Published differences

Indirect Tax

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Chris Lallemand and *John Voyez* consider cross-border compliance for VAT

Key Points

What is the issue?

Cross-border transactions have for some time been an important part of business life, but with this comes a need to focus on the VAT rules in various jurisdictions and the status of the customer – business or non-business

What does it mean to me?

VAT or GST is a truly global tax with over 160 countries having some form of turn over tax. Although in principle the rules may be similar, especially within the EU, in practice they may be applied differently, resulting in a wide range of issues to be considered by an indirect tax adviser who is to look after cross-border business clients

What can I take away?

Attention to the scope of engagement letters and communication of the boundaries of the adviser's ability to advise on indirect taxes in another country should help to minimise misunderstandings with clients

The continual growth of internet shopping was evidenced in the US on 30 November 2015, known as Cyber Monday, when online sales soared above $3bn, breaking the record set only three days earlier on Black Friday. Moreover, the UK and other parts of Europe seem to be following the US template.

How much of this activity represents cross-border transactions is unknown, but digital operations have opened up the global marketplace. Businesses seeking to grow have generally embraced this selling medium, and will inevitably find themselves selling to customers worldwide. At the same time governments have refocused their revenue collection activities away from direct to indirect taxes while the complexity of the VAT rules remain unabated. This is despite attempts by the EU to review, simplify and reduce the problems many businesses have to grapple with in their own country and in overseas jurisdictions.

Two recent articles in Tax Adviser, 'R*isk and reward*', June 2015 and 'D*igitalisting VAT*', October 2015, explored some of the difficult issues to be faced by businesses selling cross-border in the EU. Some of these include:

- Collecting evidence of the location and VAT status of the customer.
- Ensuring each country's 'call off' or consignment stock arrangements are correctly dealt with.
- Identifying chain transactions and triangulation arrangements correctly.
- Limitations of the current VAT administration system, including different distance selling thresholds, and MOSS rules which now apply to broadcasting,

electronic and telephone services.

Any VAT adviser will know that different countries administer similar VAT rules in different ways, so it is not possible to assume that the treatment applied to transactions in the UK will be replicated elsewhere. Examples of cases illustrating differences in the past include *RBS Deutschland* (CJEU Case C-277/09) on the leasing of cars from Germany to the UK and a mismatch between the way each country analysed the supply, resulting in no VAT being paid at all. In another [*IDT Card Services Ireland Ltd* [2006] EWCA Civ 29] the cross-border sale of mobile phone time between Ireland and the UK was scrutinised. Due to the different VAT rules, it was contended that no output VAT was due in either Ireland or the UK. However, the court considered on a purposive basis that there was a liability to UK VAT. Anomalies such as these continue to crop up.

Published differences in VAT treatment across the EU

The EU has published a list of country-by-country differences in the VAT treatment of electronic broadcasting and telecoms (EBT) services to assist those dealing with their VAT obligations for cross-border and intra-EU supplies. In the UK the ‘use and enjoyment rules’ for supplies of telecoms and broadcasting services to non VAT-registered customers, where the place of supply is the UK but the services are enjoyed outside it, are not subject to UK VAT. An example might be a mobile phone service supplied to a UK customer who is on holiday in the US when making or receiving calls. In contrast, France has no such use and enjoyment rules. Thus a similar supply to a non VAT-registered French customer on holiday in the US would be subject to French VAT.

Subject to any commercial issues, the UK VAT rules allow a presumption that the supply is made in the country where the SIM card is issued (see www.tinyurl.com/nh2q7ga). Neither the UK nor France obliges a VAT-registered supplier to issue a VAT invoice for EBT services to a non VAT-registered customer. Contrast this to Spain where there is an obligation on a supplier subject to Spanish VAT, albeit a simplified invoice may be issued for values up to €400.

The use of MOSS

The facility to use MOSS to enable businesses to meet their cross-border EU VAT filing obligations for EBT services has helped what would otherwise have been a nightmare scenario for businesses. However, some of the record-keeping requirements placed on EBT businesses – such as the need to obtain and keep two pieces of information to prove where a consumer lives – are onerous. There are some relaxations for VAT-registered UK micro-businesses using payment providers, and for non VAT-registered UK micro-businesses, where customer location decisions can be determined based on information provided to them by their payment provider. But the rules remain complex and a possible disincentive for small business, which the EU is keen to avoid.

Proposals are expected this year for extending MOSS to cross-border sales of tangible goods. The EC VAT committee has already considered strategies used by businesses to exploit the distance-selling rules to avoid VAT registration in another EU country (see working paper 885 of the EC VAT Committee dated 5 May 2015). It seems likely that the distance-selling thresholds will be reformed, and the variety of VAT-registration thresholds in different EU countries may be simplified. These and other changes may be a long way over the horizon, but they will need to be considered when putting systems in place to deal with cross-border VAT obligations.

Implications of cross-border VAT work for the tax adviser

The recently re-issued guidelines for professional conduct in relation to tax have the following requirement at paragraph 2.7: “A member has a professional duty to carry out his work within the scope of his engagement and with the requisite skill and care. A member should take care not to stray beyond the agreed terms of the engagement; if he does exceed the scope he should agree revised terms with his client and check that his professional indemnity insurance covers the enhanced work.”

The extent to which some forms of tax advisory services can be provided cross-border is being tested before the Court of Justice of the European Union (*X-Steuerberatungsgesellschaft v Finanzamt Hannover-Nord* C-342/14). It concerns the provision of tax services by a UK company operating from the Netherlands to a German client. Tax advisory services are regulated in Germany. The problem in this case was that this ability to assess competence via the qualifications or experience

of individuals did not extend to the individuals actually providing the tax services. This discriminated against tax advisory companies established outside Germany. The court held on 17 December 2015 that the German rules are incompatible with the freedom to provide services within the member states guaranteed under article 56 of the Treaty on the Functioning of the EU (TFEU). It should be noted that Germany and some other countries regulate the tax profession, unlike the present position in the UK.

An example of the need to properly interpret the contractual terms between the parties to determine whether to register for VAT in another country or rely on the VAT principles applicable to chain transactions was highlighted in *Indirect Tax Voice* of August 2015. Although a UK adviser may feel confident in advising on how HMRC would approach a particular set of cross-border circumstances, there are examples where different revenue authorities would have a different interpretation. This is the case in land-related services where the UK and Germany have differing views. Without detailed knowledge of practices and interpretations applied in foreign jurisdictions, advising will always be full of potential pitfalls.

In today's business environment, tax advisers will need to think carefully to what extent they are qualified to assist their clients with cross-border, intra-EU VAT compliance and advisory work. This will require attention to the scope of engagement letters and the way clients are alerted to their VAT responsibilities. With the introduction of MOSS and its probable expansion to a wider range of business activities, the ability to file a return in one country covering supplies in many others and the request for advice on VAT issues in other jurisdictions are likely to be far more frequent demands on the tax adviser than before.

Although the difficulty of dealing with another revenue authority may be resolved if responsibility for reviewing MOSS returns is devolved to the jurisdiction in which the return is filed, one presumes a sufficient level of knowledge of the VAT requirements of the customer's operational jurisdictions will be required in order to file an accurate return. It is imperative that tax advisers ensure their engagement letter is clear on the scope of the services they are providing.

Further information

Read '*Risk and reward*'.

Read the August 2015 issue of *Indirect Tax Voice*.