Public consultation on the OECD International VAT/GST Guidelines

CALL FOR COMMENTS

FEBRUARY 2013

ODILE COURJON

About A3F

A3F is the *Association des Femmes Fiscalistes Françaises* (French Women's Tax Association).

To date, A3F has 90 members with recognised professional experience working in different capacities in the tax sector: tax directors, corporate tax experts, partners in law firms, lawyers, members of professional groups, editors of tax revues and lecturers in taxation.

Purpose of A3F:

To provide a forum for dialogue and meetings between women tax professionals pursuing their activities in public and private sector bodies.

To co-ordinate with women tax professionals from other countries as well as other associations, both in France and abroad, representing the interests of women tax professionals.

To initiate a dialogue with the authorities on tax reform.

To promote the role of women tax professionals working in French, European and international organisations and bodies, in public administrations (and in the case of France the tax administration), in associations and in private companies.

To promote and uphold the legal rights of women, particularly in terms of job seeking, parity and the fight against inequalities in the workplace.

Background

- The entire draft consolidated version has been reviewed.
- The Guidelines on the ‘destination’ principle mentioned in chapter 1 do not elicit any comments on our part.
- The Guidelines on the VAT ‘neutrality’ concept mentioned in chapter 2 do not elicit any comments on our part.
- Chapter 3 elicits the following comments.

Comments on chapter 3

• Comments on paragraph 3.3

- Confirmation is needed that the Guidelines in paragraphs 3.2 to 3.7 only concern businesses that are fully subject to VAT, to the exclusion therefore of zero-rated businesses which will be covered by a later and specific review by the OECD.

- Confirmation is also needed that paragraphs 3.2 to 3.7 only concern transactions between parties acting in good faith.

• Comments on Guideline 3.3

- A business agreement comprises a number of mutual rights and obligations that necessarily go beyond more than just the identity of the customer.

- Shouldn't the text state that a business agreement determines **in particular** the identity of the customer, but also primarily the nature and modalities of the supply? This seems to be expressed in Box 3.1, on page 34, which is not a Guideline – which is a very great shame: Box 3.1 should be a Guideline in that, besides the parties and the identity of the customer, the agreement must determine the supply and the price. There are clearly three components: the identity of the parties, the supply and the price.

Comments on chapter 3

• Guideline 3.4: Concept of establishment

- The concept of establishment is never defined. Given that the entire rationale of the re-charging method is predicated on the existence of an establishment of use, it is imperative that the OECD's work define what is meant by "establishment" for VAT purposes.

• Guideline 3.5: External costs

- It does not seem possible for most businesses to allocate VAT taxing rights in two steps **in a way that is totally dissociated** from the rules on transfer pricing or recharging for corporate tax purposes.

- It is therefore crucial that reference be made to the transfer pricing rules applicable within a group that has several establishments in different jurisdictions, so that the documentation on transfer pricing, where such documentation exists, **can be accepted** for VAT purposes. This is not clearly stated in paragraphs 3.19 and following, which creates a legal uncertainty.

- The existence of a transfer pricing method and documentation must be capable of being **accepted for VAT purposes if it is accepted for the purposes of corporate/direct tax**.

Comments on chapter 3

• Comments on paragraph 3.23

- The paragraph states that Guideline 3.5 does not apply to internally generated or developed services or intangibles. It is unclear what the OECD wishes to cover by this paragraph.

- This paragraph appears to be aimed in particular at subsidiaries in the banking sector. However, in principle the Guidelines only concern businesses that are fully subject to VAT.

- In groups whose activities are fully subject to VAT, the activity of a local subsidiary will by definition be taxable at 100% (sales subsidiary, supply of a service), which makes it unclear what this paragraph is supposed to cover.

- The recharging of internal costs to a fully taxed subsidiary will not affect VAT neutrality: consequently, both external and internal costs can be recharged to the subsidiary.

- In contrast, if the subsidiary is not fully taxed (bank subsidiary), there is a risk that the internal recharging method will result in double taxation: once at the level of the customer and a second time at the level of the establishment of use.

Can this paragraph be seen as an attempt to find a compromise with the EU principle enshrined in the case law relating to the FCE Bank (2006) judgement, according to which relations between headquarters and subsidiaries are outside the scope of application?

Comments on chapter 3

• Comments on paragraph 3.40

- What we see in practice is that in order to determine the identity of the customer in a supply chain, the customer's VAT number is used as an indicator allowing the location and identity of the customer to be determined.

- In the case of a central procurement agency or of recharging in a chain, each transaction must be analysed in the light of the commercial agreements and in most cases it is the VAT number on the invoice and its coherence with the party charged (as shown by the commercial documents and invoice) which determine who the customer is.

- In the case of headquarters or multiple subsidiaries and therefore multiple VAT numbers, good market practices require the VAT number of the subsidiary which effectively uses the service to be shown in the invoice when the latter is charged directly by the supplier. This good practice should be indicated by way of example.

Comments on chapter 3

• Comments on paragraph 3.61

- What is basically stated here is that the customer's establishment which has entered into the business agreement with the external supplier is required to subsequently charge the other establishments of the MLE using the service or intangible ...

- This phrase confirms the existence of an **obligation to recharge for VAT purposes**, as stated above.

- This recharging obligation cannot be dissociated from the rules applicable to transfer pricing.

- It is therefore very important to refer to these transfer pricing rules to ensure that they are **for VAT purposes if they are accepted for the purposes of corporate/direct tax.**

Comments on chapter 3

• Comments on paragraph 3.70

- The last sentence of this paragraph states that "Whatever allocation key is used, it must be capable of being justified and applied consistently without creating undue compliance and administrative burden for businesses and tax administrations."

- Once again, it would appear to be very important to refer explicitly, here too, to the **acceptability of the transfer pricing documentation**.

- A different sharing of costs to that applicable to transfer pricing would result in a *de facto* excessive compliance charge for businesses.

Comments on chapter 3

• Comments on paragraph 3.83

- This paragraph seems to go beyond what a "fair and reasonable apportionment" would require, particularly in cases where the provision is made for the establishment of use to apply VAT **as if** a recharging agreement were in force.

- We recall that with regard to VAT, there is no concept of a service deemed to have been carried out as there is in direct taxation: either there is a transaction or there isn't.

- Consequently, we suggest that the final bullet point in paragraph 3.83 be deleted, or, failing that, redrafted to read as follows:

"the establishment of use has applied VAT in accordance with the agreement signed with its headquarters …" .

Comments on chapter 3

• Comments on paragraph 3.84

- This paragraph seems to us to be absolutely fundamental to the approach that businesses should adopt. We cannot but agree with the joint use with the tax administration of the information already available for accounting, tax and regulatory purposes in order to avoid creating new methodologies and processes solely for VAT purposes.

- In particular, if VAT documentation is required, it is important to stress that it can **draw on already existing documentation relating, for example, to transfer pricing, or it can be supplemented by a VAT analysis**.

- **This paragraph should be inserted much earlier in the texts and should probably be placed at the very beginning to chapter 3.**

- Indeed, as already stated above, drafting VAT documentation differently to that relating to corporate tax runs the risk in many cases of resulting in tax uncertainty.

Comments on chapter 3

• Comments on Guideline 3.7

- We fully appreciate how difficult it is to define services or intangibles directly connected with immovable property.

- As this Guideline is a principle of exception, it should be given a **restrictive interpretation**.

- In this respect, paragraph 3.101 includes "other supplies of services and intangibles that do not fall within the first two categories but where there is a very close, clear and obvious link or association with the immovable property".

- It seems that many countries may well have diverging interpretations of what constitutes "**a very close, clear and obvious link or association**".

- Let us take the example of services relating to the expert appraisal or architectural design of an immovable property. The expert may give an opinion from a remote location, he may visit the property and then go away again. The architect prepares drawings for a property project. These drawings may well be used or may equally well never actually be used to construct a building.

- For expert appraisal services, do we fall within the general rules or within the scope of Guideline 3.7?

- We are not convinced by the analysis whereby an architect's services are work relating to immovable property, particularly in cases where the architect's drawings never give rise to construction of a building.