SwissBanking

Mr. Piet Battiau
Head of Consumption Taxes Unit
Centre for Tax Policy and Administration
OECD
piet.battiau@oecd.org

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JBR

OECD INTERNATIONAL VAT/GST GUIDELINES

Dear Mr. Battiau,

Reference is made to the draft consolidated version of the OECD International VAT/GST Guidelines published in February 2013.

We welcome the publication of the draft guidelines, which aim at setting standards at international level and we thank you for the invitation to comment on them.

We will address a few points, which we consider important. Our points mainly address the issue of the need of certainty for the business as well as the additional costs implied by the solutions proposed. We also ask questions suggesting further analysis of the implications of the draft guidelines as they stand.

Business Agreements

Business agreements are defined as agreements concluded between separate legal entities of the same company or external parties.

According to Guideline 3.3 the identity of the customer is normally determined by reference to the business agreement. Since the term business agreement is also used in a more general sense, the local tax administration would have to provide clear guidelines in this field. It is in particular important to know what kind of business agreements are recognized as sufficient for the customer's identification and thus may serve to determine the place of taxation. Such clear guidelines should not only lower the cost of the tax compliance and administration for both the taxpayer and the tax authority, but should also increase clarity and certainty.

In addition, we would like to point out that a non-written business agreement (section 3.13) would probably lead to uncertainty and can easily be challenged.

Swiss Bankers Association
Schweizerische Bankiervereinigung
Association suisse des banquiers
Associazione Svizzera dei Banchieri

Aeschenplatz 7
PO Box 4182
CH-4002 Basel

T +41 61 295 93 93
F +41 61 272 53 82
office@sba.ch
www.swissbanking.org

The second step of the two-step approach (section 3.19) to allocate the taxing rights within a MLE (multi location entity) demands to treat the establishment of a legal entity as a separate independent legal entity for VAT purposes. In this respect, the following questions should be considered: (i) What would the legal basis be for allowing to treat the domestic and the cross-border recharges within the same legal entity differently (see section 3.20)? (ii) How do OECD guidelines take into consideration existing judgments (e.g. Judgment of the European Court of Justice in the FCE Bank case C-210/4), which somehow contradict what is currently proposed?

The idea to have a separate entity approach may derive from the OECD Model Tax Convention. Please note that in certain jurisdictions, e.g. in Switzerland, the single entity approach applies.

It is our understanding that a MLE is defined as a legal entity with several establishments in different jurisdictions as described in section 3.17 and set out in Annex 2 of the guidelines. Transactions between subsidiaries are, however, not considered as MLE. That means that transactions between the MLEs would not be out of scope for VAT purposes anymore (as it is the case for transactions between head office and branches in the EU countries and when applicable between branches) but considered as VAT relevant turnovers for the taxation (as far as the internally generated services are concerned, please see below). Therefore, the cost of documentation and administration for the additional VAT turnover may increase and the business, respectively the final consumer, may have to bear additional VAT cost due to non-recoverable input VAT (e.g. for MLE's with exempt and taxable supplies).

Another issue is that the recharges are based on internal recharge agreements between the MLEs. The precondition is that MLEs need to implement such a recharge system with an appropriate allocation of the costs with respect to the other establishments. Additional cost will arise therefore from the implementation of such a recharge system and from the documentation of the allocation keys.

The recharge allocation keys are documented in transfer pricing records and internal agreements. The tax administration then uses these as a basis to determine whether a recharge between MLEs and between entities belonging to the same enterprise are at arm's length (article 9 of the Model Tax Convention on Income and Capital). The tax administrations have the power to challenge the allocation keys. In that respect the following questions need to be considered: (i) Does an allocation key correction for past periods affect the VAT declaration for the business and thus increase the burden to fulfill VAT compliance for companies? (ii) Is it correct to assume that if the single entity approach is valid for VAT purposes, each MLE will have to calculate the input VAT for its own location (including the recharged services, but excluding the internally generated services as described in the next section) and as a consequence, the input VAT rates of the headquarters and the other branches are not to be considered?

Internally Generated Services

As mentioned in section 3.23, the guidelines do not deal with internally generated or developed services, which are therefore not considered with respect to the recharge method. As a consequence, taxpayers do not know how to treat the charges of internally generated services with respect to other establishments. Should such internally generated services be treated differently for VAT purposes than the recharges of externally purchased services within MLEs (e.g. out of scope of the VAT), the taxpayer would need an advanced recharge system to separate the externally purchased services, which shall be recharged to the appropriate MLEs, and then taxed at the location of the MLEs, from the internally developed services which are e.g. not to be taxed. This would create a higher administrative and documentary burden for the business which leads to higher cost to implement such a recharge system.

A clarification of this issue in the guidelines would therefore be recommended.

Final Remarks

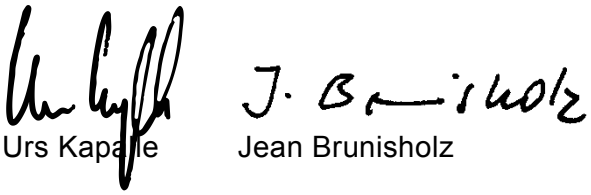
The advantage of the recharge system lies by the supplier. The supplier does not have to know how his services are used in a MLE. He only needs to identify the customer based on the business agreement. The customer will have the obligation to apply an appropriate allocation key and separate the externally purchased services and the internally generated services for the recharge to its MLEs, therefore the compliance burden is largely shifted from the supplier to the customer.

The recharge method has more advantages than the "direct use method" as described on page 6 of the document, where the customer also has to provide the information on which establishment uses the externally purchased services and in what amount it does so. The supplier will have to make an allocation of the customer in different locations directly to the MLEs. This method, compared to the recharge method, would have more disadvantages since the customer must know in advance which of its establishments will use the purchased services and to what extent it will do so, in order to be taxed correctly.

Another proxy to determine the place of taxation for VAT purposes is the head office location. This is valid also if the service is used by (and charged to) an establishment in another jurisdiction. Even if there is a recharge from the head office to its establishments or from one MLE to another MLE, these transactions would be regarded as out of the scope for VAT purposes. Such an approach is easy to understand and to implement. Clarity as well as certainty are therefore provided and in addition, compliance requirements for the business involved is kept simple. As a consequence, the cost of compliance and administration of the tax remains low.

We thank you for taking good care of the remarks we have made and we are ready to provide you with additional explanations if you so wish.

Yours sincerely,
Swiss Bankers Association



Urs Kapalle Jean Brunisholz