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In the third World Wide VAT forum recently held by PWC Switzerland, the topic of discussion centred around cross-border supplies and sales structures. Although a number of thoughts and ideas were exchanged at this forum, the implications of potential VAT strategies that businesses can apply; the recent changes of the German "Pommes Frites" simplification rules, and the ECJ's decision on the Euro-Tyre case were the main topics addressed on the day.

World Wide VAT forum: Cross-border supplies/sales structures

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I. Introduction – What is World Wide VAT?

The World Wide VAT international VAT forum [1] at PwC Switzerland was launched three years ago as a platform where participants have the opportunity of meeting and speaking with international business people who are also dealing with indirect taxes. World Wide VAT is meant to be a platform for discussing the latest global indirect tax topics and sharing experiences. At each session, we focus on specific topics but also include further hot international VAT topics if they come up.

[1] The workshops take place at PwC Zurich. International guests may participate via Live Meeting. For details please see:
https://www.pwc.ch/user_content/editor/files/events12/pwc_event_120925_world_wide_vat_e.pdf

The third workshop in this series took place on February 5, 2013 with the title: "Cross-border supplies/sales structures". The following main topics were discussed with our participants in the workshop:

- the implications of potential VAT strategies that businesses can apply;
- recent changes of the German "Pommes Frites" simplification rules;
- case studies relating to various cross-border supplies; and
- the European Court of Justice's (ECJ) decision on the *Euro-Tyre* case (C-430/09).

II. The implications of VAT strategies

Depending on the given company's objectives, different VAT-strategy models can be implemented. Sales transactions can be structured in various ways and amongst others the following two opposite strategies may be applied:

1. Full business flexibility: a business can have a supply chain that is as flexible as possible in order to satisfy customer needs;

2. Cost efficient priority: a business can decide to have low VAT administration costs and thus avoid every additional VAT registration.

Of course there are many other strategies in addition to the above.

If a business decides to have a "fully flexible supply chain" that allows the company to buy and sell goods in all relevant jurisdictions without restrictions, it is very likely that multiple VAT registrations need to be obtained. The clear advantage of this model is that the company has full flexibility in the way it addresses customers' needs and most likely can significantly minimise the VAT risk of its supply chain (if implementation is done correctly). However this solution usually leads in practice to high VAT-related administrative work and costs to the business.

If a company decides to implement a standardised supply chain with strict limitations for the sales team, this can certainly decrease the amount of VAT registrations and hence the administrative work and costs. However, this strategy often does not facilitate the same level of customer service and may even increase the level of VAT risks. It can even go as far as to prevent the sales department from putting any orders into the ERP system that deviate from specified "standard cases".

PwC Switzerland's experience shows that a shift from the "fully flexible supply chains" to more restricted models appears to have been underway in the past five years. Before the financial crisis, businesses were less sensitive to the costs associated with flexible supply chains; however, in recent years this has clearly become a key factor in setting up international sales structures.

III. Germany – voluntary declaration of intra-Community acquisition restricted

Since 1993, Germany has had a simplification rule in place with regard to cross-border transactions, commonly referred to as the "Pommes Frites" simplification [2] . Under this simplified arrangement, European suppliers are allowed to treat cross-border transactions as an intra-Community transfer of own goods from the respective EU Member State to Germany. This means that European suppliers can report an intra-Community supply in the EU Member State of dispatch and a corresponding intra-Community acquisition in the Member State of destination, rather than making the German customer liable for reporting the intra-Community acquisition of goods. The sale of goods to the recipient is then treated as a domestic supply in Germany.

[2] German VAT Application Decree*Umsatzsteueranwendungserlass* (UStAE) s.1a (14); this name is derived from an example in the decree where Dutch companies supply chips ("Pommes Frites") to small German snack bars at the Dutch-German border.

Since 1993, Germany has had a simplification rule in place with regard to cross-border transactions, commonly referred to as the "Pommes Frites" simplification

In order for companies to take advantage of this option, an approval was required from the tax authorities in both the Member State of dispatch and in Germany. The rationale for the simplification was to decrease the administrative burden for small businesses (which may include food stalls selling Pommes Frites/chips – hence the name) which probably would not need a VAT identification number for any other reason than reporting the intra-Community acquisition of goods. The simplification also relieved suppliers from verifying a vast array of VAT numbers and providing evidence for a large number of intra-Community supplies of goods to individual customers.

However, most likely as an anti-tax-avoidance measure, the German Ministry of Finance restricted the simplification rule with effect from January 1, 2013. It now can only be applied if the supplier transports the goods itself from the EU Member State of dispatch (e.g. with its own means of transport). Companies that make use of freight forwarders to dispatch their goods or stipulate that their customers must collect the goods on their own will no longer be allowed to use the simplification arrangement. In order to leave sufficient time for businesses to adjust to the new rules, the German authorities have provided for a transitional period until September 30, 2013.

The German Ministry of Finance further clarified that, in order for the simplification to apply, companies are required to obtain in advance of the first supply a confirmation from the tax authorities of both EU Member States concerned. This is not something new, as this was already a pre-condition under the old rules.

In the absence of such approvals, the transaction should be qualified according to the general rules, i.e. a zero-rated intra-Community supply of goods by the supplier in the EU Member State of dispatch, followed by an intra-Community acquisition by the customer in the EU Member State of arrival.

IV. Non-EU companies doing business in Europe

Non-EU companies, e.g. Swiss companies want to do business in Europe without restrictions. However, given the customs borders, the businesses may face difficulties negotiating that the customer is doing the importation of the goods themselves as they will face administrative as well as VAT cashflow issues, whilst they could buy customs cleared goods from a European competitor.

Thus the Non-EU companies and the logistics providers have previously been quite creative in setting up new structures where the flow of goods is managed in such a way that the supplier is doing the importation either in Austria, France or Germany. It usually works as follows:

The goods are sold from the manufacturer to, e.g. a German customer with an agreed Incoterm DAP (old: DDP, Delivered Duty Paid). The customs clearance of the goods, e.g. coming from Switzerland is in our example done via the Austrian border. The goods are sent directly after importation to the German customer and thus at the same moment an intra-Community supply is effected and consequently it is possible to take the advantage of a special import procedure [3] , where the import VAT at the Austrian border is assessed at a zero rate. The manufacturer can either register for its own purposes in Austria to be able to declare the intra-Community supply from Austria to Germany or can engage a third party as its fiscal representative, who in turn will then operate under a special VAT identification number for such purposes. The German customer therefore receives from a Swiss supplier customs cleared goods – like from any other EU supplier – and merely has to declare the intra-Community acquisition under its own German VAT identification number. This procedure can also be applied at the German or French border in a similar way and is a common procedure for companies in order to stay competitive in the European market. The cash flow advantage, i.e. that the supplier does not have to pay the import VAT due to the zero-rating, is clearly a bonus. This procedure is also used for goods coming from Asia to Europe that are imported, e.g. via the Netherlands, Rotterdam and are then sent onwards to customers in various EU Member States.

[3] Article 143 lit d. of the Council Directive 2006/112/EC.

In the past, though, some of the freight forwarders adapted this rule in such a way that the intra-Community supply was declared in the same way as an intra-Community transfer of own goods between two VAT identification numbers that belong to the non-EU company, e.g. between their own Austrian and own German VAT identification numbers. In such a scenario, the German customer received an invoice with German VAT because the intra-Community acquisition has already been declared by the supplier. As the final customer is known at the time the goods leave the respective country, the transfer of own goods may be a possibility to simplify the process even more as the VAT identification numbers of each customer does not have to be checked, but this procedure is clearly not accepted by the German authorities.

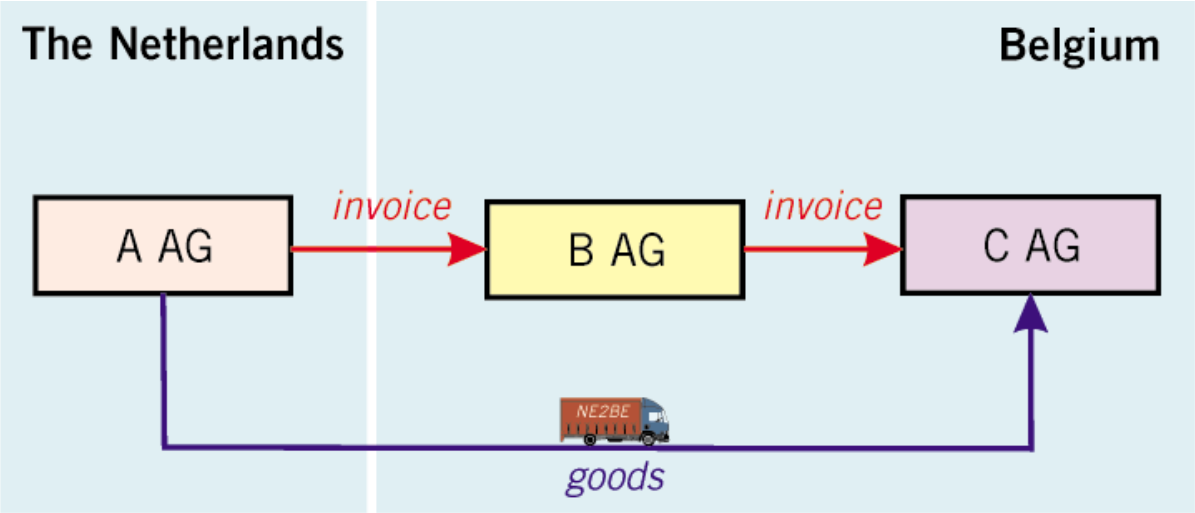
The argumentation may be different if the goods are sent from the Austrian border to a warehouse rented by the supplier in Germany, and subsequently the German customers are served out of that warehouse. In cases where it can be proven that work has been done on the goods in an economically useful manner, e.g. re-packing, labelling, etc., there is definitely enough room for argumentation that the importation can be accomplished by using their own Austrian and their own German VAT identification numbers to declare an intra-Community transfer of own goods and a local sale to the German customer. In such an instance, the import VAT at the Austrian border will be zero-rated as well, however this approach has to be implemented carefully by taking into account the consistency of the documentation.

V. ECJ case: Euro-Tyre Holdings B.V. (C-430/09)

The ECJ's judgment in the *Euro-Tyre Holdings B.V.* [4] case was a significant decision in terms of the qualification of chain transactions in the European Union or, as it were, the clarification of the applicability of a zero VAT rate.

[4] ECJ December 16, 2010, C-430/09 *Euro Tyre Holding B.V.*

The case involved a Dutch supplier, Euro-Tyre Holdings B.V. ("party A") that sold goods to its Belgian customer ("party B"). Since the Belgian customer sold the goods to another Belgian company ("party C"), the parties agreed that B would transport the goods from the Netherlands to C in Belgium. This is illustrated in the below image.



Holdings B.V. treated the transaction as a zero-rated intra-Community supply of goods to party B, which party A was able to substantiate with copies of the transport documents while also providing party B's Belgian VAT registration number. As a result, party B should have reported the acquisition of the goods in Belgium that was followed by a local sale to party C in Belgium. However, the Dutch tax authorities took the view that the sale from party A to B was a domestic transaction in the Netherlands with regard to which Dutch VAT rate should have been applied, while the transaction between party B and party C should be the zero-rate intra-Community supply.

The matter was therefore referred to the ECJ with the following question: "When goods are the subject of two successive supplies between different taxable persons acting as such, but with only one single intra-Community dispatch or transport, how should one determine to which supply the intra-Community transport should be ascribed when the transport is effected by or on behalf of the person who acts both in the capacity of purchaser for the first supply and in the capacity of the vendor in the second supply"?

The ECJ noted that no general rules in this respect are embedded in the Sixth Directive. Further the ECJ stated that "the answer to the question, which supply the intra-Community transport should be ascribed, depends on an overall assessment of all the specific circumstances from which it is possible to determine which supply fulfils all the conditions relating to an intra-Community supply".

The court also indicated that the transfer of the right to dispose of the goods should also be taken into consideration in such cases, since it may result in a different VAT treatment. According to the ECJ, in the case at hand it can be argued that the title to goods passed from party A to party B when the goods were handed over for transportation. However, the court went on to say that in the event the title to the goods was already transferred to party C before B collected the goods from party A, then the zero rate should be applied to the second supply in the chain.

This decision unfortunately does not provide full clarity on chain transactions. A lot of entities are the middle party in chain transactions and can be exposed to significant VAT risk in the country of dispatch and the country of destination. It is therefore of utmost importance that all circumstances are carefully considered. For the middle party it is always important to know how the Member State of dispatch and the Member State of arrival interpret special cases. This is especially challenging because the local interpretation of chain transactions still differs in Europe: some countries merely argue that, to determine the intra-Community supply, it merely has to be documented that the right to dispose has been transferred, whereas other EU Member States still stick to the rules on which party is giving the "transport order" when determining the party to which the zero-rated intra-Community transaction is to be allocated.

In times where chain transactions are daily business there is in our view still the necessity to clarify the VAT treatment in each of the countries involved.

For More Information

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