instances of double taxation are minimised. This is particularly important given the continued absence of an effective international VAT/GST dispute resolution mechanism.

Below are our comments and suggestions on several aspects of the draft Guidelines. We hope that these observations are helpful to you in framing the final output.

**Guideline 3.1**

- As separate Guidelines have been developed for determining the place of taxation for business-to-business and business-to-consumer supplies, the first step that a supplier needs to take in determining the appropriate VAT/GST treatment is to establish whether its customer is in business or not. Although the draft Guidelines include some guidance on how customer status could be determined, we would suggest that the Guidelines should go further and make specific recommendations on how this determination should be made given the importance of this decision. Alternatively, this could be addressed in detailed Commentaries on the Guidelines provided that these can be agreed and made available in reasonable time.
- Paragraph 3.8 of the Guidelines suggests that “where a supplier, acting in good faith and having made reasonable efforts, is not able to obtain the appropriate documentation to establish the status

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1 Commentaries on the VAT/GST Guidelines should be viewed in the same context as the Commentaries published on the OECD Model Tax Convention on Income and Capital

2 Paragraphs 3.7 and 3.8 of the discussion drafts deal with customer status as well as the footnote to paragraph 3.9.
of its customer, this could lead to a presumption that this is a non-business customer and that therefore the rules for business-to-consumer apply”. We support including this presumption in the Guidelines but would suggest that the Guidelines make a recommendation on this point rather than noting it as an option. This could be done by using the word “should” rather than “could”. It is our view that the Guidelines should be as prescriptive as possible to support a globally consistent interpretation of the rules. We would also suggest that it is better to use the word “evidence” rather than “documentation” as there are a number of ways in which the determination on customer status could be made that may not strictly be regarded as documentation (e.g., IP addresses on online databases). A suggested list of appropriate evidence for determining customer status should also be provided in the Guidelines (or an Annex to the Guidelines) to promote consistency in application.

- We would also suggest including a statement to the effect that if a supplier has acted in good faith and made all reasonable efforts to determine customer status, a tax authority should not challenge the resulting VAT/GST treatment applied. The same point is also relevant for determining customer residency in Guideline 3.6. When a customer deliberately misleads a supplier on its status or residency, this should not result in the supplier being exposed to penalties.

**Guideline 3.5**

- We agree that the place of physical performance is an appropriate proxy to determine the place of consumption for “on the spot supplies” of services to final consumers and that it is reasonably practical for business to apply.

- We agree with the suggestion made in paragraph 3.18 that the general rule for B2C “on the spot” supplies could also be adopted as a specific rule in a business-to-business (B2B) context when businesses supply such services to large numbers of customers at a specific place and time (e.g., restaurants). This would remove the risk that such businesses would otherwise be required to distinguish between their business and non-business customers and apply different VAT/GST rules to each. Again, we would suggest that Guidelines make a recommendation on this point rather than noting it as an option by changing the word “could” to “should”.

**Guideline 3.6**

- We agree that customer residency may often be a reasonable and workable proxy to determine the place of consumption for most services not coming within the general rule for “on the spot” services. However, as noted above, we want to stress that the move to tax cross-border B2C services on this basis represents a fundamental change for many. To date, suppliers of these services have largely been required to determine only whether VAT/GST was due in their home country. If tax applied, the suppliers were typically required to pay it to their local tax authority, with whom they would ordinarily be registered.

    Going forward, these same suppliers will need to build additional steps into their tax determination process and specifically consider whether a VAT/GST liability arises in another country. Businesses will further be required to register in these other countries notwithstanding that they may not have a physical presence in them. Countries with both national and subnational
consumption taxes require even more complicated knowledge and decision-making. This is a massive and costly change as businesses will now be expected to have a working knowledge of the VAT/GST rules and applicable tax rates in consumer markets where they are not based in order to meet new tax compliance obligations. These changes will not only result in additional compliance costs for businesses but will also give rise to a wide and important range of commercial and legal issues (e.g., pricing for services sold into jurisdictions with different VAT/GST rates, the interaction of data protection rules and the collection of evidence of customer status and residency, the prospects for time-consuming multi-jurisdictional audits with non-standard methodologies and appeals processes). Governments and tax authorities will also face significant challenges in drafting new laws, supporting regulations and guidance, as well as developing new or modifying existing systems to support the changes necessary for online registration and compliance systems. The OECD Guidelines and Commentaries should provide countries with a comprehensive framework that leads to consistency in implementation.

- The challenges of implementing such a fundamental change in the way services are taxed can be seen when we look at countries that have already implemented similar changes or are in the process of introducing such changes. The experience of the 28 EU Member States is a good example. In 2003, all EU Member States introduced a requirement that non-EU remote sellers of electronic services to EU consumers should be required to register and account for local VAT in the EU jurisdiction where the consumers were located. Although the so-called “One Stop Shop” mechanism was set up so that non-EU sellers could register and remit VAT to multiple tax authorities via a single registration in one EU country, we understand that there are fewer than 1,000 such VAT registrations to date. In fact, the majority of large non-EU based suppliers chose to establish within the EU in order to account for VAT to one tax authority (i.e., their new “home” country in the EU). From 1 January 2015, the 28 EU countries introduced similar rules for EU-based suppliers supplying telecoms, broadcasting and electronic services to consumers in other EU States. Now, all suppliers of such services to consumers resident within the EU need to determine whether their customers are in business and where they are resident. Suppliers also need to comply with local registration and compliance obligations, change their pricing, and manage their margin differentials. A simplification measure has also been introduced for registering and paying the VAT that allows suppliers to register in one EU state (“Mini One Stop Shop”) and remit any VAT owing to other jurisdictions via this registration.

- Based on our experience in dealing with businesses, many small- and medium-sized businesses, in particular, are struggling to understand the new EU VAT rules. This is not surprising given that KPMG in the UK recently estimated that an overseas business supplying services to UK consumers would now need to read approximately 236 pages of legislation and guidance to familiarise itself with the new rules as applied in the UK. Businesses are clearly finding it very difficult to deal with these changes, notwithstanding the long lead-in time prior to their introduction, the communication campaign run by the EU, the comprehensive guidance made available on the application of the rules, and the compliance simplifications introduced to make the transition easier. Extrapolating the complexity found now in the EU to the rest of the world will be difficult for businesses without uniform simplification efforts by taxing authorities. We think that the OECD proposals should refer to the large number of countries (including the 28 countries of
the EU and certain members of the OECD\(^3\)) that have already implemented, or plan to implement, this type of rule change and draw out the experiences in the Guidelines of what is effective and what has been challenging for both tax authorities and businesses.

We have noted below some suggestions on specific aspects of Guideline 3.6.

- **The type of services to which Guideline 3.6 will apply** – We appreciate that the OECD does not want, at this stage, to be overly prescriptive in defining the type of services that should come within this rule. However, the ability of individual countries to create their own definitions may have unintended consequences such as inconsistencies in approach, gaps and double taxation. We would therefore suggest that the Guidelines include a more detailed list of the services that should typically be covered or not covered by this rule. This could be addressed in Commentaries but it is very important that these are agreed to and made available in a reasonable and timely fashion.

- **Determination of customer residency** – To determine the appropriate taxing jurisdiction, businesses will be required to establish the country in which their consumers are resident. Given the importance of this determination, we welcome the guidance provided by the OECD on how this decision should be made and evidenced. We think that many of the points raised should be framed as strong recommendations of best practices rather than options that jurisdictions could consider. For example, suppliers should (rather than could) be able to rely as much as possible on information that they routinely collect from customers in the course of their normal business activities. It would also be helpful if the Guidelines could note that jurisdictions should allow businesses to rely on evidence they are required to collect in their countries for other purposes (e.g., evidence to support the non-application of VAT/GST to exports).

- **We would also suggest that practical examples of what constitutes acceptable evidence of customer residency for a range of different services should be included in annexes to the Guidelines to promote consistency and certainty for business. Examples of best practices could be taken from the detailed guidance and regulations produced by the EU prior to implementing the 2015 changes.**

- **Simplified registration and compliance obligations** – If the compliance burden is disproportionately or unduly burdensome, some businesses may simply not comply or choose not to supply customers in certain jurisdictions. The latter instance reflects a barrier to trade that is contrary to the OECD’s founding principles. Since the introduction of the EU rule change at the start of this year, there is already some evidence that smaller businesses are reviewing their business models and re-evaluating sales into overseas markets in light of the additional compliance costs and risks. The alternative for such businesses is to rely on a few large platforms with the scale and capacity to manage the VAT/GST burden, which many businesses cannot afford where they operate on low margins.

- **We very much welcome and support the recommendation by the OECD that simplified online registration and compliance systems should be put in place by jurisdictions. Simplified systems should encourage voluntary compliance by remote sellers and alleviate some of the challenges**

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\(^3\) Norway, Iceland and Switzerland are examples of OECD countries that have already introduced changes requiring remote vendor registration and collection. We are also aware that other OECD countries such as Israel, Canada and Japan are also considering changes in this area.
associated with enforcement. We also welcome the framework guidance provided in Annex 3, which is designed to assist jurisdictions in developing simplified compliance systems. Simplification alone, however, is insufficient. It must be paired with uniformity across jurisdictions. One hundred simple systems are still complex if they are not uniform. We have noted below a number of specific areas where we think this guidance could be further strengthened to ensure that compliance requirements are proportionate and ultimately workable for businesses.

- While the framework guidance discusses the use of registration thresholds below which remote suppliers are not required to register, it does not specifically recommend their introduction. We are strongly of the view that reasonable registration thresholds (similar to those that are generally applied to domestic suppliers) are essential to make the new rules feasible for remote suppliers. Without such thresholds, businesses would be obliged to register in all of their consumer markets irrespective of the value of their supplies. As you are aware, the 28 countries of the EU decided not to implement any registration thresholds, and this could encourage other countries to reciprocate. In our view, the inability of the EU countries to agree on registration thresholds has resulted in disproportionately high compliance obligations for remote businesses selling relatively small amounts (in value terms) into overseas markets and probably contributes to a significant level of non-compliance. This disproportionately high compliance burden has an equal and opposite effect for the tax authority required to register and manage VAT payments for many small businesses. We understand that this was one of the reasons that EU tax authorities agreed to set distance selling thresholds for goods. We believe similar sound reasons exist for introducing thresholds for the supply of services and would furthermore note that the absence of any threshold for services is inconsistent with achieving neutrality between transactions involving goods and those involving services. It is also worth mentioning that a number of countries, including OECD members, have introduced thresholds for remote suppliers of services (e.g., Norway, Switzerland, Iceland and South Africa). Furthermore, the Marketplace Fairness Act, which is currently pending in the United States, provides for a small seller exemption threshold of US$1 million below which remote sellers are not required to register.

- With regard to invoicing requirements, we welcome the suggestion that jurisdictions eliminate the requirement for invoices for B2C supplies covered by the simplified registration regime. Given that invoicing represents a significant compliance burden for businesses, we would, however, support including this point as a recommendation rather than an option.

- We note that Annex 3, paragraph 15 of the Guidelines suggests that jurisdictions could also consider applying the simplified registration and compliance mechanism in the context of B2B services where their domestic rules do not differentiate between B2B and B2C supplies. We would note that this could act as a disincentive for non-residents to voluntarily register as suppliers would be taking on additional compliance obligations for B2B supplies that they could otherwise avoid if the main B2B reverse charge rule applied.
Finally, when providing jurisdictions with guidance on a framework for collecting VAT, we think that it is important that the OECD also include a recommendation that any measures adopted by countries when enforcing the new rules should also be proportionate. It is our experience that the manner in which penalties and interest are applied varies greatly across jurisdictions and are often disproportionate to the compliance failure and net tax loss.

Guideline 3.7 – B2C Specific Rules

- We had previously noted in our response to the consultation on the OECD paper, “Tax Challenges of the Digital Economy”, that while customer residency is a workable proxy for consumption for the majority of digital and telecom services, it may not be practical for all. We had provided some examples from the telecom sector to illustrate this point (See Appendix A). We therefore welcome the inclusion of a Guideline that recognises that the general rules may not lead to appropriate taxing results in all cases. We also welcome the evaluation framework provided to support jurisdictions in deciding when exceptions are justified. This framework should be sufficiently flexible to take account of new service offerings and business models.

- We do, however, think that the Guidelines or Commentaries should include more practical examples of the circumstances in which specific rules are justified (in addition to those already provided in paragraph 3.47). Such examples could be included in annexes to the Guidelines similar to the approach previously adopted when developing the B2B guidelines. Given the absence of an effective dispute resolution mechanism for VAT/GST issues, it is important to try to prevent any inconsistencies in the implementation and interpretation of the rules by providing as much clear guidance as possible at the outset. A company finding its B2C supplies exposed to double taxation, because of inconsistent implementation of the Guidelines, may have difficulty in resolving the issue other than by reference to the actual Guidelines or OECD Commentaries.

Chapter 4 – Supporting Provisions – Mutual cooperation, dispute minimisation, and application in cases of evasion and avoidance

- We note that the supporting provisions focus on dispute prevention and do not address the issue of dispute resolution. While the various means suggested to prevent disputes arising (mutual cooperation, exchange of information and effective communication between tax authorities) may assist in reducing the risk of disputes and double taxation and are therefore welcome, they do not eliminate this risk. As it is hoped that these rules will be introduced globally and it is acknowledged that the rules represent a significant change in the manner in which B2C supplies are taxed for most, it is likely that disputes will arise. Accordingly, we feel that it is equally important that the issue of dispute resolution be addressed in the Guidelines.

- VAT/GST dispute resolution should also be considered as part of BEPS Action 14, which seeks to make dispute resolution mechanisms more effective. Existing bi-lateral or multi-lateral income tax agreements could be modified or a new VAT/GST model agreement put in place to ensure that binding dispute resolution mechanisms are equally applicable to VAT/GST and that double taxation is avoided.
Paragraph 4.5 of Chapter 4 notes that proportionate counter measures taken by jurisdictions to protect against evasion, avoidance, revenue loss and distortions of competition are not inconsistent with the Guidelines. We would also suggest that paragraph 4.23 in Chapter 4 should expressly recommend that measures adopted by jurisdictions should be proportionate to the objective to be achieved.

We welcome the suggestion that the OECD’s Committee on Fiscal Affairs could develop additional guidance on best practices and recommended approaches for applying the International VAT/GST Guidelines. Guidance on aspects of the published B2B rules, as well as the new B2C rules, would be very beneficial in promoting their consistent application globally (e.g., specific examples on what should or should not constitute an establishment from a VAT/GST perspective, further guidance on the practical application of the rules regarding multi-location enterprises and the approaches suggested to appropriately allocate taxing rights). Although we have noted a number of times in this letter that we would welcome the provision of more practical examples on the application of specific aspects of the B2C rules, we would hope that this could be included in the actual B2C Guidelines prior to their finalisation rather than being deferred to future best practice guidance. We believe that it is important to give tax authorities and businesses as much clear direction on the application of these rules at the earliest point.

Paragraph 3.34 of the Guidelines also refers to advancing work on the exchange of information and mutual assistance. It proposes the development of a common standard for the exchange of information that is simple and cost effective both for tax administrations and business. We would suggest that the OECD’s Committee on Fiscal Affairs also consult with business on the work to be undertaken in this area, in particular, as regards the type of data to be provided as well as its sourcing and verification.

Other

Based on our work with businesses, it is our experience that certain jurisdictions are taking the position that a VAT/GST registration itself gives rise to a permanent establishment for corporate income tax purposes. We feel that it is extremely important for the OECD to specifically address this point in its VAT/GST Guidelines and to confirm that this should not be the case. Jurisdictions should also be clear on this point to optimise voluntary compliance by remote vendors.

We would also stress that consideration should be given to the VAT/GST impact of certain direct tax measures discussed in the context of the overall BEPS plan, particularly those related to the definition of permanent establishments in Action Plan 7.

Many indirect tax systems currently based on the consumption principle (particularly in the southern hemisphere) may already have domestic provisions aimed at taxing services and intangibles consumed in their jurisdiction regardless of the contractual flow (direct or indirect to the consumer). Consideration will need to be given to ensuring the interaction of the Guidelines and existing legislation does not give rise to double taxation, including where the liability may
exist with both the remote service provider and the local consumer (under reverse charge provisions).

- Finally, notwithstanding that the Guidelines apply to all cross-border supplies of services and intangibles, there is a risk that some businesses may believe that the Guidelines are solely aimed at those operating within the digital economy. This misunderstanding may occur because the Guidelines have been produced against the backdrop of the recent OECD paper on the Tax Challenges of the Digital Economy and because many countries may cite developments within the digital economy as the primary motivation for the need to change their VAT/GST rules. Care needs to be taken when communicating the changes to businesses.

We hope that you will find our comments and suggestions constructive as you work to finalise this stage of the Guidelines. We would be happy to discuss our suggestions with you further or answer any questions on points raised in this letter.

Yours sincerely

Timothy H. Gillis         Amanda Tickel
Global Head of Indirect Taxes  Partner
KPMG LLP        KPMG LLP (UK)

cc: KPMG’s Global Indirect Tax Policy Group
- Amanda Tickel, KPMG in the UK
- Pratik Jain, KPMG in India
- Niall Campbell, KPMG in Ireland
- Gert Jan van Norden, KPMG in the Netherlands
- Dermot Gaffney, KPMG in Australia
- Arthur Kerrigan, KPMG in Ireland
- Rainer Nowak, KPMG in Canada
- Alexander Nicholson, KPMG in the United States
- Sinéad Carolan, KPMG in Ireland
Appendix A


“The telecoms sector provides an example where there are a number of issues that need to be analysed further before proposing residency as the appropriate proxy.

Telecoms sector issues

The telecoms sector is broad, including fixed, mobile and satellite operators that make supplies over proprietary, non-proprietary, other and even competitor networks. It also includes ‘over the top’ services, which refer to businesses within the sector that run B2C services over a network owned by others, such as international calling cards and roaming SIMs. The charging method for these types of services is often ‘event based’ or ‘one-off’, with no on-going relationship with the customer. By the very nature of these events, purchases and consumption often occur away from the home environment. The pre-pay market is also significant in the telecoms sector. The services often involve cash/voucher transactions by the customer and are therefore relatively anonymous to the provider.

For the ‘primary telecoms provider’ (e.g., actual or virtual network operators), preliminary assessments showed there are a number of straightforward data sets indicating customer residence, such as country code of SIM card, resulting in a generally feasible basis for tax collection. However, because of the lack of data and information obtained at the time of supply under current business models for ‘over the top” services, regulatory modifications required to track ‘residence’ so that it can be used as a proxy for place of consumption within these types of model would require very disruptive changes to business models or processes.

Evidentiary requirements that may be proposed for the telecoms sector with regard to place of consumption or location of customer need to be appropriate to the transaction nature. In some instances, actual place of consumption may be less complicated for businesses and tax authorities to apply than a residence proxy. It may be helpful to relate any new rules to existing VAT/GST legal frameworks developed to tax international services, such as rules for consumption on board ships. Existing VAT/GST legal frameworks on services consumed outside of territorial waters or in airspace (often satellite) could also be considered.

Using customer residence to determine place of supply has a number of advantages for certain aspects of the telecoms sector, including consistency with the proposed rules to be applied to the digital services (the services often overlap). However, because of the complexities in the telecoms sector and the different business models operated, we believe that further detailed consideration be given to ensure either that using residence as a proxy could be widely adopted, or that alternative proxies are developed.
Finally, it is worth noting that significant business trading models in the digital and telecoms sectors are developed on the basis of simple, easy to access, ‘one click to buy’ customer experiences. ‘One click’ business models do not require time-consuming information collection; and efficiency has been one of the hallmarks contributing to their success. We think it is important for any new rules to accommodate innovative business models, permitting them to continue and evolve. The imposition of additional information requirements in respect of customers should therefore be measured against the risk of impeding or stifling innovation and growth.”
Louise Birkett

Response to the OEDC’s public consultation on place of taxation for business to consumer services and intangibles

Reasons for interest: The bulk of my income comes through being a freelance writer for businesses but the economic downturn impacted me so badly that I decided that diversification was my only option. As a result, I have planned and am in the early days of creating a cross stitch design business that will provide me with a second income stream. The idea is that it can operate 24/7 and that once products are uploaded it can all be done automatically with minimal input from me as I try to make a living elsewhere. This plan was going very well until November, when I found out about the changes to EU VAT that came into force on 1 January 2015. My plans have been badly hit by these changes.

Key concerns about customer-location taxation

The main issue is one of resources – the change to customer-location taxation effectively requires nano businesses, start-ups and hobby businesses to have the same level of resource and knowledge as giants like Amazon and Apple. The EU keeps saying this change ‘will level the playing field’ – from my perspective, it makes the playing field resemble the Himalayas.

In its consultation document (para A3.3) the OEDC requires that compliance for businesses should be kept as simple as possible. My experience of the EU’s requirements is that for nano businesses compliance is virtually impossible due to the following issues.

Specific issues

Issue 1: resource – cost. Changing the taxation point to the customer location means a business must be able to identify where that customer is located. The EU regulations require two non-conflicting pieces of evidence. I usually get one, occasionally none, and only after the transaction has taken place. At the moment my online shop is shut as I wait for the hosting platform I use to complete the programming. It has been shut since 1 January, so I am losing sales. When I eventually move to my independent site it will be much more expensive as the provider will have to factor in their cost for the time it has taken to complete (and continually update) the necessary programming. This [link provides an example of how difficult this programming is. Extending it from 28 jurisdictions is likely to make matters even more complicated and costly. How, exactly, are nano businesses like mine supposed to resource this?

Issue 2: resource – time. Most nano businesses are below the VAT threshold. As there is no threshold for cross-border sales we now have to register. Despite HMRC making the process as simple as possible, the notion of customer-based taxation means micromanaging sales information. As the majority of us don’t have the resources to employ someone to do this, we are effectively becoming unpaid global tax collectors at the expense of what we are trying to do. If my sales pattern is anything to go by, the amounts that will be declared will cost more to process than they will bring in, meaning everybody suffers.

Issue 3: resource – storage: The EU’s requirements are for the records to be stored for 10 years on an EU-based server. Like most nano businesses I work on a laptop. I have no idea where my ISP’s servers are located.
Issue 4: lack of knowledge about nano businesses. In paragraph 3.23 of your consultation document you state 'In the business-to-consumer context, suppliers are less likely to have an established relationship with their customer than in the business-to-business context.’ For nano businesses this is not the case — because there is no one else to answer consumer queries or do the marketing we do develop relationships with our customers. Part of the attraction of buying from a small designer is that contact. Officials at the EU are regularly publishing documents that show a belief that businesses start small and local and then expand to the internet. When the internet was first invented that was probably the case but now the internet is the starting place — it’s quick, cheap and — until the change from supplier to customer-based location — easy. Your paragraph 3.27 makes the point that collecting small amounts from consumers will be outweighed by the costs involved; in many cases nano businesses are smaller than high-spending consumers so the point still applies.

Suggestions

A specific definition of a nano business — one to two people, with a turnover of less than £100,000 a year should be agreed.

If a nano business definition can be agreed then states should be encouraged to provide specific help. Many people set up nano businesses to avoid being a burden on the state; some do have ambitions to become corporate empires but most just wish to survive.

Specific help can include: exemption from legislation where it is too burdensome (the ideal for customer-location taxation); sliding thresholds; simplified taxation — once a definition is agreed there’s a host of measures the OEDC could recommend.

If this cannot be agreed then at the very least there should be a threshold to prevent the decimation of the nano and micro business sector.
Dear Organization for Economic Co-operation and Development,

In reference to your “Discussion Draft for Public Consultation re International VAT/GST Guidelines”.

I have a micro business (one-person, work out of my home) selling mail-order goods and digital patterns related to needlework, which I have been doing for over 15 years. I am based in ON, Canada, and my customers are worldwide, including many in the UK and Europe.

When I learned about the EU VAT regulations requiring all businesses worldwide to collect tax appropriate to the EU country into which I was selling, I did quite a lot of investigative work. Complying with the complex requirements, and remitting the tax (even with the VATMOSS) would be very time consuming for me, and require I completely change my web site, and negate all profit I make from selling in the EU. Currently I have had to stop selling automated digital goods to EU countries as I cannot comply with the new Tax Regulations. This has a serious impact on my income. My yearly sales to EU countries is approx. 3,000. Losing these sales = a 15% loss in my net profit, which is a significant loss for me.

In reference to your “Discussion Draft for Public Consultation re International VAT/GST Guidelines” I have the following comments:

A 3.3 “compliance by businesses involved in these supplies is kept as simple as possible” and “the costs involved in complying with the tax and administering it are minimal.”

It was only by chance that I even heard about the new EU VAT regulations on digital goods. The majority of micro home-based businesses are not even aware of this new law, and even if they were, like me, they could not make the changes required to comply. The following are simply beyond the time and financial abilities of micro businesses like mine:

- Costs of changing a web site to comply to collecting 3 sources of the purchaser’s address.
- Listing the VAT included prices for each item for each country.
- Keeping up to date with regulations as they change and evolve.
- Signing up for the VAT MOSS and completing quarterly paperwork and payments.

There is nothing simple, nor inexpensive, for micro businesses to comply with the EU VAT.

As I have suspended sales to EU countries of automated digital goods, all of my competitors who are either unaware of, or are ignoring the new regulations, are benefiting by my customers going to them to buy the same goods that I can now no longer sell to EU customers.

I have read of hundreds of businesses within the UK restricting their sales to UK only and no longer selling into Europe, and many businesses having to close down completely as they do not have a web site that will allow them to restrict sales to within their own country. Many Canadian and US small businesses are refusing to sell into the EU to avoid the complications.
While I do have the option of selling my digital goods only through 3rd parties, the amount of commission that they take is very high.

The reasonable and responsible solution to the devastating impact that VAT has on micro businesses, is for a threshold amount of yearly sales to EU countries to be set, and all businesses below this threshold exempt from collecting VAT. (as Norway currently does) I also encourage this solution to apply to both digital and hard goods (which I read will be attracting EU VAT in 2016).

The original intent of the new EU VAT regulations was to target the ‘big fish’ companies, and I can understand the huge financial benefits to EU countries in terms of this tax change. However, they have inadvertently caught thousands of ‘small fish’ in the net. Just as nature does best with diversity and respect for all creatures great and small, the world of business needs all of us too, big and small, to create a varied and thriving supply of goods for a healthy world economy.

Respectfully yours,

Marsha White
The Needle Arts Book Shop
www.needleartsknitting.com
Dear Sir

Please find below the comments we wish to submit for your consideration as part of our feedback on the discussion drafts relating to (i) the place of taxation of business-to-consumer supplies of services and intangibles (B2C Guidelines) and (ii) provisions to support the application of the Guidelines in practice (Supporting provisions).

For over 20 years Meridian has been working with companies around the world who want to do business across borders. We have been providing VAT assistance and advice to thousands of companies involved in cross border transactions and we have much practical experience of the issues these businesses face.

Meridian welcomes the work done by the OECD and the guidelines so far introduced which should really assist in dealing with some of the problems that businesses face.

We feel the draft document produced is balanced and proportionate and have added below some further comments for discussion which we believe may strengthen the document.
Comments on OECD draft re guidelines on place of taxation for business-to-consumer supplies of services and intangibles

Section A – page 3

- Footer note 1 – consider aligning note to fit the page, as currently going over to page 4.

Section A – page 4

Suggestions:

- 3.7 – maybe add a definition of a taxable person as follows “a Taxable person shall mean any person who independently, carries out in any place any economic activity, whatever the purpose or results of that activity”.
- 3.7 – maybe expand upon the definition above, by adding “a business should include all taxable persons acting as such, whether they are VAT registered or not.”

- The sentence beginning “such recognition may include....” – consider changing the wording to “National legislation may set out legal definitions of what is considered to be a taxable and non-taxable business, within their jurisdiction”.

Section C – page 9

Suggestions:

- 3.30 – consider adding “Where a VAT registration is already in place and returns filed separately; the Taxpayer has the option to include or exclude jurisdictions from the simplified return, under the Simplified system.
- 3.31 – consider adding “When using the simplified system, jurisdictions should not require any other declaration to be filed, apart from the simplified VAT return.”

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1 Some Member States in the EU have minimum registration thresholds for domestic business, where VAT registration is not required, subject to thresholds.

2 Certain countries in the EU require additional declarations to be filed as part of a domestic VAT registration, including intratstats, sales lists, and customer listings.
Suggestions:

- 3.33 - consider adding “A domestic tax administration should ensure that sufficient advice and training material is available, so that Traders can comply fully with legislation.”

Annex 3 – page 17 – point 9

Suggestions:

- Rename 9 “Payments and repayments”
- Consider adding to point 9 “Repayments” and state that “There should not be disproportionate procedures in place, that makes it more difficult for a foreign company than a domestic company to claim a refund due eg bank guarantee, local in-country bank account.”

Annex 3 – page 17 – point 10

Suggestions:

- Consider adding “Tax administrations must be mindful of customer confidentiality and domestic legislation relating to data protection.”
- Also consider adding “Jurisdictions should not require VAT records to be kept using a local accounting package, as long as the required data is maintained.”

Annexe 3 – page 18 – invoicing

Suggestions:

- Consider adding “Tax administrations should allow credit notes to be included in a VAT return in the period to which they are issued.”

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3 Repayments can arise as a result of credit notes being issued.
4 Certain Tax Administrations currently require for accounting systems to be compatible with Tax Administration’s software, and for the supply of electronic live data.
5 Under the 2015 MOSS system in the EU, credit notes must be reported in an amended return for the period in which the related invoice was reported.
We greatly appreciate the opportunity provided by you for us submit our comments as we feel that we can bring a broad view to this process from the experiences of a wide variety of businesses large and small.

Kind Regards

Mike Molony
Director

Meridian Global Services
February 20, 2015

Mr. Piet BATTIAU
Head of Unit
CTP/TPS
OECD
Annexe Delta 7138
2 rue André-Pascal
75016 Paris
France

RE: NFTC COMMENTS ON THE OECD INTERNATIONAL VAT/GST GUIDELINES:
ON PLACE OF TAXATION FOR BUSINESS-TO-CONSUMER SUPPLIES OF SERVICES
AND INTANGIBLES

Dear Mr. Battiau:

The National Foreign Trade Council (the “NFTC”) is pleased to provide written comments on
the Discussion Draft on the VAT/GST Guidelines published on December 18, 2014, and
referenced above (the “Guidelines”). The NFTC, organized in 1914, is an association of some
250 U.S. business enterprises engaged in all aspects of international trade and investment. Our
membership covers the full spectrum of industrial, commercial, financial, and service activities.
Our members value the work of the OECD in developing guidelines that provide certainty to
enterprises conducting cross-border operations. We welcome the opportunity for business input
on this important project. A list of the companies comprising the NFTC’s Board of Directors is
attached as an Appendix.

The NFTC recognizes that the VAT/GST Guidelines on business to consumer are a work in
progress and are included as part of a broader effort to develop meaningful guidance for the tax
treatment of cross-border trade in services and intangibles. The NFTC strongly supports the
development of the Guidelines and believes that they provide for reasonable tax administration
and compliance. The objective that the VAT/GST normally flows through business, and the
acknowledgement that the administrative requirements imposed on foreign businesses should
be balanced and not an additional burden not imposed on domestic businesses is particularly
applauded.
Concerns About Other Work on the Base-Erosion and Profit Shifting Project

The NFTC recommends that the VAT/GST Guidelines not be viewed in the vacuum of indirect taxation. As part of the on-going G-20 BEPS project, other Action Items being discussed under direct taxation will have an impact on indirect taxation. We are particularly concerned that Action 7 on permanent establishment status, especially the options related to commissionnaires, could have a negative impact on companies’ ability to comply with VAT/GST collection. Many countries require a non-resident company to have an in-country collection agent for VAT/GST purposes. Those independent collection agents are not affiliated with the non-resident company, and are only used for VAT/GST purposes. If those agents are considered “commissionnaires” under Action 7, and would give the non-resident company a permanent establishment where there are no other employees or affiliations located, it is very likely that a company would be exposing itself to direct taxation in order to comply with its VAT/GST collection. The Discussion Draft for Action 7 is very ambiguous on this point and will likely be interpreted very broadly by tax authorities. For the most part, large platform marketplace service providers generally comply with existing remote seller registration obligations — often by assuming the primary burden for tax collection and remittance as a “commissionaire”. If these large platform service providers were deemed to create PE’s for the tens of thousands of small sellers they represent, the use of these aggregation points would cease and governments would be forced to deal with a much higher number of remote sellers. In addition, since these platforms aggregate sales of thousands of developers, the overall VAT collection is higher since many of the developers would either be below registration thresholds or may even not be aware of a remote compliance burden.

We feel very strongly that an independent agent established for VAT/GST collection should not give rise to a permanent establishment for a company that has no other affiliations or employees within that jurisdiction. Footnote 24 of the Guidelines, which highlights that a registration for VAT/GST purposes does not constitute a permanent establishment, should be incorporated into the BEPS Action 7 guidance on permanent establishment status.

We are also concerned that Action Items 8, 9, and 10 on risk, recharacterization and special measures under the transfer pricing rules on the taxation of intangibles could detrimentally affect the classification of services for VAT/GST purposes. It is unclear as to how transfer pricing adjustments will be treated for VAT/GST purposes. The transfer pricing of intangibles is generally looked at from a direct taxation perspective. Without additional clarification on how transfer pricing adjustments are treated for VAT/GST purposes, there is a danger of increased risk, double taxation, and legal uncertainty.
We do have a concern with an issue that has not yet been addressed as part of the Guidelines, and is slated for future work. The NFTC appreciates that the work of Working Party 9 on the Guidelines is an on-going project and that the work is not yet completed. However, we would like to take this opportunity to advocate for the inclusion in the final version of the Guidelines for a procedure for resolving conflicts between countries where one country applies the main rule to a cross-border supply, and the other country applies a specific rule. Such conflicts could result in double taxation for the companies involved. Consumption taxes are not covered by double tax treaties, and are unlike direct taxes in providing for negotiating authority to relieve double taxation when it occurs. There is no procedure for alleviating tax conflicts when one country claims taxing rights under the main rule, and another country claims taxing rights under a specific rule. Unless the Guidelines provide a rule for resolving these disputes and a procedure to insure the parties reach an agreement, then disputes will not be resolved and double or multiple-taxation could result. As such, we recommend that the BEPS work on dispute resolution include issues relating to the resolution of disputes for indirect taxation.

The NFTC strongly recommends that all of the Working Parties responsible for the on-going work on the BEPS project coordinate their work so that the potential effects on indirect taxation under the VAT/GST are taken into consideration.

**VAT/GST Business to Consumer Guidelines**

The desired elements of the VAT/GST Guidelines from businesses’ perspective are simplicity, consistency, flexibility and proportionality in both determining the place of taxation, and the collection of the taxes at stake. There are two general rules established in the Guidelines for determining the place of taxation for business-to-consumer supplies of services and intangibles: 1) for on-the-spot supplies, the place of taxation is the place of performance; and 2) for other supplies, the place of taxation would be based on the customer’s usual residence. The NFTC strongly supports these general rules because they allocate the taxing rights over B2C supplies of services and intangibles to the jurisdiction where is can reasonably be assumed that the final consumer is actually located when consuming the supply.

The place of taxation rule, based on the customer’s usual address, is also the most practical way for suppliers to apply, and for tax administrators to administer, the VAT/GST obligations. The Guidelines states that jurisdictions should provide clear and realistic guidance for suppliers on the information that is required to determine the place of usual residence of their customers in a business-to-consumer context. We strongly recommend that governments write rules that are not overly complex and to permit businesses to use the best available information in determining a customer’s location. In this regard, the drafting of “clear and realistic” guidelines is critical. Annex 3 to the Guidelines covers the main features of a simplified registration and compliance regime for non-resident suppliers. The NFTC strongly recommends that Annex 3 be incorporated into the Guidelines as a separate chapter. Uniformly applied rules on the place of taxation and the collection method of the tax, improve the
neutrality for business as the tax collector, and safeguards the VAT/GST revenues for governments. Simplified registration is critical to business, and without its inclusion in the body of the Guidelines, some countries may not feel compelled to use it, which could lead to unnecessarily burdensome additional compliance requirements.

We appreciate the opportunity to comment on the Discussion Draft on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles under the International VAT/GST Guidelines and applaud the commitment of Working Party 9 to working with business and other interested parties and believe this will enhance the value of the final product for everyone. We look forward to working with the OECD on these issues in the future.

Sincerely,

Catherine Schultz
Vice President for Tax Policy
Appendix to NFTC Comments on International VAT/SGT Guidelines on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles

NFTC Board Member Companies:

<table>
<thead>
<tr>
<th>McKenna Long &amp; Aldridge LLP</th>
<th>Occidental Petroleum</th>
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<tr>
<td>ABB Incorporated</td>
<td>Oracle Corporation</td>
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<td>AbbVie Pharmaceuticals</td>
<td>Pernod Ricard USA</td>
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<td>Applied Materials</td>
<td>Pfizer International Inc.</td>
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<td>Baxter International Inc.</td>
<td>PricewaterhouseCoopers LLP</td>
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<td>British American Tobacco</td>
<td>Procter &amp; Gamble</td>
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<td>Caterpillar Incorporated</td>
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<td>Chevron Corporation</td>
<td>Ridgewood Group International, Ltd.</td>
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<td>Chrysler Corporation</td>
<td>Siemens Corporation</td>
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<td>CIGNA International</td>
<td>Sullivan &amp; Worcester LLP</td>
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<td>Cisco Systems</td>
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<td>Coca-Cola Company</td>
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<td>ConocoPhillips, Inc.</td>
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<td>Deloitte &amp; Touche</td>
<td>United Parcel Service, Inc.</td>
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<td>DHL North America</td>
<td>United Technologies</td>
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<td>eBay, Inc.</td>
<td>Visa, Inc.</td>
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<td>E.I., du Pont de Nemours &amp; Co.</td>
<td>Walmart Stores, Inc.</td>
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<td>Ernst &amp; Young</td>
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<td>ExxonMobil Corporation</td>
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<td>McCormick &amp; Company, Inc.</td>
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<td>Microsoft Corporation</td>
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PwC Africa

Mr Piet Battiau
Head of Consumption Taxes Unit
OECD Centre for Tax Policy and Administration

E-mail: piet.battiau@oecd.org

Date 20 February 2015

Dear Piet

COMMENTS ON OECD GUIDELINES ON PLACE OF TAXATION FOR BUSINESS-TO-CONSUMER SUPPLIES OF SERVICES AND INTANGIBLES

1 Public comments were invited on two new draft elements of the OECD International VAT/GST Guidelines, namely the discussion drafts relating to:

- the place of taxation of business-to-consumer supplies of services and intangibles (B2C Guidelines) and
- provisions to support the application of the Guidelines in practice (Supporting provisions).

2 These comments are in addition to the response submitted by the PwC network of firms, and we fully endorse those comments, however, given the importance of Africa in the global economy, we provide additional comments based on the relevance of these guidelines to VAT systems in Africa. We set out below our comments on the B2C Guidelines and the Supporting provisions from a South African, and as far as possible, an African perspective.

3 It should be noted that while there are a number of similarities between the VAT systems in Africa, especially in respect of those countries which have implemented VAT in recent years, there are still a number of systems which are derived from the European approach. While we have attempted, as far as possible, to position comments based on experiences in Africa especially where the VAT system is similar to the one operated in South Africa, we acknowledge that there may be a bias to the South African system and similar systems.

B2B and B2C

4 While not directly linked to the current discussion draft for public consultation as a point of departure, many African VAT systems do not draw a distinction between business-to-business (‘B2B’) and business-to-consumer (‘B2C’) supplies. The destination-based mechanism thus applies whether the customer is a business (a VAT vendor qualifying for input tax deductions) or a final consumer (bearing the burden of VAT). Any change from this position will result in a...
fundamental move away from the current model, and will require a change to the underlying principles and layout of the legislation.

In this regard, it would be necessary to make a determination as to whether a business customer is only a business that is entitled to a full recovery of the VAT, or whether a business customer that operates in a partially exempt environment, where the full amount of input tax is not recoverable, is regarded to be a business or a consumer.

To the extent that a business is not entitled to a full recovery of VAT, additional rules are necessary to deal with accounting for VAT by the supplier in these circumstances, and also, how the recipient accounts for the component of the VAT which is not recoverable.

In addition, the way that businesses have implemented VAT systems does not have the information or infrastructure within these systems to distinguish between the types of customers that receive this supply.

The introduction of a place of taxation rule, whereby VAT vendors must determine the VAT status of the recipient, has accordingly, not been a priority. While practical difficulties are often experienced in determining the place of final consumption as required under a true destination-based VAT model, the approach has been to keep the VAT system simple and easy to administer for all VAT vendors.

There are important compliance considerations especially for international business regarding the information and source of that information that is used for determining the status of the customer, and whether revenue authorities have the infrastructure to make this information available to VAT vendors in an effective way.

These aspects go to the design of VAT systems, and impact on the extent to which principles of the International VAT/GST Guidelines can be achieved.

**Specific comments on the discussion drafts for public consultation**

As requested, our comments will follow the paragraph numbering of the OECD document

**B2C Guidelines**

**A. The Destination principle**

<table>
<thead>
<tr>
<th>Guideline 3.1</th>
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<tr>
<td>For consumption tax purposes internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption</td>
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It is stated in the Guidelines that VAT systems must have mechanisms for identifying the jurisdiction of final consumption. Accordingly, VAT systems need place of taxation rules to implement the destination principle not only for business-to-consumer supplies, which
involve final consumption, but also for business-to-business supplies, even though such supplies do not involve final consumption, but facilitate the ultimate objective of taxing the final consumption. This is essential for achieving VAT neutrality, and to level the playing field between foreign suppliers relative to domestic suppliers.

While African VAT systems are also based on the destination principle, the concept specific “place of taxation” rules are not part of the VAT systems, but these are either implied within the general layout of the legislation, or limited to general rules, which are often the subject of disputes. Instead, the taxation of consumption is achieved by way of the following destination-based mechanism:

- VAT registration of any person carrying on an enterprise wholly or partly in a territory, in the course or furtherance of which goods or services are supplied or taxable supplies as made as part of a taxable activity for consideration;
- zero-rating of exports;
- standard-rating of the importation of goods by any person;
- standard-rating of the supply of imported service under the reverse charge rule, but only to the extent that the customer would not be entitled to an input tax deduction.

While the implied place of taxation rules and general limited rules have been criticised no amendments have been promulgated as the rules set out above have achieved satisfactory results in most instances particularly in respect of the movement of goods (except with regard to meeting the documentary and procedural requirements for zero-rating exports).

Where only implied place of taxation rules exist, the introduction of detailed place of taxation rules were often requested due to the shortcomings of the destination-based mechanism including:

- uncertainties as to when a foreign business is carrying on an enterprise wholly or partly in a particular jurisdiction;
- the interaction with other taxes levied within a particular jurisdiction and the total tax exposure for a foreign business; and
- non-compliance with the imported services reverse charge rule, which has affected neutrality.

The supply of services by foreign service providers to local customers, both physically outside or inside of the country, as well as the supply of electronic services, have resulted in various practical difficulties in determining VAT registration liability for foreign suppliers. In addition, very few final consumers pay VAT on the acquisition of services from foreign businesses, e.g. e-books, games, music etc., while VAT is payable when the same product is acquired from a local VAT vendor.
In South Africa and Ghana, VAT amendments were introduced to oblige foreign suppliers of electronic services to register and account for VAT in certain instances. In some jurisdictions, it is possible for foreign suppliers to appoint a tax representative to levy, collect, and fulfil their VAT obligations.

B. Business-to-business supplies – The general rule

Guideline 3.2
For the application of Guideline 3.1, for business-to-business supplies, the jurisdiction in which the customer is located has the taxing rights over internationally traded services or intangibles.

Despite African VAT systems generally not having B2B place-of-supply rules (refer discussion above), the principle that the jurisdiction where the customer is located should have the taxing rights over internationally traded services is generally in line with the destination-based model. In principle, services supplied to non-residents are zero-rated (except if consumed in a particular jurisdiction), and services supplied by foreign business to customers located in that jurisdiction are subject to VAT.

We thus agree with the principles contained in Guideline 3.2.

Guideline 3.3
For the application of Guideline 3.2, the identity of the customer is normally determined by reference to the business agreement.

For South Africa, in the case of the supply by a person of electronic services from outside South Africa to a South African customer (with no distinction between B2B and B2C), the foreign supplier has to register as vendor and account for VAT on the supply if any two of the following three circumstances apply, to indicate that the customer is in South Africa:

- the customer is a resident of the Republic of South Africa (which test is very difficult to apply in practice, as it must be applied with reference to the income tax meaning of the concept, as well as additional VAT tests);
- payment is made from a South African bank; or
- the customer has a business address, residential address or postal address in South Africa.

Therefore, the location of the customer could be established with reference to the address stated on the business agreement. In the case of certain export transactions, the zero-rating would also depend on certain requirements, which must be contained in the business agreement between the parties.

In other jurisdictions, there are limited proxies to determine whether the services are received or delivered to a person in that particular jurisdiction.
Thus, while we agree in principle that the business agreement would normally (but not always) provide an indication of customer location to achieve this objective, it is necessary to have the necessary proxies in place, and also, mechanisms or systems to achieve effective implementation of this guideline.

**Guideline 3.4**

For the application of Guideline 3.2, when the customer has establishments in more than one jurisdiction, the taxing rights accrue to the jurisdiction(s) where the establishment(s) using the service or intangible is (are) located.

We agree with the principle contained in this Guideline, especially where the nature of the service is that of a cost that is used by the customer in several jurisdictions.

This does, however, again raise the issue of B2B supplies as discussed above.

**C. Business-to-consumer supplies – The general rules**

**C.2 On-the-spot supplies**

We agree that the place of physical performance may be an appropriate proxy to determine the place of supply. It could create confusion for jurisdictions that have not followed this approach.

However, the fact that all three requirements (in the bullet points) must be met for Guideline 3.5 to apply, might limit the application of this Guideline, and make the test difficult to apply. An “ordinarily” test often creates uncertainty and disputes, and it is necessary to design a specific guidance for the meaning of ordinary.

Accordingly, we agree that a proxy based on the location of the supplier could be used as an alternative for place of performance (as contemplated in Guideline 3.5) as a test based on the supplier’s location would eliminate uncertainty and risk for the supplier.

We also agree that this test can be applied to business-to-business supplies, as well as business-to-consumer supplies, which would also make it appropriate for jurisdictions where such distinction are not drawn.
C. 3 Supplies of services and intangibles other than those covered by Guideline 3.5

Guideline 3.6
For the application of Guideline 3.1, the jurisdiction in which the customer has its usual residence has the taxing rights over business-to-consumer supplies of services and intangibles other than those covered by Guideline 3.5.

30 The residence test is one of the alternative tests for the location of the customer in South Africa in the case of the supply of electronic services from outside South Africa. Due to the fact that it will often be very difficult for a foreign business to determine a customer’s tax residence status, we foresee that residence will often not be the determinative factor to determine liability for VAT.

31 In Ghana, the test is place of use and enjoyment of the service without any reference to residence. It would be necessary for countries to amend existing legislation to ensure that there is no double taxation for these supplies.

32 Therefore, while we agree that Guideline 3.5 is not appropriate in the case of supplies referred to in paragraph C.3, and that the place of usual residence would be a better indication of the place of consumption, we also agree with the concerns expressed in paragraph 3.23, as to the practical difficulties to determine a customer’s usual place of residence. The determination and/or verification of the customer’s residence could prove to be difficult if not impossible for the supplier, hereby placing the supplier at risk of the incorrect VAT treatment of the supply.

33 To limit the risk of the supplier, the supplier should be allowed to rely on a statement or a declaration by the customer as to his residence status, except if the supplier obviously knows that the declaration is false (which of course immediately again introduces room for manipulation).

The South African test that determines place of consumption of electronic services with reference to the existence of two of the three potential indicators might provide a practical approach. Further indicators could also be added to this test to take business reality and exceptional circumstances into account.

34 While it is stated in paragraphs 3.23 and 3.24 that Jurisdictions should provide clear and realistic guidance for suppliers on the information that is required to determine the place of usual residence of their customers, and that suppliers should be able to rely on information that is known, or that can reasonably be known at the time when the tax treatment of the supply must be determined, we are of the view that mere guidelines will not be sufficient to ensure neutrality. Instead, individual countries should introduce legislative measures, maybe in the form of secondary legislation, to enforce consistent application by suppliers, thus achieving VAT neutrality. Any proposals in this regard should take account of the time
required to make the changes, and well as how difficult it is to implement the required changes.

35 In all instances, the test should be practical and easy to implement even in circumstances from a systems perspective, as well as taking account of the conditions within particular jurisdictions as to how readily available the information is to obtain confirmation of addresses, bank accounts, or the relevant proxy in these circumstances.

36 Paragraph C.3.2 highlights the difficulties where the supplier is not located in the jurisdiction of taxation. The reverse charge mechanism recommended to minimise administrative costs for foreign businesses in the jurisdiction of taxation applies for all recipients whether businesses or customers. The onus is on the customer to establish the extent to which the imported service will be used for non-taxable purposes, and to account for VAT on declaration in respect of such non-taxable usage. However, due to very low compliance levels, this mechanism could not ensure neutrality between foreign and local suppliers.

37 In South Africa, the new VAT regime for foreign-supplied electronic services requires the foreign business to register as VAT vendor in South Africa. However, to prevent high compliance cost, the foreign business is allowed certain exceptions. National Treasury has also announced that further concessions will be considered in order to reduce compliance costs for foreign businesses in South Africa to prevent these businesses from merely withdrawing from South Africa due to high VAT compliance costs.

38 We agree with the comments and recommendations in paragraph 3.29 and further, that a simplified form of VAT registration and compliance regime be allowed. It is necessary to consider a number of additional aspects including:

- the claiming of input tax;
- the extent to which input tax is offset against output tax which is due or refunds are actually made in cash;
- how refunds are made to foreign business and, depending on the quantum, the effect on individual country budgets; and
- aspects associated with the administration and audits required to ensure compliance.

39 Paragraph C 3.3 (and the Supporting provisions) stresses the need for international cooperation for VAT collection where the supplier is not located in the jurisdiction of taxation. We agree that exchange of information is required to ensure VAT compliance and prevent VAT evasion. However, a proper balance should always be maintained between the rights of individuals and businesses, and the interests of the State where exchange of information is concerned.
D. Business-to-business and business-to-consumer supplies - Specific rules

<table>
<thead>
<tr>
<th>Guideline 3.7</th>
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<tbody>
<tr>
<td>The taxing rights over internationally traded services or intangibles supplied between businesses may be allocated by reference to a proxy other than customer location as laid down in Guideline 3.2, when both the following conditions are met:</td>
</tr>
<tr>
<td>a. The allocation of taxing rights by reference to customer location does not lead to an appropriate result when considered under the following criteria:</td>
</tr>
<tr>
<td>• Neutrality</td>
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<tr>
<td>• Efficiency of compliance and administration</td>
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<tr>
<td>• Certainty and simplicity</td>
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<tr>
<td>• Effectiveness</td>
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<td>• Fairness.</td>
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<tr>
<td>b. A proxy other than customer location would lead to a significantly better result when considered under the same criteria.</td>
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<tr>
<td>Similarly, the taxing rights over internationally traded business-to-consumer supplies of services or intangibles may be allocated by reference to a proxy other than the place of performance as laid down in Guideline 3.5 and the usual residence of the customer as laid down in Guideline 3.6, when both the conditions are met as set out in a. and b. above.</td>
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40 We agree that there is a need for another category where the circumstances do not fit under Guidelines 3.2, 3.5 or 3.6. However, we also support the approach that the application of a specific rule should be limited as far as possible as the existence of specific rules will increase the risk of differences in interpretation and application between jurisdictions, and thereby, increase the risks of double taxation and unintended non-taxation as outlined in paragraph 3.40.

41 In order to determine whether there should be a ‘specific rule’, or rather an exception to the General rule, the OECD provides a framework (‘two step approach’) against which Governments should test the need for a ‘specific rule’. The objective is to encourage Governments to limit the numbers of ‘specific rules’, (e.g. passenger transport, real-estate related services, work on moveable goods) to make the VAT systems more transparent and legally certain for both business and tax authorities. We support the comments and recommendations in this regard as a decision framework within which to determine whether a ‘specific rule’ is required is a pragmatic approach to limit the number of exceptions. On the one hand, we welcome the opportunity to apply the various guidelines and criteria for good taxes (as outlined in Guideline 3.7) to determine whether a specific place of supply rule is appropriate. On the other hand, we foresee that the need to analyse the appropriateness of the other Guidelines against these criteria will be a cumbersome and subjective exercise, which will increase administration and compliance cost and result in disputes.

42 Therefore, while we agree that there should be room for exceptions in specific cases, we are of the view that set guidelines offer more certainty for businesses.
Guideline 3.8
For internationally traded supplies of services and intangibles directly connected with immovable property, the taxing rights may be allocated to the jurisdiction where the immovable property is located.

43 The same principle applies in most jurisdictions in Africa. If services are supplied to a non-resident, but the services are supplied directly in connection with fixed property situated in a particular jurisdiction, the supply does not qualify for zero-rating, but is subject to VAT at the standard rate.

44 We thus agree with the principles contained in Guideline 3.8.

ANNEX 3 [TO CHAPTER 3]: MAIN FEATURES OF A SIMPLIFIED REGISTRATION AND COMPLIANCE REGIME FOR NON-RESIDENT SUPPLIERS

45 We agree with the proposed simplification measures to reduce compliance cost for foreign businesses while still ensuring adequate compliance with the VAT law.

46 As regards the registration procedure, it might also be considered whether payment or collection agents (whether acting as agents or third party service providers), especially in the case of internet transactions, could not be appointed and registered as a VAT agent on behalf of the foreign business. There are a number of African jurisdictions which already have provisions to make this possible. This would then mean that each foreign business would not have to be registered. This ensures that the Revenue Authority can generally control the VAT payments made by people in its jurisdiction to a foreign business through the collection agent. This will of course be practical only if all foreign suppliers, whose payments are channelled through the agent, are registered for VAT. We suggest that such a mechanism can at least be considered. In addition, especially in respect of electronic supplies, there are a number of market places which often act as the agent for the distribution of the services and consideration could be given to the market place being appointed as the VAT agent on behalf of the principals, who make the supply via the market place.

Supporting provisions

47 We agree with the proposals to support and assist jurisdictions in developing practical legislation to tax consumption in their jurisdiction, to ensure neutrality, and to prevent double taxation, non-taxation, as well as VAT evasion.
If you require any further information regarding any aspect of this letter, please do not hesitate to contact us.

Yours sincerely

Charles de Wet  
Director: Tax Services  
charles.de.wet@za.pwc.com  
T: +27 (0) 21 529 2377  
F: +27 (0) 21 814 2377
M. Piet Battiau  
Head of Consumption Taxes Unit  
OECD Centre for Tax Policy and Administration  

By email to: piet.battiau@oecd.org

20 February 2015

Dear Monsieur Battiau,

**BEPS Discussion Drafts: Two new elements of the OECD International VAT/GST Guidelines**

This response reflects the general views of the PwC network of firms, and we offer our observations on several key aspects of the Discussion Drafts for inclusion in the OECD International VAT/GST Guidelines. We are also intending to submit a more detailed response expanding on these observations, and offering some additional comments, from the viewpoint of member firms of our network based in Africa. This reflects the specific OECD objective to involve developing countries more specifically in the BEPS process.

The current draft Guidelines deal with (i) the place of taxation of business-to-consumer supplies of services and intangibles (B2C Guidelines) and (ii) provisions to support the application of the Guidelines in practice (Supporting provisions). We respond in relation to each matter in turn.

The OECD states that “The collection of VAT in business-to-consumer (B2C) transactions is a pressing issue that needs to be addressed urgently to protect tax revenue and to level the playing field between foreign suppliers relative to domestic suppliers”.

This positions it as a key part of the BEPS Action Plan that is of critical importance to a number of countries due to the significant budgetary impacts.

I. **Place of taxation of business-to-consumer supplies of services and intangibles (B2C Guidelines)**

The OECD proposes that most services supplied B2C should be taxed on the basis of the destination principle, i.e. based on the customer’s usual residence, as being the best proxy for identifying the place of consumption (General rule).

However, the OECD points out that the General rule may not give a good indication of the place of consumption in the case of ‘on the spot’ services and provides a second rule – i.e. generally where the services are actually performed.

In addition, the OECD accepts that even with the two above rules, taxation should not take place where the consumer is located in relation to certain services and that a specific rule should be applied to tax such services.
In order to determine whether there should be a ‘specific rule’ or rather an exception to the General rule, the OECD provides in the Guidelines a framework (‘two step approach’) against which Governments should test the need for a ‘specific rule’.

The draft states that the OECD’s objective here is to encourage Governments to limit the numbers of ‘specific rules’ (e.g. passenger transport, real-estate related services, work on moveable goods), to make the VAT/GST systems more transparent and legally certain for both business and tax authorities. This is to be welcomed – having too many exceptions to the General rule complicates the application of VAT/GST and would complicate the position of businesses in dealing with their compliance obligations. The provision by the OECD of a decision framework within which to determine whether a ‘specific rule’ is required is an excellent idea. Careful monitoring as to how this framework is applied in practice by governments will, nonetheless, be required to ensure that governments do not use the framework to justify ’specific rules’ when the General rule is a better proxy for determining the place of actual consumption.

In the Annex to chapter 3, (it would perhaps be better if this were in the main body of the Guidelines as an integral part of the ‘destination system’ proposals) the OECD proposes that governments adopt a ‘Simplified Registration and Compliance Regime for non-Resident Suppliers’.

This is very much inspired by the EU’s MOSS system which took effect on 1 January 2015 (and the earlier EU VoeS system in place since 2003 for non-EU companies), whereby non-resident suppliers will collect the tax in each country where the customers are located, but would remit the tax via a simplified compliance system.

The alignment of the OECD’s proposals with the EU system is a very significant move and will enable global business to optimize their compliance systems wherever they are located. In an ideal world a global MOSS, where a taxpayer would file and pay locally in his own territory to satisfy his VAT/GST reporting obligations globally would ensure more effective compliance and enable tax authorities to more easily reconcile VAT and other tax reporting.

II Provisions to support the application of the Guidelines in practice (Supporting provisions)

The OECD suggests, to meet the objective of minimizing the scope for double taxation or unintended non-taxation, that more use be made of existing instruments and points out, for example, that the OECD Model Tax Convention, in its article 26, specifically provides for the exchange of information in relation to any taxes (including VAT/GST) and not just those covered by the Convention. This proposal is important. Experience shows, however, that even within the EU the 2010 Regulation on Administrative Cooperation is still not used effectively in all cases – see the Commission’s report COM(2014) 71 final of 12 February 2014.

In attempting to provide a balance between taxpayers and governments, the OECD insists that governments provide more attention to the provision of data and information to taxpayers such that the latter find it easier to comply with their reporting obligations. This point is critical. Governments cannot expect businesses to comply if they (governments) do not provide simple compliance systems and a detailed level of information in the language of the taxpayers to ensure that compliance is effective and as simple as possible.
On behalf of the global network of PwC Member Firms, with the contribution of our colleagues, we respectfully submit our response to the Public Discussion Draft. For any clarification of this response, please contact the undersigned or any of the contacts below.

Yours faithfully

John Steveni  
Partner, PricewaterhouseCoopers LLP  
john.steveni@uk.pwc.com  
T: +44 (0) 7213 3388

Stephen Dale  
Partner, Landwell & Associes, France  
stephen.dale@fr.landwellglobal.com  
T: +33 (0)1 56 57 41 61

cc Stef van Weeghel, Global Tax Policy Leader

<table>
<thead>
<tr>
<th>PwC Contact</th>
<th>Email</th>
</tr>
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<tbody>
<tr>
<td>Stephen Dale</td>
<td><a href="mailto:Stephen.dale@fr.landwellglobal.com">Stephen.dale@fr.landwellglobal.com</a></td>
</tr>
<tr>
<td>John Steveni</td>
<td><a href="mailto:John.k.steveni@uk.pwc.com">John.k.steveni@uk.pwc.com</a></td>
</tr>
<tr>
<td>Jo Bello</td>
<td><a href="mailto:Jo.bello@uk.pwc.com">Jo.bello@uk.pwc.com</a></td>
</tr>
<tr>
<td>Philip Greenfield</td>
<td><a href="mailto:Philip.greenfield@uk.pwc.com">Philip.greenfield@uk.pwc.com</a></td>
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Dear Piet,

Retail NZ is a trade association representing the interests of retailers in New Zealand. We have around 5,000 members who together account for around three-quarters of New Zealand’s total retail sales revenue. Our membership comprises of both bricks and mortar stores and e-commerce retailers.

We strongly support the conclusions of the OECD Report on the Tax Challenges of the Digital Economy. The collection of VAT/GST in business-to-consumer transactions is a pressing issue that need to be addressed urgently to protect tax revenue and level the playing field between foreign and domestic suppliers - but the issue goes is far broader than simply services and intangibles.

We are pleased that attention is being paid to the importation of services and intangibles, which in New Zealand are not intercepted at the border and are not taxed. However, we urge the OECD to consider developing, as a matter of urgency, guidelines and a standardised system of consumption tax for the importation of low-value goods.

The ‘neutrality principle’ agreed to by OECD member nations at the Global Forum on VAT in April 2014 is under threat. We do not currently have a neutral consumption tax system in New Zealand. Low-value goods (which do not attract GST and duty of more than $60NZD) are exempt from taxation. Foreign business are significantly advantaged compared to domestic businesses.

International e-retailers offer a near limitless selection of products and 24/7 opening hours, however the biggest challenge posed to domestic retailers is on price, because they are able to sell to New Zealand consumers without charging domestic GST. Foreign suppliers of low-value goods, services and intangibles are able to undercut New Zealand suppliers by at least 15%.

New Zealand’s GST system does not distinguish between business-to-business and business-to-consumer transaction. Businesses are refunded the GST charged on purchases and expenditure at the end of the tax year. Our submission therefore only considers the Guidelines for business-to-consumer transactions.

New Zealanders spent $3.19billion online in 2012 and this is predicted to grow at 14.3% p.a. We estimate that the total loss to New Zealand from GST not collected at the border to be at least $200million.

We support the principle that services and intangibles should be taxed according to the jurisdiction of consumption (Guidelines 3.1). We also support the principle that taxation should occur in the jurisdiction where the supply is physically performed (Guideline 3.5), or the jurisdiction of the customer’s usual residence (Guideline 3.6). This information is generally collected in the course of normal business activity and does not impose an additional burden on consumers or businesses.

We support the OECD view that the most effective mechanism for ensuring the collection of GST/VAT from offshore services and intangibles is to require non-resident supplies to register and account for tax in the jurisdictions they are trading. However, this will result in increased administration for businesses that can only justified if an international agreement is reached to ensure the compliance of all jurisdictions and online retailers.
Annex 3 outlines sensible guidelines for jurisdictions to develop registration and compliance regimes for non-resident suppliers. We agree that the cost of compliance for non-resident tax registration should be minimised, and only the necessary details for VAT/GST taxation should be collected. We encourage the use of technology to ease the administrative burden on businesses.

While we welcome the opportunity to submit on service and intangibles, our strong view is that the principles outlined in the discussion document should also apply to goods. The Guidelines provide an excellent starting point for the development of an international agreement on the collection of all consumption tax. Such an agreement is long overdue, Governments must act now to remove distortions from markets in goods as well as services and intangibles.

Please feel free to contact me should you require any further information in relation to our submission.

Yours sincerely

Greg Harford  
**General Manager Public Affairs, Retail NZ**  
Tel +64 4 805 0853  
Email: greg.harford@retail.kiwi
February 20, 2015

By E-Mail: piet.battiau@oecd.org

Mr. Piet Battiau
Head of Consumption Taxes Unit
Organization for Economic Co-operation and Development
Centre for Tax Policy and Administration
2, rue André Pascal
75775 Paris Cedex 16
France

Re: Public Comments on the Discussion Drafts on VAT/GST Guidelines

Dear Mr. Battiau,

Thank you for the opportunity to provide comments on the Discussion Drafts on Place of taxation for Business-To-Consumer supplies of services and intangibles and on Provisions on supporting the guidelines in practice, issued on December 18th, 2014 by the Organization for Economic Co-operation and Development (“OECD”).

Please find below our comments and suggestions of issues to address.

General Comments
1. Digital business makes it easier to do business across jurisdictions as well as enabling consumers to access services and ‘products’ from anywhere in the world, generating challenges in terms of collecting the appropriate amounts of VAT. We understand OECD is concerned about businesses operating only in domestic markets or refraining from BEPS activities that may face a tax competitive disadvantage relative to MNEs that are able to avoid or reduce VAT payable by consumers or exempt businesses. We share that concern as domestic suppliers are required to collect and remit VAT on their supplies of services to local consumers or domestic businesses while non-resident suppliers could structure their affairs so that they collect no VAT. While most jurisdictions have enacted self-assessment provisions in order to force consumers to self-assess and remit VAT when acquiring from non-registered suppliers, those provisions have proved to be hardly enforceable at best or purely theoretical.

2. We appreciate OECD’s efforts in making suggestions in order to promote a consistent implementation of the destination principle for determining the place of taxation for supplies of services and intangibles. We believe the OECD guidance is correctly addressing the key parameters and considerations for the collection of the applicable VAT.
Practical Aspects

3. We believe it is important to remember that a supplier, when collecting VAT, is an agent of governments/tax authorities. Consequently, the Guidelines could be improved by elaborating on the accountability of tax authorities with respect to practical application of the VAT determination and collection by suppliers, particularly the small or medium enterprises (SMEs), which have a more difficult access to information technology resources. Is it the opportunity for a paradigm shift in the tax compliance approach by addressing more than streamlined registration and reporting processes?

4. Greater use of technology to ensure an equitable tax playing field in global commerce: as mentioned in the OECD discussion draft on ‘Tax challenges in Digital economy’, advances in technology have improved access to real-time market information and business analytics, and have improved communications within and between businesses. We respectfully submit that it is a great opportunity for local tax administrations to better use technology to develop their collective tax oversight with real-time data and to assist tax collectors/taxpayers in their VAT management.

Specific Comments

B2B supplies

5. We support the suggestion made in paragraph 3.8 (p.4) relating to the use by a supplier of a customer’s VAT registration number in order to clearly establish the customer status for VAT purposes. Furthermore, with the evolution of technology, this information will enable cross-referencing by tax administrations of VAT credits claimed by a business customer and VAT collected by the supplier in a real-time manner. This cross-referencing process would be useful to tax administrations and businesses as it would confirm VAT recovery to the customer/taxpayer where the vendor did charge the VAT or identify rapidly tax collector not remitting VAT.

B2C supplies

6. Paragraphs 3.22 to 3.24 of Chapter 3 address the information required by a supplier to determine the place of residence. We firmly believe that tax administrations must be accountable to provide clear directives to suppliers in order to ensure appropriate VAT compliance. OECD could improve the guidance on that aspect.

7. Paragraph 3.25 highlights the VAT collection obligation resting on suppliers. We want to stress that in practice the difficulties are most often encountered when comes the actual implementation of the VAT collection process (including tax determination) and not the registration or VAT return process, particularly for SMEs. As well, maintaining current numerous VAT rates can become quite costly for SMEs growing in the international market and which would bear a disproportionate compliance burden.

Annex 3 (to Chapter 3)

8. Paragraph 13 highlights the responsibility of tax administrations to inform their agent, the tax collectors, by making available relevant information to ensure tax compliance. We kindly ask OECD to define that responsibility to include as well the provision of tools, such as software and equipment, to ensure the appropriate management of the tax charging and collection processes. These tools would be particularly useful for SMEs expanding in the global market by ensuring they will not become unfair tax competitors unknowingly.
Conclusion

To summarize, we strongly believe that a critical focus of the revisions of the Guidelines should be on the practical aspects of the VAT collection mechanisms and the required oversight that must be lead by the tax administrations with appropriate representations from businesses, MNEs and SMEs.

Thank you again for the opportunity to share our comments with the OECD on International VAT/GST Guidelines. As always, we welcome guidance from the OECD to facilitate the management of VAT principles for tax administrations, suppliers and taxpayers.

Yours very truly,

Richter LLP

Natalie St-Pierre, Adm.A  
nst-pierre@richter.ca

Catherine Dickner, CPA, CGA, D.Fisc., Adm, A.  
cdickner@richter.ca

Martin Gilbert, LL.B.  
mgilbert@richter.ca

Irena Giavina, CPA, CGA.  
iglavina@richter.ca

Christiane Maurice, LL. B., M.Fisc.  
cmaurice@richter.ca
20 February, 2015

Via Email

Mr. Piet Battiau
Head, Consumption Taxes Unit
OECD Centre for Tax Policy and Administration
Organization for Economic Cooperation and Development
piet.battiau@oecd.org

Re: OECD International VAT/GST Guidelines
Business-to-Consumer Supplies of Services and Intangibles and Supporting Provisions
Public Consultation

Dear Mr. Battiau:

The Software Finance and Tax Executives Council (SoFTEC) is pleased to respond to OECD’s the invitation to comment on the draft International VAT/GST Guidelines relating to business-to-consumer supplies of services and intangibles, exposed for public comment in December, 2014. SoFTEC generally supports Working Party No. 9’s efforts on the International VAT/GST Guidelines and we appreciate its willingness to allow business input into that work on an ongoing basis. SoFTEC generally supports the direction taken in the draft B2C guidelines with regard to cross-border business-to-consumer supplies of services and intangibles. SoFTEC also associates itself with the comments submitted by the United States Council for International Business.

SoFTEC strongly agrees that the usual residence of the consumer is the appropriate proxy for the jurisdiction of consumption of remotely supplied services and intangibles. However, as more fully explained below, we have specific concerns with some of the proposals for determining the jurisdiction in which a consumer has his or her usual residence.

SoFTEC is a trade association providing software industry focused public policy advocacy in the areas of tax, finance and accounting. Because our member companies include multinational firms engaging in cross-border transactions involving remote supplies of services and intangibles to consumers that give rise to VAT and GST compliance burdens, SoFTEC has an interest in providing comments for this public consultation.

SoFTEC strongly supports OECD’s efforts to craft international VAT/GST guidelines in general, and believes having business input with regard to their development will enhance their quality and credibility, not only amongst OECD member countries but other countries as well. We firmly agree the burden of value added taxes should ultimately be borne only by consumers and
not by businesses. The only burden on business with respect to value added taxes is an administrative one with successive businesses effectively paying tax only to the extent their liability for the tax on the value of their outputs exceeds the tax on the value of the goods and services used as inputs for their production of goods or supply of services or intangibles. We strongly concur that the work on guidelines will not become final unless and until final agreement is reached on the guidelines as a whole; in other words “nothing is agreed until everything is agreed.” We also applaud OECD’s efforts to socialize the draft guidelines with governments from non-OECD countries, especially undeveloped countries seeking guidance respect to the establishment of VAT systems, as evidenced by the OECD’s successful Global Forum on VAT.

SoFTEC has concerns with Section C.3.1 of the draft guideline dealing with determining the consumer’s usual place of residence, which is to be used as the proxy for determining the jurisdiction of final consumption. While SoFTEC strongly agrees with most of the commentary in paragraph 3.23 of the draft guidelines, we have concerns with the following passage:

 Particularly in e-commerce, where activities often involve high volume, low-value supplies that rely on minimal interaction and communication between the supplier and its customer, suppliers might not be able to rely on one single source of information, such as a contract, to reliably determine the place of usual residence of the customer of a business-to-consumer supply.  [Emphasis supplied.]

We believe, in the context of high-volume, low-value supplies, the interaction between the supplier and consumer typically is minimal. Therefore, the supplier will have only a single source of information on which to rely in making a jurisdiction determination; having more than one source of information relevant to taxation decisions will be the rare exception. The above-referenced passage suggests that in order to enhance the reliability of the taxation decision, jurisdictions should require that suppliers obtain more information than is necessary to complete the transaction.

Our concern is reinforced by the commentary in paragraph 3.24 that provides that “[]jurisdictions may require that the reliability of such information be further supported through appropriate indicia of residence.” The proposed language further suggests that suppliers may be required by jurisdictions to obtain additional information supporting the consumer’s place of usual residence. This approach is not feasible in the context of high-volume, low-value transactions. The more information a supplier requires a consumer to provide in order to complete a transaction, the more likely it becomes that the consumer will abandon the transaction prior to completion.

The commentary contained in paragraph 3.24 also omits consideration of the differences between the technology used to facilitate the remote supply, and the technology used to bill the consumer for the transaction. The two systems typically are not connected to one another. Suppliers do not necessarily have the ability to ascertain the Internet Protocol (IP) address of the device used by the consumer to download digital content and then use that information for purposes of making taxability decisions at the moment the customer is billed for the sale. Further, verifying a consumer’s country of residence using the IP address of the device used to receive a remote supply may not be a reliable indicator of jurisdiction of usual residence because consumers routinely use technology, such as virtual private networks (VPNs), that masks the IP address.
Using the language of the digital content supplied as an indicator of country of usual residence raises similar issues. Suppliers do not categorize their products by language, but rather by product numbers. It is unlikely the supplier’s billing system could recognize the language of the content by reference to the product number. Nor is content-language a useful indicator of country of residence. For example, when customer orders content in Spanish, the supplier will not be able to determine in which of the many Spanish-language jurisdictions the consumer might reside.

Many remote suppliers of high-volume, low-value content anticipate repeat business and require that their customers set up an account that facilitates future transactions. Account information typically includes a mailing address for the customer along with billing information such as a credit card number and a credit card billing address, which typically is the same as the mailing address. Suppliers will incorporate this in making taxability determinations for purchases made using the account. We believe use of this information in determining the usual residence of purchasers is of sufficient reliability that it should be accepted by jurisdictions for VAT purposes. Solicitation of further information from the consumer or scouring the supplier’s remote content delivery systems for additional information should not be required.

Suppliers of remote content that do not contemplate repeat business usually do not require that their customer set up an account, and may only require a credit card number and billing address before completing the transaction. Thus, the credit card billing address will be the only information available to the supplier for use in making taxability determinations. Nevertheless, SoFTEC believes the consumer’s credit card billing address is a sufficiently reliable indicator of the consumer’s residence for purposes of making a taxability determination.

A third category of remote supplies is when a supplier allows a consumer to use a third-party financial intermediary for payment for a remote supply. In these cases, the remote supplier may not receive any billing information from either the customer or the financial intermediary. All the supplier will receive is payment. Many times, the supplier will request that the customer select a country of residence from a drop down menu, but, out of concern the customer will abandon the transaction, will not ask the customer for any other information that might be used for verification. We suspect, in a certain number of cases, consumers will select a country from the drop-down menu that is not the country where the consumer resides. We believe that providing additional guidance with respect to cases falling into this fact pattern would be helpful.

Use of gift cards or pre-purchased digital codes as payment for the right to download digital content raises similar issues. VAT may or may not have been collected when the gift card or digital code was acquired. There is no information bearing on the consumer’s usual place of residence or whether VAT was collected at the time of purchase associated with the gift card or digital code. Again, we would suggest that it would be useful to offer guidance in the draft guidelines about how to treat these types of transactions for VAT purposes.

To summarize, SoFTEC supports the majority of the draft B2C guidelines but we have concerns with the commentary on how much and what types of information suppliers should be required to capture when determining the usual residence of the consumer.
Finally, with respect to the overall process, SoFTEC does not support conflating the international VAT/GST guideline process with the BEPS process. Doing so would create an artificial end-of-year deadline for completion of the guidelines, which does not allow sufficient time for consideration of all the issues surrounding B2C supplies of services and intangibles.

We thank the OECD and Working Party 9 for the opportunity to provide these comments on the draft International VAT/GST Guidelines on business-to-consumer supplies of services and intangibles. I can be reached at (202) 486-3725 or mnebergall@softwarefinance.org with any questions.

Respectfully submitted,

Mark E. Nebergall
President
Software Finance & Tax Executives Council
Mr. Piet Battiau  
Head of Consumption Taxes Unit  
Centre for Tax Policy and Administration  
OECD  
piet.battiau@oecd.org  

Basel, 20 February 2015  
St.008.1/JBR  

OECD INTERNATIONAL VAT/GST GUIDELINES  

Dear Mr. Battiau,  

The Swiss Bankers Association (SBA) is the leading professional organisation of the Swiss financial centre. Its main purpose is to maintain and promote the best possible framework conditions for the Swiss financial centre both at home and abroad. The SBA was founded in 1912 in Basel as a trade association and today has 317 institutional members and approximately 18,500 individual members.

The SBA would like to thank the OECD for the opportunity to comment on the discussion draft on the B2C Guidelines and on the draft supporting provisions. The SBA has been in close contact with BIAC, while it was preparing its comments and can therefore support them.

In addition to the points raised by BIAC the SBA would like to stress the following.

To discussion draft of the B2C Guidelines (draft chapter 3 of the Guidelines)  

Taxpayers and tax authorities need legal certainty for the determination of the place of taxation. A limited and small number of indicia should allow the determination of the customer’s usual place of residence; these indicia should be recognized by all parties in order to prevent double taxation or non-taxation.

As a consequence, those defined indicia should be considered as sufficient evidence for suppliers and tax authorities to determine the place of the usual residence.

Furthermore, those indicia should be collectable during normal business processes in order to avoid additional administrative burden.
To draft supporting provisions (draft chapter 4 of the Guidelines)

A key element for taxpayers is the assurance of a uniform and consistent interpretation by the different tax authorities of the proposed VAT guidelines and their rules (e.g. with respect to the above mentioned indicia, to the invoice requirements or to the information required for the VAT returns). Different interpretations of the rules, services or required indicia in different jurisdictions would lead to i) burdensome and costly disputes between taxpayers and tax authorities and ii) high infrastructure cost for taxpayers in order to comply with these different interpretations.

We thank you for taking good care of the remarks we have made and we are ready to provide you with additional explanations if requested.

Yours sincerely,
Swiss Bankers Association

Regula Haefelin       Jean Brunisholz
For the attention of Piet Battiau, Head of Consumption Taxes Unit
(Mail and email piet.battiau@oecd.org)

Re: International VAT/GST Guidelines
Public consultation on place of taxation for B to C supplies of services and intangibles
and provisions to support the application of the Guidelines

Dear Piet,

We are happy to send our comments on the place of taxation for B to C supplies of services and intangibles and the provisions to support the application of the Guidelines.

As you know, Taj has actively participated to the TAG process of OECD and is committed to support the OECD’s VAT work, considering that it is necessary for businesses to have guidelines to facilitate their day-to-day transactions on a worldwide basis.

As a general matter, we fully support and endorse the work done on VAT / GST issues. We also recognize the time pressure that the OECD has and congratulate it for its objective to have Internationally accepted VAT / GST Guidelines operating as a global framework.

As a member of the Deloitte organization, we have helped in two major International webinars where our clients, contacts and Deloitte members participated. Our contribution below is based both on our technical comments as well as on the feedback from our clients and contacts. We have also encouraged them to participate directly to OECD consultation.

1. Comments regarding the B to C Guidelines: Determination of the place of supply for cross-border supplies of services and intangibles

OECD’s objective is to levy tax in the jurisdiction where the final consumption occurs and this principle is in line with the VAT fundamentals, VAT being a tax due on consumption.

We understand that this objective is connected with the need of neutrality, efficiency of compliance and administration, certainty and simplicity, effectiveness and fairness. We agree with this objective and these principles.
However, we wish to stress a few issues which have repeatedly arisen in our clients' concerns.

1.1. Place of taxation rules should have a cohesive main rule

It is of critical importance both for governments and businesses to determine where the consumption has occurred. OECD currently provides a Guideline in two branches:

- **On the spot supplies** (supplies physically performed at an identifiable location and ordinarily consumed where they are performed in the presence of both the person performing the supply and the person consuming it): the place of taxation is the place of performance;
- **Other supplies** (services with no obvious connection with a readily identifiable place of physical performance): the place of taxation is the customer usual residence. The place of taxation should be the place of usual residence of the customer and the tax Administration should provide clear and realistic guidance in this respect.

OECD also provides for specific rules applicable in cases where general rules may not give an appropriate result. These cases should be limited and they should be supported by clear criteria.

At this stage, we consider that there is not one main rule but two main guidelines and specific rules with lots of options.

Since no hierarchy has been set up between the two branches of the proposed Guideline, there is a high risk that this framework will be complex to implement by Tax Authorities and will lead to unpredictable and inconsistent scenario across the countries for businesses.

We therefore suggest introducing a hierarchy between the proposed rules in order to have a more readable wording providing for one main rule and possible exceptions, as follows:

- **Main B to C rule**: applies to all remote supplies (cross-border services / digital or non-digital services) should be taxed under the main rule according to which VAT is due to place of customer's residence.
- **Exceptions**: non remote supplies (for example: passenger transport, long / short term hire of property): countries have an option to find the most: appropriate place of taxation.

The ultimate taxing result will have greater chances to reach consistency across countries, as the main rule is a cohesive one and an "all-including" one providing clearer guidance.

For businesses, it means a greater legal security because they will have more chances to rely on a larger main rule and know where their B to C transactions ought be taxed.

1.2. Needs of the digital economy should lead to further work

Concerning the digital economy, our attention has been drawn on the fact that some key issues have not been addressed adequately:

- Role of intermediaries remains unclear;
- Chain services transactions (especially B to B to C) are not considered.

In practice, these issues are essential because they help determine which operator endorses the B to C transaction. Since January 1, 2015, new rules have been implemented for electronic services in the EU and give presumptions or criteria that help determine the conditions in which an intermediary may find itself engaged in a B to C transaction. Also, in the famous B to B to C scenario, it is of utmost importance to determine which business in the chain crystalizes the B to C transaction.
2. **Provisions to support the application of the guidelines: Annex 3 to Chapter 3: Simplified registration and compliance regime**

We agree that simplicity, consistency, flexibility and proportionality are essential for businesses. Therefore, simplified registration and compliance are a vital concern for non-resident suppliers.

### 2.1. **Inclusion of Annex 3 in a separate chapter of the Guidelines**

Considering that these subjects are key elements for businesses, we would recommend that these comments be included in a new chapter and not in an Annex. Indeed, OECD needs to deliver a clear message to the businesses that the Guidelines provide for "easy to comply" rules. This must be part of "business friendly" approach.

Indeed, we are convinced that the success of the Guidelines will be measured by the rate of compliance by non-resident businesses in all jurisdictions where implemented.

Our clients considered that simplified registration process is the most important issue for them.

### 2.2. **Simplified registration process: registration threshold should be addressed**

The Guidelines do not provide for explicit de minimis threshold. It should be either considered if a common threshold for all countries could be possible in order to avoid multiple registrations, or if no threshold at all would create stronger sense of liability (the EU model has no such threshold).

### 2.3. **Threat of fraud: key issue to be completed**

OECD work on VAT has been done on the ground that businesses operate as bona fide parties, engaging in legitimate transactions. Obviously, in case of evasion, avoidance or fraud, tax authorities must protect themselves and businesses are interested in this chase too, because unlegitimate traders create distortions of competition.

But our attention has been drawn on the fact that the issue of fraud is not fully dealt with, particularly for non-resident vendors failing to register. Should a specific VAT arbitration be invented? Should it be included in existing OECD tax treaty model? Or should it remain only in VAT / GTS Guidelines? Our "gut feeling" would probably respond by saying it should be in both! Indeed, we know that tax treaties generally do not cover VAT. Maybe they should! Maybe B to C VAT / GST compliance of non-resident vendors could be included in BEPS 15 on Multilateral Instruments which aims at modifying all existing treaties at once.

### 2.4. **Permanent establishment (PE) risk (footnote 24 of the Guidelines)**

OECD should provide stronger security concerning the consequences of a VAT registration in a country and the potential risk of force of attraction.

A mere VAT registration should not lead per se to PE issues for corporate tax purposes: a VAT registration should not imply the existence of a PE in a country. Indeed, we are of the opinion that if businesses are considered as having a PE risk in a country as a result of their VAT registration, this will inevitably create disincentive for crossborder compliance.

Our clients considered that this PE issue is the most relevant issue for businesses.
We thank again the OECD for this opportunity to provide these comments and for the work already done on the Guidelines.

We hope that these comments will be useful and please do not hesitate to contact us should you have any question.

Yours Sincerely,

Taj, Société d'Avocats

Odile COURJON
Partner
16 February 2015

TAXAND'S COMMENTS ON THE OECD'S DISCUSSION DRAFT OF INTERNATIONAL VAT/GST GUIDELINES REGARDING THE PLACE OF TAXATION FOR BUSINESS-TO-CONSUMER SUPPLIES OF SERVICES AND INTANGIBLES (“DRAFT B2C GUIDELINES”)

1. Introduction

Taxand welcomes the OECD's draft B2C guidelines overall. With the rapid expansion of online services, cloud computing, mobile applications – all of which have little regard for the traditional fiscal borders used to tax supplies of goods where they are consumed – these guidelines, if adopted by most OECD member countries, should achieve an effective balance between:

- ensuring tax is collected where services are consumed
- reducing the risk of double or no taxation; and
- minimising the administrative burdens placed on businesses and their customers

Taxand recognises the similarities between the OECD's draft B2C guidelines and the European Union’s (“EU's”) B2C place of supply rules for electronically-supplied services introduced in 2003 for suppliers established, for VAT purposes, outside the EU. The EU's B2C place of supply rules were recently supplemented, with effect from 1 January 2015, with additional B2C place of supply rules for suppliers established in one or more EU member states. All Taxand firms, particularly those in EU member states, have an in-depth knowledge of how these rules have affected both EU and non-EU service providers and how those businesses have dealt with the practicalities of declaring VAT using the type of simplified measures envisaged in the OECD's draft B2C guidelines.

2. Scope of the destination principle for B2C services – the general rules

Taxand supports the general principle of taxing services where they are consumed which should, if broadly adopted by OECD members, ensure a reasonably fair and non-distortive system of indirect taxation. At the same time, to promote international trade, the guidelines must be practical and implementable without excessive cost or administration. For example,
we express a note of caution regarding the practicalities of relying too much on identifying the consumer’s usual place of residence to determine where B2C services are consumed.

Taxand agrees that the place where a non-business customer (“a consumer”) usually resides is an appropriate proxy, in some cases, for identifying where services are consumed. However, the consumer’s usual place of residence is not always the most appropriate. nor practical way, to determine the place of consumption. To that end Taxand welcomes the OECD’s guidance on when it would be appropriate for national governments to set an override to the general rule.

The draft B2C guidelines include appropriate exceptions to using the consumer’s usual place of residence, particularly with respect to ‘on-the-spot’ services where both the supplier and consumer need to be present for a supply to take place. Examples given in the draft B2C guidelines include restaurant services and other types of services where physical performance better identifies where services are consumed.

However, the B2C guidelines contemplate national governments using the consumer’s usual place of residence for identifying the place of consumption of a variety of services including, for example, consulting, accountancy, and legal services. While there are no particular reasons for services like consulting, accountancy, and legal services to be taxed differently to electronically-supplied services, providers of these ‘non-electronic’ services may be less able to accurately or reasonably determine the customer’s usual place of residence. This could result in an undue economic burden being placed on the supplier and an increased risk of the supplier incorrectly-determining a consumer’s usual place of residence and therefore declaring VAT/GST in the wrong country.

An undue burden could easily fall on suppliers of B2C services who do not routinely obtain consumers’ credit card details, IP addresses, or other means of independently determining a customer’s usual place of residence in the way that suppliers of online services typically do.

We consider certainty for businesses to be of paramount importance to an effective system of international taxation. We suggest therefore that B2C guidelines may be better supported by retaining the supplier’s place of business as the default place of taxation for B2C services. This should be overridden by more specific exceptions, ensuring that B2C services are taxed by default according to the consumer’s usual place of residence only when it is feasible and realistic for suppliers to obtain third-party evidence of the consumer’s usual place of residence.

There could, for example, be a specific rule that only electronically-supplied B2C services are taxed according to the consumer’s usual place of residence. This would have the advantage that it encompasses not only the majority of B2C services that are likely to be provided internationally, but would also ease the burden and administrative complexity of identifying where services are consumed in more complex cases where residence can be determined and verified less easily.

The European Union’s rules for taxing B2C where they are supplied are currently limited to electronically-supplied services, telecoms, and broadcasting. The EU’s B2C rules also
benefit from the greater certainty provided by explicit exceptions to using the consumer’s usual place of residence. For example:

- mobile telecoms services, and services delivered using a mobile network, are deemed to be consumed in the EU member state where the user’s SIM card is registered; and

- telecoms services that are delivered using fixed-line telecoms are deemed to be consumed in the EU member state where the fixed-line is located.

We gather that several countries outside the European Union are considering similar B2C rules for electronic services. Greater consistency would not only raise awareness and certainty, it would also reduce the instances of double taxation.

**Recommendation:**

2.1. **Taxand supports the use of the consumer’s usual place of residence as a general proxy for the place of consumption, and therefore place of taxation, when there is no reasonable alternative to determining the place of consumption. We recommend, however, that:**

2.1.1. the scope of using the consumer’s usual place of residence be limited to electronically-supplied services and other services for which a supplier can relatively easily verify the consumer’s usual place of residence via a third-party, such as a credit card operator, and/or by identifying the consumer’s internet protocol (“IP”) address; and

2.1.2. the exceptions to using the consumer’s usual place of residence should be made more explicit to minimise the likelihood of double or no taxation of services.

3. **Services directly connected with immoveable property**

Similarly to the points made above under Recommendation 2.1, we also consider more specific criteria would be useful in determining what services are directly related with immoveable property (“land-related services”) and what services are not.

The differences in various tax authorities’ definitions of land-related services, even between EU member states, frequently add to the complexity of determining a business’s VAT registration obligations and VAT recovery entitlement. To give businesses and consumers greater certainty regarding VAT/GST treatment of land-related services internationally, particularly when dealing with jurisdictions of which businesses may have relatively little knowledge, we consider the guidelines would benefit from more precise examples of what services are land-related and what services are not land-related.
Recommendation:

3.1. The circumstances in which using the location of land or buildings as the place of taxation for services directly-connected with land or buildings should be made more explicit with examples of services that are land-related and examples of services that are not land-related.

4. Simplified VAT/GST registration and compliance regime

Taxand welcomes the OECD’s recommendation for national governments to implement a simplified registration and compliance regime for non-resident suppliers of B2C services and, in particular, the emphasis on encouraging governments to provide an online means of meeting compliance obligations and to provide relevant information in the language of significant trading partners.

While the type of simplified online regime contemplated in the draft B2C guidelines is likely to offer the greatest incentive to non-resident supplies to meet their VAT obligations, we fully support additional ways of minimising the administrative burden on suppliers as noted in the B2C guidelines, in particular:

- registration thresholds to relieve small businesses from international VAT registration obligations;
- exemption from mandatory invoicing requirements; and
- certainty on the appropriate exchange rate to be used for charging and declaring VAT/GST on B2C supplies.

While the use of a registration threshold is likely to result in tax revenue going to the government of the supplier’s country – or to no taxation if the VAT/GST rules in the supplier’s country do not require the supplier to be VAT registered there (because, for example, there is a domestic registration threshold) – the economic effect would be mitigated by minimising administrative burdens and helping small business thrive in the global economy.

Recommendation:

4.1. National governments should be encouraged to set a realistic registration threshold for non-established suppliers of B2C services such that supplies of a value below the threshold would allow suppliers to meet their VAT/GST obligations in the destination country by charging VAT/GST based on where the supplier is established (requiring reciprocal rules in the supplier’s country).

4.2. National governments should be encouraged to exempt non-established suppliers of B2C services from all mandatory invoicing requirements, providing that appropriate procedures are in place to allow the tax authorities of the destination country to verify that non-established suppliers are meeting their VAT/GST obligations.
4.3. National governments should be encouraged to provide a fixed exchange rate at the beginning of each month that B2C suppliers may use to determine how much VAT/GST must be declared with certainty for each VAT reporting period (subject to emergency measures needed to deal with significant fluctuations in the exchange rate).

5. Taxand's Take

Taxand fully supports this OECD initiative and hopes it will soon lead to member countries adapting their existing VAT/GST rules to better facilitate international trade, and to give businesses more certainty around their compliance obligations, while ensuring governments can continue to collect tax in a fair and efficient manner.

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Mr. Piet Battiau
Head of Consumption Taxes Unit
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
2, Rue Andre Pascal 75775
Paris, Cedex 75016
France

Via email: piet.battiau@oecd.org

Re: International VAT/GST Guidelines

Dear Mr. Battiau,

On 18 December 2014, Working Party No. 9 on Consumption Taxes of the Organisation for Economic Co-operation and Development (OECD) released a consultation document setting forth two new draft elements (the Discussion Draft) of the International VAT/GST Guidelines (the Guidelines). The elements address the place of taxation for business-to-consumer (B2C) supplies of services and intangibles. In its Report on Tax Challenges of the Digital Economy, which was prepared in context of work on Action 1 of the BEPS Action Plan, the OECD identified this area as a “pressing issue that needs to be addressed urgently to protect tax revenue and to level the playing field between foreign suppliers relative to domestic suppliers.”

Tax Executives Institute (TEI) commends Working Party No. 9 for its work on the Guidelines. Crafting globally applicable approaches for use in countries with different legal frameworks, customs, and backgrounds is a difficult task. The benefits of that work, however, are significant. All countries have the common objectives of fair taxation, maintaining (or achieving) a level playing field between domestic and foreign vendors, and the efficient collection and enforcement of their tax
systems. In the specific context of electronic commerce, it is in the interest of all parties to ensure a consistent global approach in line with OECD principles and guidelines. As the International President of TEI, I am pleased to submit the following comments on the Discussion Draft.

**Tax Executives Institute**

TEI was founded in 1944 to serve the professional needs of business tax professionals. Today, the organisation has 56 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 individual members represent 3,000 of the largest companies in the world.¹

**TEI Comments**

**General Comments**

Countries around the world struggle with the application of consumption taxes to supplies of services and intangibles, especially when those supplies are made by businesses with no presence in the country of their customers. During the past decade, a number of countries have developed approaches for addressing B2C supplies of services and intangibles. For example, effective 1 January 2015, the European Union introduced a new set of rules and registration requirements for supplies of electronically-delivered services. Norway has been taxing sales of electronic services made by foreign (non-established) vendors to Norwegian customers and operating a simplified registration and collection system since July 2011. Beginning 1 June 2014, South Africa introduced a set of rules addressing this same part of the economy. Finally, Canada and Japan continue to analyse different approaches to ensure the proper amount of GST and CT, respectively, is collected on these transactions. As more countries introduce measures governing the application of their VATs to supplies of services and intangibles, there is greater risk of creating a patchwork of inconsistent rules that could (and often do) result in double taxation or double non-taxation, thereby eroding the principle of neutrality, which is critical to a properly functioning international VAT system. TEI commends the OECD and Working Party No. 9 for their ongoing efforts to develop international VAT guidelines and appreciates this opportunity to comment on the Discussion Draft.

¹ TEI is a corporation organised in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).
Comments on Specific Areas of the Discussion Draft

The Discussion Draft adds two new elements to the Guidelines that were approved at the OECD Global Forum on VAT held in Tokyo in April 2014: (1) Chapter 3 – Determining the Place of Taxation for Cross-Border Supplies of Services and Intangibles; and (2) Chapter 4 – Supporting the Guidelines in Practice – Mutual Cooperation, Dispute Minimisation, and Application in Cases of Evasion and Avoidance. Chapter 3 of the Discussion Draft also includes an annex discussing the main features of a simplified registration and compliance regime for non-resident suppliers.

**Paragraph 3.5:** Guideline 3.1 of the Discussion Draft addresses the application of the destination principle to supplies of services and intangibles. In Paragraph 3.5, there is a discussion of the differing objectives between taxing business-to-business (B2B) supplies and B2C supplies. Taxation of the former is aimed at ensuring the neutrality of the international VAT/GST system while taxation of the latter is designed to collect tax in the jurisdiction where the ultimate consumer is likely to consume the services or intangibles. Many jurisdictions employ separate rules for B2B and B2C supplies to aid in achieving these objectives, but other jurisdictions do not. The final sentence of Paragraph 3.5 provides that “[t]his should not be interpreted as a recommendation to jurisdictions to develop separate rules or implement different mechanisms for both types of supplies in their national legislation.”

**Comment:** The final sentence of Paragraph 3.5 could be viewed as running counter to Annex 3, which provides a framework for a simplified registration and compliance regime aimed at non-resident suppliers of B2C services and intangibles. Generally, non-compliance in this area occurs with B2C supplies where VAT/GST is a cost, rather than at the B2B level where it is rarely a cost (except for “exempt” or “input taxed” businesses). Requiring collection of VAT/GST on B2B supplies by foreign suppliers, rather than by their domestic customers through a reverse-charge mechanism (where appropriate), would create a new administrative burden without enhancing compliance with, or collection of, local VAT/GST. Thus, we recommend amending the last sentence of Paragraph 3.5 by adding the following parenthetical (underlined):

This should not be interpreted as a recommendation to jurisdictions to develop separate rules or implement different mechanisms for both types of supplies in their national legislation (with the exception of the recommendations in Annex 3).

The recommendations contained in Annex 3 regarding a simplified registration and compliance regime for non-resident suppliers would make the VAT/GST collection process more efficient for both tax administrators and business. It would also better align with OECD recommendations recently endorsed by governments at the second meeting of the OECD
Global Forum on VAT in Tokyo, where the reverse charge mechanism was recommended as the preferred collection mechanism in B2B scenarios.

**Subsection C.3.1:** To best achieve taxation in the jurisdiction of consumption, Guidelines 3.5 and 3.6 provide a two-step process. The first step, Guideline 3.5, applies where the services or intangibles are physically performed at a readily identifiable location, are ordinarily consumed at the same time and place where they are physically performed, and ordinarily require the physical presence of both the supplier and purchaser at the same time and place. When Guideline 3.5 does not apply, Guideline 3.6 deems the place of supply to be the jurisdiction where the customer has its usual residence. The Discussion Draft goes on to discuss the documentation on which suppliers can rely to determine customer residence.

**Comment:** TEI welcomes the clear distinction achieved by Guidelines 3.5 and 3.6. So-called “on the spot supplies” will achieve the correct tax result through the application of Guideline 3.5 regardless of whether purchasers are in transit. Deeming the place of supply to be the jurisdiction of residence for all other services and intangibles is the only logical and practical conclusion.

The commentary in Paragraphs 3.23 and 3.24 concerning the determination of acceptable evidence for businesses to identify the residence of their customer is generally helpful and practical. The language recognises the impossibility of achieving absolute certainty as to customer residence in every transaction and urges jurisdictions (as much as possible) to permit suppliers to use documentation produced or collected as part of their normal business activity. Paragraph 3.23 introduces the concept of reasonably reliable evidence as a standard for whether suppliers have met their burden to prove the residence of their customers. Again, the practicality of that standard is a welcome inclusion in the Discussion Draft.

By focusing on the difficulties of obtaining documentation sufficient to prove the residence of a customer, these paragraphs de-emphasise the ability of suppliers to obtain highly reliable documentation to establish residence in circumstances. It is often the case that low-value supplies made with minimal interaction between supplier and customer may limit the ability to secure that documentation. But, in other cases, a supplier and its customer will enter into a contract that provides reliable data on customer residence. In that case, the contract will be more accurate than two pieces of less reliable evidence, making an evaluation of the quality of the evidence even more important than the quantity of evidence. It should be made clearer in Paragraphs 3.23 and 3.24 of the Discussion Draft that it may be acceptable for suppliers to rely on a single piece of evidence with a high degree of reliability. For example, information provided to a supplier by a payment processor, such as a credit card or bank, is more reliable for identification of customer residence than an IP address.
Paragraph 3.23 suggests that jurisdictions should consider rules limiting challenges by the taxing authority to situations where “there is misuse or abuse of such evidence.” As a general matter, we view such rules as being positive. It would be helpful, however, for the OECD to provide some indication of “misuse or abuse” that might trigger a challenge to the use of otherwise acceptable evidence. If an exception for misuse or abuse of evidence is interpreted broadly, it would defeat the anticipated benefit of heightened compliance at a lower cost for businesses and tax administrations.

The observation at the end of Paragraph 3.24 that the indicia of residence used by businesses to support their place of supply determinations will “likely evolve over time as technology and business practices develop” is astute and helpful. TEI urges the OECD to take the recommendation in Paragraph 3.24 one step further. Jurisdictions should be advised to craft their rules in a way that permits flexibility in responding to future changes in technology and business processes.

Subsection C.3.2: This subsection provides guidance for the implementation of registration systems for non-resident suppliers and is a welcome addition to the Guidelines. TEI commends the OECD for addressing this issue, which has become a focus of many jurisdictions over the past few years.

Comment: One point absent from this subsection is any mention of thresholds for very small suppliers, i.e., suppliers that only generate a very small level of revenues in a particular jurisdiction. Experience from TEI members in jurisdictions that have implemented these types of registration systems confirms the need to exclude very small suppliers from the tax net. The costs for small suppliers to comply and for tax administrations to manage the registrations of these small suppliers outweigh any benefit generated by their registration. This point could also be bolstered in Paragraph 16 of Annex 3, which addresses proportionality issues. Just as important, jurisdictions should provide clear guidance on their websites to facilitate compliance so that sellers of all sizes can quickly and easily register and comply with the applicable rules.

Guideline 3.7: In limited situations, a specific rule for determining the place of supply for a transaction will more likely result in the transaction being taxed in the jurisdiction of consumption. Guideline 3.7, in Paragraph 3.39, provides a helpful five-factor evaluation framework for assessing the desirability of specific rules. The second of the five factors is “efficiency of compliance and administration.”

Comment: TEI agrees that specific rules for determining place of supply should be limited. The evaluation criteria in Paragraph 3.39 are critical for evaluating when a special rule is appropriate. Automation through technology has helped ease the VAT/GST compliance burden for businesses, and the OECD is correct to include “efficiency of compliance and administration” in the evaluation criteria. TEI urges the OECD to add language to Paragraph
3.39 indicating that the ability to automate tax decision-making should be considered when evaluating such efficiency.

**Annex 3:** Annex 3 provides helpful guidance for jurisdictions establishing or maintaining registration and compliance regimes for non-resident suppliers, in particular exploring the key measures that taxing jurisdictions could take to simplify the administrative and compliance processes of a registration-based collection regime for B2C supplies.

**Comment:** Given the importance of this work, TEI recommends that this topic be included as a separate chapter in the Guidelines rather than consigned to an annex. In addition, whilst the application of the reverse charge is the preferred main rule approach and is fully supported by business for B2B cross-border transactions, there may be some merit in investigating whether a simplified registration regime might be beneficial in B2B scenarios where the reverse charge does not apply.

**Annex 3, Paragraph 13:** One of the key elements of VAT/GST regimes generally, and specifically those portions applicable to non-resident suppliers, is the availability of guidance from tax authorities to ensure compliance. Paragraph 13 encourages jurisdictions to make that guidance available online in a manner that is kept current and in the language of the jurisdiction’s main trading partners.

**Comment:** Researching the VAT/GST treatment of transactions for all jurisdictions in which a supplier has customers is a time-consuming and expensive process. This is especially true when determining how, when, and where to declare and pay VAT/GST outside the home country of the business. Maintaining easy-to-understand, up-to-date guidance in an online format would benefit both tax administrators and businesses. For example, it would help safeguard VAT/GST revenues of jurisdictions through more accurate reporting and, at the same time, reduce the administrative burdens and compliance costs for businesses.

**Annex 3, Paragraph 14:** The recommendations in Annex 3 recognise that the simpler jurisdictions make their compliance systems, the more likely it is that businesses are able to register and comply. Paragraph 14 suggests allowing suppliers to use third-party service providers to “act on their behalf in carrying out certain procedures, such as submitting returns,” as a way to help small and medium-sized business with their compliance.

**Comment:** Some jurisdictions already require use of a local agent to comply with their VAT/GST obligations. Use of those third party agents creates an additional expense for the business. One of the biggest barriers to compliance in jurisdictions with low value sales is when the cost of compliance outweighs the benefits of continuing to do business in the jurisdiction. Both the business and its potential customers lose in that situation. To avoid any implication that the Discussion Draft is promoting the mandatory use of third party agents for VAT/GST
purposes, TEI urges the OECD to add language to Paragraph 14 of Annex 3 clarifying that use of third party agents should be optional for businesses.

Chapter 4, Section A: Chapter 4 recognises that it is appropriate to identify mechanisms that may help facilitate the interaction between tax administrations to avoid instances of double taxation and unintended non-taxation, to facilitate the minimisation of disputes over potential double taxation or unintended non-taxation, and to deal with evasion and avoidance.

Comment: Prevention is the best way to minimise disputes – the more consistently the Guidelines are interpreted and implemented at a global level, the less often disputes regarding neutrality and place of taxation issues should occur. However, in practice, TEI recognises that there will always be exceptional instances where jurisdictions will implement or interpret the neutrality or place of taxation principles in different ways. In this context, it is clear that Chapter 4 is crucial in trying to resolve disputes as and when they occur. TEI maintains that mutual cooperation and the exchange of information between governments is vital not only to aid in the resolution of disputes regarding the Guidelines, but also to make compliance as simple as possible for business and to create efficiency for both business and tax administrators when managing VAT/GST in practice.

Paragraph 4.5: The Guidelines have been developed on the presumption that all parties are acting in good faith, and that all transactions are legitimate and possess economic substance. Where there are efforts to avoid or evade taxation, however, Paragraph 4.5 recognises that it is not inconsistent with the Guidelines for jurisdictions to take proportionate counter-measures to protect against evasion and avoidance, revenue losses, and the distortion of competition.

Comment: TEI appreciates the need for governments to take measures in the context of the Guidelines to protect against evasion and avoidance. Because such measures create distortions of competition for business, however, TEI urges the OECD to emphasise the need for governments to apply these measures responsibly and proportionately, only in cases of abuse, and consistent with the principles of these Guidelines, particularly the principle of neutrality.

Furthermore, any such measures should also be applied in a way that is specifically directed to tackle the perceived abuse. As TEI members have experienced in practice, rules that are insufficiently targeted increase the complexity and cost of compliance for legitimate businesses, whilst doing little to diminish evasion or avoidance at an overall level. Consistent with this, TEI recommends that the OECD encourage tax authorities to ensure that penalties for genuine mistakes (which frequently occur in the complex day-to-day commercial and taxation environment) be proportionate and take into consideration the net amount of revenue lost.

To this end, TEI also notes that many of the e-services that are addressed in these Guidelines are provided through lengthy supply chains with frequently a number of third
parties involved between the content owner and the final consumer. In such cases, the taxpayer responsible for charging, collecting and remitting the VAT/GST must rely on those third parties for the information declared on their VAT/GST filings. This information is often provided too late to allow for timely filing of one’s entire liability. TEI urges the OECD to encourage tax authorities to adopt a flexible approach in such cases and to accept that unless the delays are significant (six months or longer) no penalties should be imposed in instances where a taxpayer files figures received from third parties in later periods than they otherwise should under the rules.

**VAT/GST & BEPS – General Points**

TEI would like to highlight several corporate tax related BEPS action items that impact VAT/GST – e.g.:

Lowering of the permanent establishment (PE) threshold will result in additional VAT/GST registration and compliance obligations with an overall increase in administrative costs to businesses. Increased complexity is also likely to occur – either through a more extensive use of force of attraction rules, or through an increased risk that conflicting establishment definitions create double taxation and unintended non-taxation, particularly if the Guidelines are not implemented and applied consistently.

Looking at this from the other side – i.e., the impact of VAT/GST registrations on PE considerations - Footnote 24 of the Guidelines highlights that a VAT/GST registration should not by itself create a PE. Because this is such a critical point, TEI recommends that it be placed in the body of the document, rather than in a footnote, as it currently appears. Experience from TEI members suggests that more and more tax authorities are trying to reclassify a VAT/GST only registration as a PE for corporate tax purposes. The globalisation of trade of cross-border supplies and the growing use of the Internet, combined with VAT/GST rules, means that businesses are increasingly required to charge and account for VAT/GST in countries where they do not have a physical presence. Given the potential wider tax implications at stake, there is a risk that such an approach may lead to increased revenue losses for governments if businesses are deterred from acting as tax collector for VAT/GST. In turn, this will also lead to increased distortion of competition for businesses.

With respect to transfer pricing adjustments, where there is a lack of consistency between governments as to how transfer pricing adjustments should be treated for VAT/GST purposes, there is an increased risk of double taxation, unintended non-taxation, and legal uncertainty.
Corporate restructuring prompted by BEPS actions also is likely to lead to additional VAT/GST costs since there are often different deduction approaches for restructuring costs between corporate tax and VAT/GST and between different tax authorities.

TEI urges the OECD to ensure that all its tax units and working parties interact closely with each other, to discuss the potential effects of the action items on VAT/GST, and align the taxes where possible.

Conclusion

Clear and uniformly interpreted VAT/GST rules that are simple, consistent, flexible and proportional, particularly with respect to the place of taxation and the means of collecting the tax, have the dual effect of safeguarding tax revenues and achieving a level playing field for business. TEI applauds the excellent work by the OECD on VAT/GST in the last few years and for involving business stakeholders in the Technical Advisory Group process and other initiatives leading to the development of the Draft Guidelines. Cooperation between business and governments on an international level is vital to ensuring the operation of a functioning VAT/GST system.

TEI’s comments on the Discussion Draft were prepared by the Institute’s European Indirect Tax Committee, whose chair is Jean-Francois Turgeon. If you have any questions about TEI’s comments, please contact Mr. Turgeon at +41 (0) 582 426 513 or turgeon_jean-francois@cat.com, or Pilar Mata of TEI’s legal staff at +1 202 638 5601 or pmata@tei.org.

Sincerely yours,

TAX EXECUTIVES INSTITUTE, INC.

Mark C. Silbiger
International President
Tax Mediation Association

Tax Mediation: An innovation promoting transparent exchanges between tax authorities and taxpayers
Executive Summary

What?
- Introducing tax mediation in the tax audit process even before the issuance of the assessment or the proposed assessment.
  - An alternative method of preventing costly legal disputes in tax matters.

Why?
- A change in culture is required to promote the economic development of businesses. These businesses are particularly disadvantaged by costly legal proceedings surrounding tax disputes.
- Represents savings and improved efficiency due to a better use of resources for all parties involved.
- The system based on adversarial relationships that has long dominated tax disputes must be transformed into a more collaborative and inclusive system.

When?
- A tax mediation pilot project could be announced in 2015.

How?
- Establishment of an 18-month pilot project with the Tax Mediation Association
  - Independent mediators specialized in the area of taxation.
  - Training in tax mediation provided by Justice Louise Otis at the McGill University.

By whom?
- OECD in collaboration with the Tax Mediation Association and other stakeholders.

For who?
- Businesses wanting to establish a collaborative approach and relationship with the government.
- SMEs face increased resource constraints in dealings with tax authorities in the current system.
1. INTRODUCTION

Tax mediation is a process of prevention and settlement of tax disputes involving the use of an independent mediator who helps the parties reach a common understanding of the issues and a mutually satisfactory settlement which complies with applicable tax legislation. The basic concepts of tax mediation are neutrality and impartiality, a completely voluntary use, the common search for admitted facts, confidentiality, self-determination, good faith, and that, while respecting applicable tax legislation.

The tax mediator is an independent and impartial third party whose function is to guide the communication between the parties involved in a dispute. The mediator is an accredited professional specializing in taxation and dispute resolution using different communication techniques and negotiation to help the parties assert their perspectives. The tax mediator cannot impose a solution upon the parties.

The Tax Mediation Association’s purpose is to develop a tax mediation project similar to the judicial mediation project developed by the Honorable Justice Louise Otis when she was a judge of the Quebec Court of Appeal. This judicial mediation project is now known around the world. The tax mediation project will strive to provide solutions for disputes between taxpayers and tax authorities. This project aims to render mediation available at the outset of an audit by tax authorities as soon as an area of disagreement or a source of dispute is identified by one of the parties.

The Honorable Justice Louise Otis, as a founding member of the Association, oversees the activities of the Association, particularly the training of tax mediators. In addition, she contributes significantly to the Association by sharing her extensive expertise in the deployment of the mediation process at the international level.

The proposition of the Association introduces the tax mediation project as a measure to:

- Greatly streamline the burden for taxpayers facing tax administrations;
- Significantly reduce administrative and judicial process costs relating to audits;
- Make justice more accessible to taxpayers.

The Proposition of the Association is divided into two parts. The first part will describe the advantages and opportunities offered with tax mediation and the second part introduces the Memorandum of Understanding for the establishment of a pilot project for tax mediation.
2. AVANTAGES AND OPPORTUNITIES OF TAX MEDIATION

Tax Mediation has many advantages over traditional methods involving court proceedings.

A. More cost-efficient for all parties involved

A tax mediation process is generally more economical for both parties involved in comparison to the costs associated with traditional administrative proceedings before the courts. A successful mediation process would allow cost savings associated with the preparation of the notice of objection and appeals, the cost of legal stamps, the costs of drafting procedures, the costs of legal advisors, amongst other.

The savings generated by the tax mediation process will largely depend on when the dispute is submitted to the mediation process. Greater benefits will be achieved when the dispute is identified and submitted in the early stages of a detailed audit or desk audit.

B. Faster

Mediation is generally faster when compared to traditional recourses. The mediation process should shorten processing delays significantly.

Delays
Several contributing factors render mediation more efficient from a timing perspective. Time savings are achieved by not having to prepare and review a notice of objection and / or a notice of appeal for court proceedings at the first or second instances. The parties would not be subjected to delays caused by the judicial process that can take up to several years. Rather, it is the parties themselves, along with the tax mediator, who agree to the timing in which the mediation is to take place. This basically means that a tax mediation process may well take place shortly after the case has been raised; it can be a matter of days or weeks.

Duration
The complexity of the issues will determine the duration of the tax mediation process. A mediation process can take several hours to several days or even weeks in very complex cases. The goal, however, is to proceed as quickly as possible: usually a half-day.

C. Confidential

Unlike traditional court proceedings, the contents of a tax mediation are confidential and are known only by the parties involved and the mediator. This is contrary to court files that are currently made public.

Often, the parties have no interest nor benefit in having disputes made public. This is particularly true for businesses where confidential and competitive information can be made public as a result of a tax dispute becoming public knowledge. This reinforces the benefits of a confidential mediation process which not only ensures that the object of the dispute is kept confidential, but also the sensitive commercial information that could be dissipated as a result.

We would also recommend that the parties involved in the tax mediation process sign a confidentiality agreement that will require them not reveal the discussions that occurred during the process. Clauses included in the confidentiality agreement could provide that the discussions / admissions made during the mediation process are not to be disclosed should the mediation process fail and that the tax mediator cannot be called as witness should court proceedings be pursued in the future.
Furthermore, this would not prevent the publication of agreements on an anonymous basis to ensure the transparency of the process and accountability of the parties involved.

**D. Maintains the relationship between the parties**

Our tax system is based on the principle of self-assessment. Accordingly, the search for a common understanding of facts and a common understanding of the applicable tax rules will promote tax compliance of the taxpayer. This will be facilitated by the tax mediation process. The mediation process allows the preservation of the relationship between the parties as opposed to building on conflictual relationship often present in the context of traditional modes of conflict resolution (courts).

Indeed, during court proceedings, the focus is put on points of disagreement between the parties. Emphasis is put on highlighting the differences between each version and each party tries to argue its point of view in order to convince the judge that the claims of the other party are without merit and do not deserve consideration. Certain parties may have more resources than others to make their respective claims. Once we add the emotional considerations and all other human behaviors that come into play when each party is desperately seeking to “win”, common sense is at times set apart, and simple disagreements can take disproportionate measures. This has certainly been highlighted in recent court decisions.

In addition, it can certainly be said that the procedures forming part of a traditional judicial process, including applications, interviews, etc., contribute to increasing the animosity that existed between parties at the outset of the dispute as opposed to mitigating the issue.

**E. Other benefits**

We also enumerate other advantages of tax mediation.

- Flexible approach fostering collaboration of the parties involved - this a fundamental change in culture for tax compliance
  - Beneficial transparency in the search for a common solution

- Accessible for a greater number of taxpayers

- Improved control over the process

- Negotiated and mutually accepted solution by the parties

- Maintains a collaborative and respectful relationship between the parties

- Maintains a relationship based on mutual trust between individuals

- Allows for innovation in reaching conclusions within the agreement:
  - For example, provide the implementation of remedial measures for the future and not only an assessment for past periods

- Accessible at any time after the first project of assessment.

For the reasons enumerated above, we believe that the establishment of a tax mediation process available at the audit level is a measure to ensure that financial and human resources are not unnecessarily invested in the tax system. In addition, amounts of tax effectively due would be determined and paid in a much more efficient manner.
3. CONCLUSION

The introduction of tax mediation in our judicial system is necessary to ensure that justice is accessible for all taxpayers and that tax disputes can be settled on a timely and cost-effective basis. The introduction of the tax mediation process via a pilot project has become urgent due to the length of time required to settle disputes through the conventional court system and the high costs associated to it. A plan should be put on motion as soon as possible.
Dear Mr. Battiau,

I appreciate this opportunity to provide my input on the OECD’s Drafts for Public Consultation of International VAT/GST Guidelines. I am providing my input only in regard to the items where I am able to add constructive suggestions for their further improvements.

My comments are based on the following: More than a decade of personal experience working as a tax advisor for MNE and SME engaged in the digital economy. I have developed a prototype software for global compliance for supplies of e-services. As part of my PhD research I have conducted a detailed review of the various consumption tax regimes that have implemented the destination principle for B2C supplies of e-services and/or have implemented simplified tax registration and compliance schemes. The reviewed tax systems are: the US Streamlined Sales and Usage Tax Agreement (SSUTA) and the Marketplace and Internet Tax Fairness Act (MITFA), the EU Mini-One-Stop-Shop (MOSS), the Norwegian VAT on E-Services (VOES), and South African, Swiss and Icelandic VAT systems. I have also taken into account the EU intention to gradually expand the MOSS first to distance sales of goods within the Community presumably within the next 18 months and afterwards to include further B2C supplies.

While the comments stated in this document express solely my personal opinion; I believe that they will be of benefit for the OECD, the businesses, and the various jurisdictions involved with the BEPS and the VAT/GST guidelines projects and their implications on the future of taxation.

I will provide further information upon your request.

With kind regards,

Tom Borec
Chapter 3 - Determining the Place of Taxation for Cross-Border Supplies of Services and Intangibles

3.7 For the purposes of these Guidelines business-to-business supplies are assumed to be supplies where both the supplier and the customer are recognised as businesses [...].

3.8 Jurisdictions that implement different approaches for determining [...] business-to-business supplies [...] are encouraged to provide clear practical guidance on how suppliers could establish the status of their customer. [...] To facilitate suppliers’ identification and verification of their customers’ status, jurisdictions are encouraged to consider implementing an easy-to-use process that would allow suppliers to verify the validity of their customers’ VAT registration or tax identification numbers.

Comm1: I suggest modifying the above guideline to always advise the jurisdictions to provide practical guidance on how suppliers can establish the status of their customers (i.e. not only in cases where the jurisdictions implement different approaches than the one recommended in Item 3.7 of these Guidelines)

Comm2: I further suggest modifying the above guideline to advise the jurisdictions to make a freely available official online tool for real-time verification of the tax status of the customers, where such checks are expected either by the legislation or by the tax practice of the jurisdiction’s tax authorities. Especially in the case of the digital economy it is important to have an access to an official tool which enables a real-time verification of the tax status of new customers. E-commerce businesses need to process the transaction immediately and automatically without undue delays. They do not have the luxury of traditional businesses to verify the tax status of their customer manually before deciding whether or not consumption tax should be charged. Any delay increases the risk that the customer will abort the transaction before the sale is made. A good practice example of such a tool is the SOAP service at the EU’s VIES web-page (European Commission, 2015b).

Comm3: My further recommendation is for jurisdictions to agree that they will not hold businesses liable for when they were unable to verify the tax status of their customers using the online tool for reasons out of their control (e.g. because the toll was inaccessible due to technical issues with the hosting provider, because information supplied by the tool was outdated, because the server hosting the tool fell victim to a DDoS attack, etc.). MITFA can be seen as a best-in-class example for such relive from liabilities.

Comm4: While I agree with the idea that in the above stated examples the taxation should occur at the place of performance, I nevertheless believe that a specific exemption should be introduced for the e-commerce sales of tickets, accommodations and other similar supplies. We have witnessed an emergence of online sellers of tickets and accommodations within the last decade. Under the current Guidelines all online sellers would be required to register locally for consumption tax if selling in their own name (i.e. for being as intermediates). They would be required to register in multiple jurisdictions, deduct input tax charged to them by their suppliers and charge output tax to their customers. Instead of this disproportionally ineffective procedure I propose implementation of a simplified registration and compliance scheme similar to that used for e-services, under which no input tax would be charged to such resellers by their suppliers, and where these resellers would be allowed to collect, report and pay only output tax. The special status of the resellers would be verifiable using a special online tool and could be blocked by the tax authorities in case of misuse at any time.

3.16 Guideline 3.5 is aimed primarily at supplies that are typically made for immediate consumption at an identifiable place of performance [...]. Examples include [...] accommodation; restaurant and catering services; entry to cinema, theatre performances, trade fairs, museums, exhibitions, and parks; attendance at sports competitions.

Comm4: While I agree with the idea that in the above stated examples the taxation should occur at the place of performance, I nevertheless believe that a specific exemption should be introduced for the e-commerce sales of tickets, accommodations and other similar supplies. We have witnessed an emergence of online sellers of tickets and accommodations within the last decade. Under the current Guidelines all online sellers would be required to register locally for consumption tax if selling in their own name (i.e. for being as intermediates). They would be required to register in multiple jurisdictions, deduct input tax charged to them by their suppliers and charge output tax to their customers. Instead of this disproportionally ineffective procedure I propose implementation of a simplified registration and compliance scheme similar to that used for e-services, under which no input tax would be charged to such resellers by their suppliers, and where these resellers would be allowed to collect, report and pay only output tax. The special status of the resellers would be verifiable using a special online tool and could be blocked by the tax authorities in case of misuse at any time.

3.23 [...] Jurisdictions should provide clear and realistic guidance for suppliers on the information that is required to determine the place of usual residence of their customers in a business-to-consumer context. [...]
3.31 [...] Greater consistency among country approaches will further facilitate compliance, particularly by businesses that are faced with multi-jurisdictional obligations, reduce compliance costs and improve the effectiveness and quality of compliance processes. [...] 

Comm5: While I agree that jurisdictions should provide clear and realistic guidance for sellers, they should also align their guidance with other jurisdictions. There is a clear and present danger of double taxation in cases where, for example, the jurisdictions are not aligned on the definition of “the place of usual residency” or definition of “e-services.” For example, the definition of the “usual residency” differs between the EU1 and South Africa2. A double taxation occurs in the following example: A South African resident temporarily works in the UK and purchases there an app using her/his UK address and South African credit card. UK would claim VAT based on the IP address and local residency address and South Africa would claim VAT based on the credit card payment made via the South African bank account.

Comm6: To prevent occurrences of double- and multiple-taxation a safeguard should be included in the Guidelines to ensure that the consumption tax will be due only once. My recommendation is to allow the seller to choose the best applicable jurisdiction in order to prevent the double-taxation. The seller should expect to be challenged by the jurisdictions only where there is evidence of misuse or abuse. See also Comm37.

3.24 The information provided by the customer […] could include information […] such as jurisdiction and address, bank details (notably country of the bank account) and credit card information. Jurisdictions may require that the reliability of such information be further supported through appropriate indicia of residence. […] These may include the contact telephone number, the Internet Protocol address of the device used to download digital content or the customer’s trading history (which could, for example, include information on the place of predominant consumption, language of digital content supplied, billing address or information provided by third-party payment providers). […]

Comm7: I recommend that no distinction is made between “information” and “indicia.” Most of the information obtainable in the business process to the average seller can either not be verified by the seller3 or is not directly available to the seller4. The only location evidences available to the average seller are therefore the IP address, the information provided by the customer, and information provided by third parties (Borec, 2013). Considering the difficulty of obtaining any kind of reliable information about customer’s location I advise against splitting the location evidences into two different categories.

3.46 If businesses that usually supply services or intangibles to a large number of customers for relatively small amounts in a short period of time (e.g. restaurant services) were required to follow the general rule based on customer location for business-to-business supplies, it would impose a significant compliance burden on suppliers. […] The same could apply for services that consist of granting the right to access events such as a concert, a sports game, or even a trade fair or exhibition that is basically designed for businesses. If a ticket can be purchased at the entrance of the building where the event takes place, businesses as well as final consumers can be recipients of the service. […] In such circumstances, jurisdictions might consider using a proxy based on the place of physical performance, which would apply both for business-to-business supplies and business-to-consumer supplies […]

Comm8: While I agree that in the above described specific circumstances it would be very hard (if not impossible) for the suppliers to verify the tax status of their business customers, I also recommend to make the above

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1 EU demands that two independent non-contradictory location evidences point to the same country to reliably identify the location of the customer (European Commission, 2014a).
2 South African tax liability is triggered if for the purchase of e-service either the South African residency address is used or payment is made with a South African bank account (Gaarlandt and Harmse, 2014).
3 The seller has no means to reliably verify the personal information provided by the customer, such as the billing address and country of residency.
4 The seller is able to define the country of the bank that issued the credit card only if the credit card number is provided to her/him by the customer or if the third party service provide provides the seller with the first six digits of the customer’s credit card. Further, the seller has access to GPS data and Mobile Country Code of the SIM card only if she/he has access to the mobile device’s operating software (i.e. essentially only if the seller is Microsoft, Apple, Google or Amazon).
recommendation an exception to the general rule. It should be applied only in specific circumstances (e.g. supplying services or intangibles to a large number of customers for relatively small amounts in a short period of time and selling tickets at the entrance of the building where the event takes place). Under different circumstances, where the supplier can reliably, effectively, certainly and simply verify the tax status of its business customer (e.g. if the purchase is conducted online via a specialized portal or app) the general rule for B2B supplies should apply.

3.52 When internationally traded services and intangibles are directly connected with immovable property, there may be circumstances where a specific rule allocating the taxing rights to the jurisdiction where the immovable property is located may be appropriate.

3.53 This is most likely to be the case when there is a supply of services or intangibles belonging to one of the following categories: […]

- other supplies of services and intangibles […] where there is a very close, clear and obvious link or association with the immovable property.

3.55 […] This very close, clear and obvious link or association is considered to exist only when the immovable property is clearly identifiable.

3.59 […] architectural services that relate to clearly identifiable, specific immovable property, could be considered to have a sufficiently close connection with immovable property.

Comm9: I recommend deleting Item 3.59 and the third bullet point of Item 3.53. Instead of requesting that services such as architectural services and the services described in my above example are taxed in the jurisdiction where the immovable property is located, the general rule should apply in such cases.

Comm10: While the OECD Guidelines in this occasion closely follow the EU VAT rules, this might be a good opportunity to reevaluate the overall position. The question arises where to draw the line between the general rules and special rules on the place of taxation. I agree that supplies such as construction, alteration, and maintenance of immovable property are directly linked with a specific immovable property and should be taxed at the location of the property. However the above rule should be treated as an exemption to the general rule as described in Guideline 3.5. In the past I had advised in the following situation: A MNE planned to lay pipeline across several countries. They have established a new company to coordinate all the preparatory work, which recharged all costs to its head office. The company hired a third party contractor to conduct a terrain study of the pipeline route. The pipeline project was aborted before the construction phase begun. Nevertheless, both the contractor and the new company had to register for VAT and the head office had to apply for a VAT refund in all those countries. The process was disproportionally inefficient considering that there was no final tax liability in any of the countries.

Comm11: In a modern society with a functioning e-governance, where all necessary information and documents should be electronically available online, it become normal that architects carry out their services in a remote location – i.e. not necessarily at the location of the immovable property. As no special tax registration and compliance scheme exists for such occasions they would be obliged to register using the standard scheme, probably resulting in tax registrations in multiple jurisdictions. The additional costs of tax registration and compliance in multiple jurisdictions increase the overall costs of their services and reduce international competitiveness between the various architectural firms.

Annex 3 to Chapter 3

Input tax recovery - Refunds

6. It is reasonable for taxing jurisdictions to limit the scope of a simplified registration and compliance regime to the collection of VAT on business-to-consumer supplies of services and intangibles by non-resident suppliers without making the recovery of input tax available under the simplified regime. Where applicable, the input tax recovery could then remain available for non-resident suppliers under the normal VAT refund or registration and compliance procedure.

Comm12: The jurisdictions should strive to make the process of consumption tax refund for non-resident suppliers as simple and as effective as possible. They should setup an online platform for handling the consumption tax refund applications and communication with the non-resident business requesting the consumption tax refund. They should
not request that the applications are filed in paper form and/or by local tax representatives. The communication should be possible in one of the major world languages. The Guidelines should incorporate this recommendation.

Return procedure
7. [...] Tax administrations could consider authorising non-resident businesses to file simplified returns [...] This information could be confined to:
   • Supplier’s registration identification number
   • Tax period
   • Currency and, where relevant, exchange rate used
   • Taxable amount at the standard rate
   • Taxable amount at reduced rate(s), if any
   • Total tax amount payable.

Comm14: I recommend to also request the following information: “Turnover divided per tax rates, inclusive of exempt supplies.” The businesses will have to archive the above information anyway, therefore this represents no additional administrative burden for them. On the other hand the jurisdictions might appreciate receiving a full overview of remote sales conducted in their territories.

8. The option to file electronically in a simple and commonly used format will be essential to facilitating compliance. Many tax administrations have already introduced or are introducing options to submit tax returns electronically.

Comm15: Even in cases of simplified tax returns most jurisdictions still request from the business to log in into their online portal and to file the tax return manually. This is manageable for now, with less than 10 jurisdictions that have implemented the destination principle for taxation of e-services. With potentially (and probably) over further 100 jurisdiction following their suit the process of manual filing of tax returns will become an unbearable and very expensive administrative task.

Comm16: The jurisdictions should allow the businesses to file their tax reports remotely (e.g. by using API, e-signed e-mail with XML attachment, some other form of a secured standard protocol). It should be possible for business to generate their tax return remotely, in their ERP system or compliance software, and file them remotely from their system directly to the appropriate system of the relevant tax administration. The whole procedure should be carried out automatically or with minimum human intervention.

Comm17: The jurisdictions should reach an agreement on standardizing the reporting protocols and processes. This should include an agreement on e-signatures that can be used worldwide – opposite to current situation where every jurisdiction essentially demands that only domestic e-signature service providers are used when submitting the tax returns.

Payments
9. The use of electronic payment methods is recommended, allowing non-resident suppliers to remit the tax due electronically. This not only reduces the burden and the cost of the payment process for the supplier, but it also reduces payment processing costs for tax administrations. Jurisdictions could consider accepting payments in the currencies of their main trading partners.

Comm18: Wherever possible measures to reduce overall transactional costs should be implemented. For example: Instead of requesting that all bank fees are paid by the business, the jurisdictions should accept SEPA payments or equivalent if applicable. With SEPA payments the bank fees are minimized and therefore both parties together are paying less than 1 EUR per transaction. If business was to cover the bank fees by itself this would cost considerably more. It is important for the jurisdictions to remember that by collecting the consumption taxes and paying them onwards to the various jurisdictions the business are essentially acting as agents for the various tax administrations.

5 For purpose of this comment I am counting EU and US as two separate jurisdictions. The other option would be to count them as 80+ separate jurisdictions.
The tax administrations should strive to minimize the administrative and cost burden for the businesses acting for their benefit.

Record keeping

10. [...] Jurisdictions are encouraged to allow the use of electronic record keeping systems [...] Jurisdictions could consider limiting the data to be recorded to what is required to satisfy themselves that the tax for each supply has been charged and accounted for correctly and relying as much as possible on information that is available to suppliers in the course of their normal business activity. [...]

Comm19: Jurisdictions should reach a consensus on which information should be archived and in what kind of format. At the moment this is especially important for the business engaged in the digital economy. Due to specifics of their business situation they are dealing with a large amount of transactions per second and they usually have no means to acquire additional information once the transaction has been completed. For this reason they must be made aware in advance which information must be collected and archived. In addition one should understand that the business will have to gather all the information requested by the various tax authorities. Due to the specific of automatic data collection and the structure of electronic files this means in practice that when one jurisdiction requires one specific type of information, this information must be collected for every single transaction regardless of the jurisdiction where the transaction is actually carried out.

Comm20: For example: For a business it is much easier to prove that supply of e-service has taken place within a specific jurisdiction than to prove that it has not taken place in all other jurisdictions. The EU requires collection of two independent location evidences pointing to the same country in order to determine the location of the B2C customer purchasing e-services. SSUTA requires a “ship to” address. South Africa requires information about residency address and bank account used. While the information collection required by each individual jurisdiction seems reasonable in isolation, it is their combined effect that strains the businesses. The business must collect all of the stated information to be sufficiently protected in cases of tax audits.

Comm21: The jurisdictions should reach an agreement for how long the collected information should be archived. Currently some of the jurisdiction require a 5-year retention period for e-services and other a 10-year retention period. In case of e-commerce business dealing with multiple jurisdictions the longest retention period is the decisive one. Due to the request that business should not temper with the collected data, they split the collected information on a country-by-country basis for archiving purposes. This means that if one jurisdiction prescribes a 10-year retention period all the data has to be archived for 10-years even if every other jurisdiction would request only a 5-year retention period.

Comm22: Master files for archiving and reporting of the collected information and their maximum retention period should be defined universally. For example: The EU has announced that it will publish a SAF-MOSS document that can be used by the businesses to provide the data for the purposes of a tax audit under the MOSS regime (European Commission, 2014b).

Comm23: The Guidelines should also contain a provision about the language to be used for record keeping and correspondence with the tax authorities. The jurisdictions should take notice, that especially in case of simplified registration and compliance systems the e-commerce businesses will not have a physical presence in their country and that they will have to deal with multiple jurisdictions (currently between 30 and 40, in the coming years probably over 100). Translation of all the records into the local language of each jurisdiction would mean a disproportionate effort. I recommend for the Guidelines to define that the records can be kept and tax audits conducted in one of the major world languages.

Invoicing

11. [...] Jurisdictions could [...] consider eliminating invoice requirements for business-to-consumer supplies that are covered by the simplified registration and compliance regime [...] 12. [...] jurisdictions could consider allowing invoices to be issued in accordance with the rules of the supplier’s jurisdiction or accepting commercial documentation that is issued for purposes other than VAT (e.g. electronic

6 Amazon sold 426 items per second during the 2013 Cyber Monday sale (Amazon.com, Inc, 2013).
Jurisdictions could consider allowing this invoice to be submitted in the language of their main trading partners.

Comm24: When customer from one country visits a “brick and mortar” store in another country everybody instinctively understands that the communication will be (probably) conducted in the language of the store’s location store and that the invoices will be issued according to the local accounting and tax rules. In cases when a MNE from one country decides to open a store in another country it is clear that for communication and for invoicing the rules and language at the location of the new store will apply. Only in case of e-commerce there seems to be a confusion which rules and language should be used. The Guidelines define the destination principle for collection of consumption tax purposes only. For e-commerce purposes it is clear that it is the customer who visits the online store of the business. The e-commerce business must collect the consumption tax at the rate of the country of the B2C customer, but it must also account the sale under the accounting rule of the country under which law it operates. However, the e-commerce business cannot issue the invoice twice: once under the rules of the domestic country and the second time under the rules of the country of the customer.

Comm25: If the e-commerce business will be required to issue the invoices under the rules of the country of the customer, state the amounts on the invoice in the local currency and use the local language, then the e-commerce business will very soon have to deal with over 100 different invoicing regulations. Not completely impossible in the days of the modern computer technology, nevertheless very impractical and definitely a disproportional effort.

Comm26: In regard to the language and currency of the invoice I believe that the invoice constitutes only a part of the overall communication between the customer and the e-commerce store. The customer is visiting the existing e-commerce store. In order to make a purchase she/he agrees with the store’s terms of business. I believe that the language and currency of the invoice should be defined in the terms of business. If the customer does not agree with them, she/he will not make the purchase. It is not for the jurisdictions of the customers to prescribe in which language, in which currency, and with which elements the invoice should be issued. They have the right to require from the seller to charge, collect, and pay onward the consumption tax. Insisting on introduction of specific invoicing requirements is a disproportional request.

Comm27: As a best-of-class example I would like to point out Norway, which does not prescribe any specifics in regard to the invoices to be issued when foreign suppliers sell e-services to the Norwegian residents. It merely requests “a list of transactions that concern the sale of electronic services to Norwegian private individuals” (Norwegian Tax Administration, 2015). The EU with a requirement that invoicing rules of each of the 28 member states must be followed represents an example from the opposite side of the specter (European Commission, 2013). At least the EU allows for e-invoices to be issued in a PDF or similar format.

Comm28: I suggest that Guidelines explain why it is impractical and disproportional to expect from the non-resident suppliers of B2C e-services to issue invoices in accordance to the tax rules of the jurisdiction of their customers, in their language and their currency.

Availability of information

13. Jurisdictions are encouraged to make available on-line all information necessary to register and comply with the simplified registration and compliance regime, preferably in the languages of their major trading partners. Jurisdictions are also encouraged to make accessible via the internet the relevant and up-to-date information that non-resident businesses are likely to need in making their tax determinations. In particular, this would include information on tax rates and product classification.

Comm29: This recommendation should be made stronger. Provision of these information should be regarded as a condition for the effective implementation of the destination principle. All jurisdictions should as a minimum provide a standardize database file with valid tax rates for all territories following the SSUTA example. The boundaries database should be synchronized with the IP address database. It would be also beneficial if the jurisdictions could agree upon a standard classification of services and products. – something similar to United

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7 The EU has also compiled a report on VAT rates in use, however only in document form and not as a database (European Commission, 2015a)
Nations Standard Products and Services Code (UNSPSC, 2014). Only all these information together enable to setup a global automated compliance system for B2C supplies subject to destination principle taxation.

Use of third-party service providers
14. Compliance for non-resident suppliers could be further facilitated by allowing such suppliers to appoint a third-party service provider to act on their behalf […]

Comm30: Due to the complexity of the global taxation of services and intangibles the use of third-party global tax compliance service providers is a given reality for almost every e-commerce business. The sole exemption are few the biggest MNE which can afford to employ in-house global tax teams. Everybody else has to use the services of third-party compliance providers. It is likely that in the future these global compliance providers will be non-residents themselves – i.e. that they will not use local agents to submit tax reports. For this reason it would make sense for jurisdictions to enable a simple online access for these global compliance providers to allow:
- Usage of international e-signatures (see Comm17)
- Correspondence in major world languages (see Comm23)
- Filing multiple tax reports in a single session (see Comm16)
- The compliance providers to conduct payments on behalf of their clients, preferably for several clients at once to reduce bank fees (see Comm 18).

Comm31: I point again towards SSUTA as a best-in-calls example on how to handle the compliance with modern technology. It is a system in which third-party intermediaries are certified and subsidized by the states to act as a seller’s agent to perform their consumption tax function (Cockfield, 2014). It is time for jurisdictions to recognize that the additional global compliance requirements introduced as a result of the new destination principle will impose additional administrative and cost burdens on the suppliers. In my experience the suppliers generally wish to comply with all (consumption) tax rules, as long as the following conditions are met:
- Tax neutrality: The consumption tax rules should be followed by everyone: the big players such as the everything-store and by the small part-time entrepreneurs. Nobody should have a tax advantage over the other.
- Simplicity: Simple to implement, simple to register, simple comply with, simple to know which data to collect, verify, report and archive.
- Effectiveness: The tax compliance tasks should be automated or carried out with minimum human intervention and not interfere with the core business and the customer experience.
- Cost neutrality: Jurisdictions impose new rules for businesses which are obliged to act as their tax collecting agents. These activities cost money. 100+ jurisdictions each with different requests make compliance a disproportionally expensive. It is only fair that the jurisdictions should reimburse these costs to the businesses that act as their tax collection agents.

Comm32: A global automated tax compliance system similar to SSUTA would solve all of the above issues. If the jurisdictions would agree to use a small percentage of the taxes collected to reimburse the all certified third-party tax compliance providers for their services, then the system could be introduced on no-cost for the businesses. Most businesses would be willing to introduce free-of-charge third party software to deal with the compliance and tax collection issues for them. This in turn would increase the overall tax compliance and effectiveness of tax collection and result in higher tax revenues for the jurisdictions. By agreeing to fund the certified based tax collection system the jurisdictions would gain the best possible control and supervision of the tax determination and collection process.

Comm33: Additional benefits of the above suggested compliance system for the jurisdictions would be the abolishment of minimal thresholds for the participating businesses (see Comm 36) and increased frequency of the tax liability payments. If the compliance and tax collection system could be simplified and automated, the certified compliance providers would collect the tax charged in real time from their customers (i.e. the suppliers of e-services) and transmit it to the tax authorities on daily, weekly or monthly basis (depending on amounts of collected taxes).

8 Of course, all these documents should be made publicly available free of charge.
Application in a business-to-business context

15. [...] These Guidelines recommend the reverse charge mechanism for cross-border business-to-business supplies of services and intangibles [...] If the customer is entitled to full input tax credit in respect of this supply, it may be that the local VAT legislation does not require the reverse charge to be made. [...] 

Comm34: I recommend that the business customer is allowed to deduct input tax that has been incorrectly charged to her/him instead of having to request a credit-note from the supplier. The Swiss VAT system is the best-in-class example of such practice.

Proportionality

16. Jurisdictions should [...] implement a registration-based collection mechanism for business-to-consumer supplies of services and intangibles by non-resident suppliers, without creating compliance and administrative burdens that are disproportionate [...] 

17. [...] Some jurisdictions have implemented a threshold of supplies into the jurisdiction of taxation below which non-resident suppliers would be relieved of the obligation to collect and remit tax in that jurisdiction, with a view to further reducing compliance costs. [...] The introduction of thresholds needs to be considered carefully. [...] 

Comm35: Part of the simplified compliance process should result in optimization of the reporting obligations. Here is an example of a practice that should be avoided: The EU MOSS regime has implemented a requirement that all invoice corrections must be reported in the tax period when the invoice has been originally issued – i.e. the supplier has to amend original tax returns for up to three years in the past. This obligation results in a supplier having to file up to 12 tax returns every quarter. This requirement is clearly disproportionate and should be avoided by the jurisdictions. They should allow for invoice corrections to be reported in the tax periods when they occur.

Comm36: In my opinion it makes sense for jurisdictions to implement a reasonable low minimum threshold⁹ in order to prevent foreign suppliers of e-services having to register for consumption tax upon carrying out an "incidental" supply of low value. However, if these suppliers would be using the services of the certified third-party compliance providers (see Comm32) the argument of disproportionality would no longer apply. In such cases the minimum threshold could be abolished.

Comm37: The suppliers should be held harmless (see Comm3) if they could not charge and/or collect the consumption tax due to the technical issues on the side of jurisdictions (e.g. if the online tools for verifying the tax status of their business customer is not working, if the jurisdictions have not updated their tax rate databases, etc.) or on the side of the third-party compliance providers (e.g. their software is not working properly).

Chapter 4 - Supporting the Guidelines in Practice

4.4 In light of the practical recognition that the Guidelines [...] will not entirely eliminate the risk of double taxation [...] it is appropriate to identify other mechanisms [...] to minimise [...] the risk of such double taxation [...] and the potential for resulting disputes. 

Comm38: It is also important to implement mechanisms that will enable for suppliers to decide which tax rules to follow in cases when they detect the risk of a double- or multiple-taxation (see Comm6). This is especially important within the scope of the digital economy and supplies to private customers where due to the nature of the e-commerce business these decision must be made automatically and immediately. Any undercharged tax cannot be collected at a later time. Any overcharged tax ruins the customer experience and probably terminates the customer relationship before the sales transaction is made.

4.5. [...] some cross-border transactions may reflect efforts to evade or avoid taxation, even when national legislation would achieve the objective of the Guidelines for parties engaged in legitimate cross-border transactions

⁹ The minimum thresholds implemented by the jurisdictions for registration of foreign providers of B2C e-services are usually in the range 3.800 - 6.700 EUR / 4.300 – 7.600 USD. The exemptions are the EU which has decided against the minimum threshold and Switzerland which implemented a general minimum threshold of 100.000 CHF / 94.000 EUR / 107.000 USD.
with economic substance. In such instances, it is appropriate to recognize that it is not inconsistent with the Guidelines for jurisdictions to take proportionate counter-measures to protect against evasion and avoidance, revenue losses and distortion of competition.

Comm39: Nevertheless the jurisdictions should first take care to implement the recommendations of the Guidelines before they undertake such counter measures. Some current measures implemented by some jurisdictions directly invite the business to structure their operations for tax evasion. A good example of this is the special tour operator margin scheme (TOMS) implemented by the EU. Under it the EU tour operators have to charge VAT on their profit margin and are prohibited to disclose the VAT on the invoice. Other jurisdictions have chosen a different approach. Switzerland for example does not charge VAT for the tour parts taking part outside Switzerland. For this reason it makes sense for the tour operators to sell their online arrangements from outside the EU as they do not need to charge VAT from their margin. This way they can offer lower prices to their customers.

Comm40: Tax optimization is a legal right of every taxpayer. Jurisdictions should first follow the OECD Guidelines and recommendations to harmonize their tax regimes before unduly prosecuting international business for their legitimate activities.

Comm41: The jurisdictions should undertake steps to ensure tax neutrality. These should include active measures for discovering and disabling activities of uncompliant e-service providers. Only by identifying and disabling such businesses the jurisdictions will ensure greater level of tax compliance and prevent illegal and harmful price competition. Without these measurements the uncompliant foreign business will have a double tax advantage over the compliant businesses:
- Their prices will be lower for the uncharged amount of the compliance tax.
- They will save on costs associated with the tax compliance, tax collection, and tax reporting activities.

Comm42: The jurisdictions can employ various traditional and technological approaches to identify and disable the activities of uncompliant businesses such as:
- Introducing whistle-blowers reward programs
- Obtaining information from banks and third-party payment providers, monitoring of credit card payments
- Using crawler programs and bots to identify unregistered online stores

The above measures should be coupled with mutual administrative support to achieve the best overall results.
Bibliography


February 19, 2015

VIA EMAIL
Piet Battiau
Head, Consumption Taxes Unit
Organisation for Economic Cooperation and Development
2 rue Andre-Pascal
75775, Paris
Cedex 16
France
(piет.battiau@oecd.org)

Re: USCIB Comment Letter on the OECD Discussion Draft on International VAT/GST Guidelines

Dear Mr. Battiau,

USCIB\textsuperscript{1} is pleased to have this opportunity to provide comments on OECD’s discussion draft on VAT/GST Guidelines. Nancy Perks will be presenting remarks on behalf of USCIB at the public consultation.

General Comments

1) The business community appreciates the role the OECD has taken with regard to the development of the International VAT/GST (hereinafter VAT) guidelines. The secretariat has designed a process that obtains business input into the guidelines both through the TAG process as well as through the public consultation. The success of the global forum in Tokyo and the broad support of the B2B guidelines by governments from all over the world is also indicative of the thoughtfulness and care that went into drafting those guidelines. However, USCIB believes that the rushed approach to finalizing the B2C guidelines resulted in much more limited and fairly narrow business input into the process. To accelerate the process the OECD limited business participation in the working meetings. There is a plan for only one public consultation. USCIB feels that the urgency for finalization is somewhat artificial as it was driven largely by the BEPS timeline.

\textsuperscript{1} USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.
2) The BEPS debate has been almost entirely focused on income tax. Despite some “lip service” to VAT as part of action plan 1, to date there has been a lack of discussion around the role of VATs in the overall balance of tax rights. We think this is a discussion that sorely needs to take place. Tax policy makers should be more cognizant of the overall burdens of various taxes and who bears them. Tax policy should not be made in separate silos. USCIB believes that a much more cogent discussion of the role of tax policy in a digital economy could be had if both VAT and income taxes were part of the same discussion.

3) Clarity in the application of VATs is critically important. This is so because unlike income taxes there is no agreed upon method for resolving VAT disputes. Thus, if VAT rules are unclear, a business may find that two (or more countries) may assert the right to impose VAT. This is especially likely to occur when the transaction involves remote suppliers of digital services. Even if countries agree on the standard to be applied (usual residence of the customer) if the criteria used to determine that residence are prescribed and differ, then double taxation is likely. Double VAT will create a significant barrier to trade and should be avoided.

4) Due to competition and the price elasticity of demand, it would be erroneous to assume that VAT’s are economically born by consumers in all cases. Since most VAT countries (Canada is a notable exception) require that prices are stated inclusive of the tax, multinational companies complying with remote seller registration requirements will necessarily bear all or a portion of the cost of VATs where they are constrained from raising prices. Significant differences in VAT rates in the EU combined with competitive pressure for uniform pricing, for example, increase the VAT cost borne by digital economy businesses. This impact is well understood by the business community but we believe that it is not as well understood by governments. The resulting increased tax on business needs to be factored into the BEPS debate to avoid a skewed result to the process.

5) VATs may be a far more efficient means of collecting a tax from companies that are able to exploit a market without being within the market. There are many reasons for this and we point out some of the key factors:

- The base upon which a VAT is computed is simpler and subject to few adjustments meaning that the base of a VAT is much more likely to be highly

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2 USCIB has been critical of the OECD’s proposals on Action 14: Make Dispute Resolution Mechanisms More Effective. We stand by those criticisms, but at least there is a dispute resolution mechanism available to resolve income tax disputes, that is not the case for VAT.
similar if not identical across jurisdictions making it far simpler to comply with, administer and audit.

- The base of VAT is far more objective than the base of an income tax. Therefore, the disputes over where the tax is due are likely to be much more limited than with an income tax where tax authorities often cannot even agree on what parts of the productive process creates value and where that occurs.

6) Since VATs tax consumption the market jurisdiction is able to tax 100% of any final consumption that occurs in that jurisdiction. This gives the market jurisdiction a significant share of the total taxes -- both VAT and income -- borne by a corporation accessing that market. USCIB continues to believe that a combination of an origin-based income tax and a destination-based VAT appropriately divides the jurisdiction to tax between the countries where income-producing activities occur and the countries where consumption of goods and services occur.³

7) In general USCIB endorses the guidelines. However, the principle reason for this endorsement stems from the need to ensure that businesses operate as much as possible on a level playing field that does not create artificial advantages of one business over another solely as a result of the location of the business establishment. (This is to be distinguished from sources of advantage that arise through competences in approach, suitability of products, more effective business and operational models.) USCIB recognizes that for many of the jurisdictions that adopt VATs that they are a significant, if not a primary source of revenue. Thus, the guidelines need to and do propose a uniform system for applying VAT to international transactions. Whether the proposed solution will achieve the intended result will only be ascertainable as jurisdictions adopt the guidelines into their national legislation. In this regard we believe that the guidelines do not go far enough in recommending that governments take simple and pragmatic approaches. For example, the discussion on the usefulness of thresholds as a way to ease the administrative burden for small traders or “incidental transactions” could be developed in a way to provide useful guidance to governments that were interested in considering them. While we agree such information might not be appropriately part of “the guidelines”, we do believe that the OECD has a role to play in defining best practices for national legislation. Best practices require an appropriate balance between the local need for remote seller taxation due to competitive distortions, and the administrative burden that such entails.

8) As indicated above, we believe the B2C guidelines were rushed and suffer from the lack of broader business input. While we make some specific suggestions for corrections and clarifications below, we wanted to suggest an alternative approach. The primary driver

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³ This issue is discussed at length in our comment letter on the digital economy. A link to that letter is included here http://www.uscib.org/index.asp?documentID=827. The in-depth discussion of this issue is on pages 11 and 12 and 20 – 23 of that comment letter.
for the guidelines appears to be the need to create a level playing field between
domestic suppliers that are required to charge VAT to their customers and non-resident
suppliers that currently are not obligated to charge VAT when they sell into countries
that do not impose a remote supplier registration obligation. The sale of electronically
delivered goods and services across border is appropriate to cover in OECD guidelines.
However, we have some concern about the extent to which the guidelines address
transactions which are entirely domestic—for instance the on the spot rule would seem
to address transaction that are essentially domestic and already addressed in national
law. Similarly, transactions relating to immovable property are also likely to be
domestic transactions in a B2C scenario.

9) An alternative approach for the B2C guidelines might be that since consumer
transactions are largely domestic, they remain outside the scope of the OECD guidelines
except for B2C supplies of electronically delivered goods and services. This would
significantly simplify the document as well as highlight the principal intent which is to
create a level playing field where, absent the guideline, there is a competitive
disadvantage for local suppliers. In addition, such an approach would reduce the need
to focus on rules that principally address domestic transactions and thus might be more
acceptable to a larger number of governments.

10) If the OECD determines that it is preferable to retain the existing approach outlined in
the draft guidelines, we have the following suggestions.

11) USCIB endorses the “on the spot guideline” of paragraph 3.5 (box top of page 7). It
appropriately creates a separate rule for transactions when everything happens in the
same place and at the same time. This rule is critical to permitting legacy transactions
to continue to be taxed as they always have been.

12) Paragraph 3.8 provides for the use of a tax identification number to establish a
customer’s status as a business or consumer. USCIB supports the use of VAT
registration numbers to identify a customer as a business. We do not, however, support
the adoption of verification requirements. Even simple verification requirements will
slow transactions. In the case of remotely delivered electronic transactions, slowing the
transaction will mean that some transactions will not take place. In addition, the costs
of verification may make a small transaction uneconomical. The benefit to governments
must be balanced with the additional burden on business. A verification requirement
would not reflect an appropriate balance between the benefit and burden. We also do
not believe that the personal tax identification numbers of individual taxpayers ought to
be used to identify individuals as consumers. These numbers are sensitive information
the disclosure of which can lead to identity theft and should be protected from routine
disclosure. Requiring individuals to provide personal tax identification numbers to
determine whether VAT is applicable will discourage individuals from engaging in transactions because they do not wish to disclose this information.

13) Paragraph 3.18 refers to paragraphs that do not exist in the consultative document. Those paragraphs in the International VAT Guidelines discuss the application of the main rule to MLE’s. This cross-reference seems inaccurate, as it should refer to the specific rules. Thus either the cross-reference is incorrect or it is not clear what the reference is intended to signify.

14) USCIB also endorses guideline 3.6 (box bottom of page 7). However, USCIB has significant concerns with the commentary on determining the jurisdiction of the usual residence of the customer. For example, we have concerns about the statement in paragraph 3.23:

   Particularly in e-commerce, where activities often involve high volume, low-value supplies that rely on minimal interaction and communication between the supplier and its customer, suppliers might not be able to rely on one single source of information, such as a contract, to reliably determine the place of usual residence of the customer of a business to consumer supply.

15) The sentence can be read to suggest that it would be appropriate for governments to require a business to obtain more data points to support the taxation determination for a 99 cent transaction than for a large business contract. The paragraph continues:

   Jurisdictions should provide clear and realistic guidance for suppliers on the information that is required to determine the place of usual residence of their customers in a business to consumer context.

16) USCIB is concerned that this guidance might encourage governments to write overly prescriptive rules (such as the EU rules) that run the risk of becoming obsolete as technologies, business models and payment methods continue to evolve very rapidly. It would make more sense to require businesses to use the “best” information available to determine customer location. Such a standards based approach to drafting legislation is much more likely to remain relevant over the long term in rapidly changing environments. This would eliminate the need for constant revisions to legislation which add significant cost to governments as well as taxpayers.

17) The requirement to use the best available information is a high standard. Businesses would be required to explain why they believe the information used is better than other potential sources. It is important to note, that businesses will most likely use the same information on customer location to meet a variety of business and other regulatory purposes. For example US businesses are required to screen customers in order to comply with US laws that prohibit sales into certain countries or to certain parties.
Companies have business reasons to want to understand where customers are located in order to determine where to spend marketing dollars, and which teams should be paid incentive compensation bonuses. Knowing where consumers are located is simply fundamental to understanding what customers want and how to market to them. If a business uses the same information on customer location for all purposes or has a reasonable explanation for a variation, governments should realize that this is in fact a very high standard.

18) There is cost and risk with collection of customer location data. Personally identifiable information (PII), is risky and costly to retain due to the critical importance of keeping that information safe and confidential as well as accurate. It is important the governments bear in mind the costs of safely storing customer location taxation data in formulating their approaches to what their legislation requires as regards the amount of information collected and the length of time it is required to be retained. Governments should note that sensitive data subject to intensive safeguards will be more costly for them to examine.

19) There is an ambiguity in the last sentence of paragraph 3.23 that we recommend be clarified:

... while safeguarding flexibility for businesses with respect to the information that is accepted for identification of their non-business customers and for determining their place of usual residence.

20) It is not clear from the language whether the intended meaning is that businesses take measures to determine whether a customer is not a business or whether the language requires that non-business customers be named. Clearly we believe that the former is what was intended as the latter is simply not appropriate. A final draft should eliminate the ambiguity.

21) USCIB fundamentally disagrees with the suggestion in paragraph 3.24 that “Jurisdictions may require that the reliability of such information be further supported through appropriate indicia of residence.” The requirement to use multiple indicia to determine residence raises the risk that a transaction could be viewed as taxable in multiple countries simply because there is a failure of the IP address to match the credit card billing address because a customer happened to make a purchase while on vacation. Such a result is avoided where a standards based approach is deployed that requires businesses to use the best available information.
22) Paragraph 3.26 of the discussion draft reference to paragraphs 3.60-61 of the consolidated guidelines is unclear. A better reference would be to the same paragraph numbers of the International VAT/GST guidelines published in April 2014.

23) Guideline 3.7 (box on page 10) poses some problems as currently drafted. First, it creates a difference in the level of burden governments have in developing rules to tax on the spot supplies for Business to Business transactions that is not created for Business to Consumer transactions. This difference could be exploited by governments or businesses potentially to achieve results that were never intended. USCIB recognizes that this current construct arises from the way the work was originally organized and appreciates the sensitivities around work that would be viewed as “re-opening agreed guidelines.” However, we believe a solution is desirable and it is likely that it would have been achieved by the TAG if it had a more appropriate amount of time to produce the B2C guidelines. One suggestion is to propose a work plan that will manage a careful and thoughtful consolidation of the B2B and B2C guidelines. The consolidated guidelines would establish a common default rule (no longer a main rule) based on customer location (as appropriately defined for businesses and consumers). 3.7 would remain as the criteria for the Specific Rules. 3.5 would become a specific rule for both B2B and B2C in its current form with the added requirement that the supplies in questions are made to both businesses and consumers. 3.8 would be another example of a specific rule. With both 3.5 and 3.8 recognized as appropriate specific rules internationally, there should be broad recognition that these are specific rules the take precedence over the default.

24) Paragraph 3.36 refers to “use and enjoyment” as potential proxies for place of taxation. USCIB believes that “use and enjoyment” is never an appropriate proxy as a supplier is rarely privy to this information at the time of transaction. Reference to use and enjoyment should be deleted from this section.

25) It is not clear from the organization of the paper whether the framework outlined in D.1 is applicable to supplies connected with movable and immovable property. USCIB thinks they should both be governed by that framework and that this should be made clearer in the paper.

26) Paragraph 3.48 and section D.3.5 is really an insufficient development of a complex area—work on tangible goods. The nature of supplies falling under work on goods area could potentially change significantly with the growth of devices connected to the internet and create the potential for confusion as to whether guidelines 3.2 (location of the customer for B2B supplies) and 3.6 (customers usual residence for B2C supplies) are preferable to a rule referencing the location of the property. USCIB recommends that the OECD simply indicate that work on movable goods is an area that requires additional
study prior to the development of recommendations. We believe this is much more responsible than the current paragraph which essentially suggests that countries can do as they wish.

Annex 3

27) Annex 3 paragraph 4 lists the information required to register under a simplified registration procedure. The last two bullets should be limited to the websites (URL) of the business with respect to sites through which commerce in the specific country is conducted. Similarly it is unclear which national tax identification number is required. At the most, a remote business should only be required to provide the national tax identification numbers of the country of consumption and its country of establishment (or tax residence).

28) Paragraphs 11 and 12 of annex 3) should clearly state that no formal tax invoice is required for B2C transactions. Issuing formal tax invoices or complying with complex electronic invoicing systems is not warranted for B2C transactions where the customer has no right of input tax deduction. Paper invoices and or invoices that require either ink or digital signatures often cost more than the value of the underlying transaction.

29) USCIB also wishes to stress the importance of using a standards based approach to determine customer location. Only this type of approach would allow businesses to deploy a consistent global solution. The cost of complying with different requirements to use different indicia will escalate with the number of countries that adopt such an approach. Annex 3 should include guidance on customer location and such guidance should be standards based as described above.

30) USCIB wishes to stress, that as a practical matter businesses will only comply if the cost and effort of doing so is reasonable given the size of the market opportunity. Countries that seek to require businesses to create local establishments, or register a PE, will likely find that their opportunity to enjoy the internal growth in their economies and in the skill sets of their populations will be significantly curtailed.

Chapter 4

31) Chapter 4 only highlights the amount of work that remains to be done in order to create a fair and effective regime for VAT imposed on cross border transactions. The business community has devoted a significant amount of time and effort to assist the OECD and national governments to help them understand how this regime might be developed and what options may be workable. Chapter 4 makes clear that governments will always have recourse to discuss disputes and work with other tax authorities regarding issues with taxpayers and abusive schemes. However, there is still no means by which
companies that are subject to multiple claims of taxation on the same transaction can seek effective redress.

32) As these guidelines are implemented into national law and enforced by national tax administration, the primary focus may shift from maintaining neutrality and achieving a level playing field to one of revenue maximization. It is far from clear what recourse businesses would have at their disposal to address multiple claims of taxation of the same transaction arising simply from different tax authorities differing preferences for indicia. This is one of the principle reasons that we feel a standards based approach to determining customer location is so critical to the success of the guidelines.

Sincerely,

William J. Sample  
Chair, Taxation Committee 
United States Council for International Business (USCIB)
Dear Piet,

International VAT/GST Guidelines for B2C Supplies

I write on behalf of the VAT in Industry Group (‘the Group’), which draws its membership from a broad cross-section of industries with operations in the UK. A list of current members can be found at Annex 1 to this letter.

The Group would like to thank the OECD for the opportunity to comment on the recently published draft guidelines, which represent a significant milestone in the development of a coherent international framework for VAT and like taxes. It is to be hoped that widespread adoption and consistent application of the guidelines will lead to greater certainty for both taxpayers and administrations and a reduction in instances of double or non-taxation.

The Group does, however, have some comments it would like to make, in particular in relation to proportionality, and hopes that these will be of assistance during the next phases of development of the guidelines.

On the spot supplies

The Group agrees with the proposed definition and place of supply of ‘on-the-spot- supplies. The Group feels, however, that further guidance may be needed on the meaning of the phrase “the presence of…the person performing the supply” particularly in the context of supplies which are performed on a principally technological level. The EU approach, exemplified in the Berkholz case, may be of assistance here – i.e. the presence of human or technical resources sufficient to render the supply.

Other supplies

The introduction to section C of the guidelines sets out some relevant background to the taxation of B2C supplies. It states that the taxation of “business-to-consumer supplies of services was reasonably easy in the past, when consumers typically purchased services from local suppliers and those supplies generally involved services that could be expected to be consumed in the jurisdiction where they were performed” and goes on to note that the “emergence of the global economy with its growing reliance on digital supplies has created challenges for this traditional approach”.

The Group agrees with this analysis, noting in particular the trend for certain digital supplies to consumers to be supplied to consumers remotely. Against that background the Group believes that a move away from the “relatively easy” taxation position of the past is justified in relation to the identified class of digital supplies (howsoever defined).

However, the Group believes that the very broad approach adopted by the Guidelines, which essentially seek to treat all supplies other than ‘on-the-spot’ supplies as supplied in the country of the customer’s residence, goes further than would appear necessary. Given the increased compliance burdens such a change will place on suppliers, this would not appear to be a proportionate response to the challenges noted.
The Group notes that several countries have adopted or are in the process of adopting or discussing similar rules. The EU has adopted such rules in relation to electronically supplied services (ESS), telecommunications and broadcasting, Switzerland in relation to ESS and telecommunications and South Africa, Norway and Iceland in relation to ESS only. Japan has recently announced its intention to introduce similar rules, again focussed on just digital supplies.

It appears that the difficulties faced by origin based VAT systems are predominantly related to digital supplies. Given the increased compliance burden imposed by a move to taxation at the place of customer residence, the Group recommends that the Guidelines be more limited in their scope and focus primarily on those categories of supply, such as digital supplies, which are empirically observed to be supplied remotely to the detriment of neutrality.

On a related point, the Group would also like to highlight the importance of jurisdictions implementing proportionate VAT registration thresholds (small undertakings exemptions) alongside any move to tax according to customer location. Thresholds do not, in the Group’s view, create any material distortions of competition but they are essential to ensuring proportionality – in particular in balancing the costs of tax compliance (both for taxpayers and tax administrations) with the revenues due to administrations – and in reducing barriers to market access.

The Group notes that of the countries listed above, all bar the EU bloc have implemented some form of foreign VAT registration threshold. The experience of the recent introduction of the EU rules, at least in the UK, has been mixed, with small business in particular faced with a significant increase in their compliance costs. Reports are that many of these businesses (200 according to the website http://euvataction.org/) have closed in the face of these disproportionate costs.

Adoption of a consistent level of threshold by different countries would be preferable and would simplify compliance further still although the Group appreciates that this may be difficult to achieve in practice. In any event, easy access to information about the tax rules in a country, including but not limited only to the existence and level of any VAT thresholds, is an important driver of compliance and the Group hopes that the OECD could actively encourage tax administrations to make basic information readily available online.

Exceptions

The Group notes that the guidelines further set out principles upon which exceptions to the place of supply rules defined should be assessed. In the Group’s view, the adoption of additional proxies should be limited to the greatest extent possible as they have an obvious potential to create situations of double or none taxation where adoption is not globally consistent.
Administration

The Group would also like to briefly comment on a number of issues of a more administrative nature.

- The determination of the place of customer residence can be challenging, particularly in the context of low value supplies where there may be little scope for collecting a significant amount of customer data. The Group believes that determination of the place of customer residence should as far as possible be by reference to information which is readily available at the time of supply. Any guidelines should avoid being too prescriptive.

- With regard to the format and content of any simplified VAT returns, the Group notes that the OECD does not recommend that input tax be included but also notes that many jurisdictions do not have any mechanism for the recovery of input tax by foreign business. We would recommend that further consideration be given as to how best to ensure neutrality in the context of a simplified compliance regime.

- The Group agrees that serious consideration should be given as to the merit of relaxing formal invoicing requirements in respect of B2C supplies. Compliance with sometimes very disparate requirements of different authorities is both legally and technically challenging.

- The Group hopes that jurisdictions will not require books of record to be maintained locally merely as a result of the place of supply being in that country for VAT purposes.

- The Group believes that any requirement to appoint a tax representative should be optional and not mandatory, noting the increased costs of compliance in countries in which appointment of a tax representative is mandatory, particularly where that representative incurs some fiscal liability for the tax affairs of its client.

- The Group would like to ask the OECD to consider whether the initial phases of a simplified registration process could be managed by the ‘home’ tax administration, and the practical issues arising. Such an approach would remove barriers to compliance and also assure tax administrations of the bona fides of requests for VAT registration.

- The Group notes the potentially significant shift in taxation scheme envisaged under the guidelines and hopes that the OECD encourages countries to adopt reasonable timescales for implementation, allowing sufficient notice in view of the likely material IT and process impacts of any change of law.

I trust that the above comments will be of interest and assistance to you in the further development of the OECD’s guidelines and of course I, and the Group, would be happy to participate further in this important work as it progresses.

Yours sincerely,

Julian Ogden
Chairman
VAT in Industry Group
Annex 1 : List of VIG members

- GE Aviation
- Balfour Beatty plc
- Rolls-Royce Plc
- Telefonica Europe
- Hutchison Whampoa Europe Limited
- Tesco plc
- NSG Group
- Vodafone plc
- BAE Systems plc
- Ricoh Europe
- AstraZeneca UK Limited
- United Biscuits plc
- Unilever UK
- Everything Everywhere Limited
- Life Technologies
- Volkswagen FS Ltd & Volkswagen Group
- Diageo
- Telereal Trillium
- Pearson plc
- Whitbread
- S C Johnson
Dear Mr Battiau,

GUIDELINES ON PLACE OF TAXATION FOR BUSINESS-TO-CONSUMER SUPPLIES OF SERVICES AND INTANGIBLES

I am writing in response to the discussion draft issued by the OECD in relation to the above mentioned guidelines. Whilst there are many comments that could be made in support and critique of various elements, and no doubt will be by others, I would like to confine myself to one point of singular importance.

In overview, I support the OECD’s efforts to promote neutrality but am concerned that neutrality is being pursued to the detriment of efficiency. As you will be aware, the principles of neutrality and efficiency together form the first two Ottawa Taxation Framework Conditions – it is clear that they have for a long time both occupied an eminent position as guiding principles, but the draft guidelines mark a significant dilution of this well established position. The inclusion of registration thresholds as a fundamental feature of the guidelines would redress this imbalance.

Neutrality and efficiency

I agree that neutrality should be a central tenet of any VAT system and that neutrality is best achieved by application of the destination principle. I also agree that the destination principle is best implemented, for B2C supplies of services other than ‘on the spot’ supplies, by reference to the place of usual residence of the customer and that VAT collection by the supplier seems the only practicable means of administering this, at least within the constraints of current technology.

But I cannot agree with the statement at paragraph 3.12 that such a place of taxation rule “is also reasonably practical for suppliers to apply”. In my experience such a rule would, on the contrary, be burdensome, complex and costly.

This is not to say that the proposed place of taxation rule is inappropriate under any circumstance. Rather it is a question of balance between the competing objectives of neutrality and efficiency. For a business with significant trade in an overseas jurisdiction it is not unreasonable to expect that business to take the necessary steps to comply. But there are up front and ongoing costs associated with overseas tax compliance and there needs to be explicit recognition that placing those same burdens on businesses which have immaterial levels of overseas trade is a wholly disproportionate response.

There are two broad classes of business to which this comment is most likely to apply. The first and most obvious is small enterprises. The second is larger businesses which operate in one or more markets only (which could be by...
choice or due to external constraints such as the regulatory environment) but which, due to the nature of their operations, also incidentally secure small numbers of customers who are usually resident outside of the countries in which they predominantly operate.

**Simplified registration**

Annex 3 sets out, in some detail, the desirable features of a simplified registration regime. It is well considered and I unequivocally agree with the various points made. However, to equate a simplified registration regime with a resolution of the administrative difficulties of overseas tax compliance is to misunderstand the end to end impact of those tax requirements on businesses. Registration and compliance are of course part of that picture and simplification of these elements is welcome; but a more significant share of the difficulties remains.

The impact of entering a foreign and unknown tax jurisdiction extends far beyond the basic act of registration and ongoing compliance. It is necessary to understand how services are taxed – not just the rate, but also the time of taxation and many more detailed considerations, for instance as to how credits or bad debts should be reflected. This knowledge, once acquired, must be kept up to date. It is also necessary to acquire language capabilities in order to respond to routine correspondence or audit enquiries – and all of this in the likely context of a geographically and culturally distant legal system.

**Registration thresholds**

A simple answer to this exists and is briefly referenced in the guidelines – implementation of registration thresholds. This concept is not new or difficult and is an accepted part of the tax environment in the majority of VAT systems worldwide. It is about striking an appropriate balance between neutrality and efficiency – the collection of immaterial amounts of VAT from a large number of businesses is inefficient both for those businesses and for the tax administration; conversely the non-taxation of an immaterial level of sales does not greatly offend neutrality.

A strongly analogous approach is indeed already adopted by many jurisdictions in the field of cross-border B2C supplies; albeit in this case in respect of supplies of goods rather than services. Many countries have implemented a low value import exemption, which is, put another way, nothing more or less than a taxation threshold. This commonly seen policy choice is about balancing the revenue collected from tax with the cost of collecting it – about balancing neutrality and efficiency.

A key question that arises is the level at which a threshold should be set. It is my view that such thresholds need only be very modest; indeed they should be so in order to preserve neutrality to the greatest extent. However, I do not believe that there is a single answer to this. The balance point between neutrality and efficiency is likely to differ from country to country depending on a number of factors – the size of the economy; the existence and level of domestic tax thresholds etc. – and the decision is therefore best left to each jurisdiction to consider for itself.

That said, I believe the OECD should come out explicitly and strongly behind the concept of thresholds (at whatever level). Without that, the guidelines do not represent a practical response to the question of B2C taxation of services.

**Experience to date**

The underlying position taken in the guidelines is not a novel solution but has, in various forms, already been adapted into law by the EU, South Africa, Norway, Iceland and Switzerland to my knowledge. Similar rules have also recently been proposed in Japan. The EU stands here as the lone example of implementation without a threshold.

Although the European Commission and EU Member States have taken very significant steps to reduce the administrative burden on business of the EU rules, the full ramifications of the absence of a threshold are only just beginning to be felt now we have passed the 1 January 2015 implementation date. In the UK alone, over 200 small businesses stopped trading entirely in the first week of 2015 due to the impact of these rules and there are repeated calls from European MEPs for a threshold to be introduced. If tax rules create a situation where the only rational decision for a business to make is to cease trading, there must surely be something wrong with those tax rules.
Conclusion

Paragraph 3.3 sets out five objectives of the guidelines, namely ensuring that:

- international neutrality is maintained;
- compliance by businesses involved in these supplies is kept as simple as possible;
- clarity and certainty are provided for both business and tax administrations;
- the costs involved in complying with the tax and administering it are minimal, and
- barriers to evasion and avoidance are sufficiently robust

The discussion draft meets only three of these objectives, whilst the impact of the second and fourth noted objectives appears to have been materially underestimated. With the recommendation of thresholds as a prerequisite to any change in the place of supply rules, all five objectives would be achieved.

Yours Sincerely,

Lee Hurst
Head of Indirect Tax