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Global Indirect Tax

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# Global Indirect Tax News

## Indirect tax updates from around the world

**December 2013**

Welcome to the December 2013 edition of GITN, containing updates from the Americas, Asia Pacific, and EMEA regions.

Features of this edition include a number of news items from Australia, further guidance from China on local implementation rules (for Beijing), a court judgment from India on the calculation of the service tax, and amendments to the reduced rate in Serbia.

This is the last edition of GITN for 2013. We wish our readers Seasons Greetings and a prosperous New Year.

If you have any queries or comments about the GITN, I would be delighted to hear from you.

**David Raistrick**
Global Indirect Tax Leader

## Country summaries

### Americas

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**EMEA**

Poland: A CJEU judgment confirms that taxpayers cannot claim exemption on the basis of domestic law and then rely on EU law to claim input VAT recovery. The European Commission has authorized a derogation from the EU rules on input VAT deduction for cars and fuel. **More**

Portugal: There have been a number of VAT amendments, including a VAT rate increase in the Azores Islands. **More**

Serbia: The Government plans to increase the reduced VAT rate from 8% to 10%, and to tax the supply of personal computers at the standard rate of 20%. **More**

United Kingdom: The CJEU has ruled on the VAT treatment of fraudulent credit and debit card payments and the UK Government has issued its Autumn Statement. **More**

## Americas

**Bahamas**

Further to the previous announcement that a VAT will be introduced from 1 July 2014 at the rate of 15%, the Government has now issued a **VAT Draft Bill and Regulations** for public discussion and consultation.

The public is invited to submit comments on the draft.

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**Brazil**

**REPETRO regime for oil and gas companies changed**

The Brazilian Government issued guidance on 4 December 2013 (Normative Instruction (NI) 1415/2013) that sets out new procedures for qualifying taxpayers to use the special “REPETRO” customs regime that applies to goods used in the exploration and production of oil and natural gas fields in Brazil. The REPETRO regime aims primarily to reduce the tax burden on companies involved in such activities and operates by granting a suspension of federal taxes incurred on the import of specific goods/assets (“temporary admission regime”). Taxes affected include the federal excise tax (IPI), the program for social integration contribution (PIS), the contribution for the financing of social security (COFINS) and the freight tax (AFRMM).

The NI provides that the following items do not qualify for benefits under the REPETRO regime:

- Machinery and equipment and parts with a customs value lower than USD 25,000;
- Goods whose main function is for the transport of persons, oil, gas and other fluid hydrocarbons;
- Goods destined for personal use; and
- Goods that are the subject of a finance lease contract.

The NI also sets out the following new procedural requirements to benefit from the REPETRO regime:

- The taxpayer must enroll in the Electronic Tax Mailbox in order to request the application of the regime (or to request an extension of the regime); all communications between taxpayer and tax authorities will be electronic, via e-CAC;
- The taxpayer must demonstrate that it is in compliance with the tax rules by presenting a certificate that it does not have any outstanding federal tax liabilities and that it has paid its tax liability in full;
- The taxpayer must submit certain documents (including a contract summary that contains specified information) to the Brazilian tax authorities; and
- The above documents must be submitted within 30 days after applying for the Repetro Regime.

A REPETRO license will be granted through an Executive Act, but it can be reviewed at any time by a tax auditor during the period the regime is in effect and the license can be revoked (and penalties can be imposed) for noncompliance.

The new NI applies as from 5 December 2013, the date it was published in the official gazette. Taxpayers that already have applied to benefit from the REPETRO regime have 60 days to comply with the new rules.

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## Uruguay

### Manufacturers and importers of fireworks designated as "perception agents"

To improve tax collection and avoid fraud, the Uruguayan tax authorities designate certain taxpayers as "perception agents" for VAT and other taxes. "Perception agents" are entities that are responsible for the tax liabilities of third parties; in addition to the consideration charged, they must collect an additional amount of tax (as set by regulation), which is paid directly to the tax authorities on behalf of their clients. This tax is then offset against the client's final tax liability.

As a lack of compliance with tax obligations has been an issue within the fireworks sector and given the upcoming festive session, which is the peak season for this sector, the tax authorities have issued a Resolution under which manufacturers and importers of fireworks

have been designated as VAT perception agents for 60% of the VAT included in the sale. This applies from 4 December 2013.

In practice, this means that for every sale of fireworks, the manufacturer/importer must collect from their client an additional 60% of the VAT included in the invoice, which will be directly reported and paid to the tax authorities in month following the transaction.

The Resolution also provides that the sales invoice will be sufficient proof of the "perception", provided it includes the "perceived" amount, the client's identification, and the "perception base" (the amount on which the perception has been calculated).

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## Asia Pacific

### Australia

**Government proceeding with restrictions on refunds of overpaid GST**

The September 2013 federal election resulted in a change of Government. The new Government has indicated that it will proceed with the change announced by its predecessor – to restrict the circumstances in which taxpayers can obtain a refund of overpaid GST. This measure is widely regarded as one of the most controversial changes to the GST law since its commencement in 2000 and will result in a significant narrowing of GST taxpayers' entitlements. The Government has yet to provide specific details about the amending legislation that it intends to introduce. However, the Government gave some indication that it may be substantially similar to the, now lapsed, Bill that was introduced by the previous Government in June 2013. Under that Bill, a new Division 142 was to have been inserted into the GST Act, disallowing all refund claims where the GST had been "passed on" – an expression not defined or sufficiently explained.

Further, the new Government is continuing to explore the business case for changing the existing imported parcel processing arrangements so as to allow the low value threshold (LVT) to be lowered. Currently, imports valued at AUD 1,000 or less, are free from GST and customs duty. A decision is anticipated in March 2014.

The Government has yet to announce whether it will proceed with 14 other GST-related measures that had been announced by the previous Government but not enacted before the election. These include changes to the "connected with Australia" rules to reduce the number of non-residents who are unnecessarily drawn into Australia's GST system, and changes to the GST grouping provisions to simplify the group membership rules and to allow holding companies to register and group for GST purposes.

### Court decision leaves landlords and tenants uncertain about GST obligations

A recent judgment of the Full Federal Court (*MBI Properties Pty Limited v Commissioner of Taxation*) has significant GST implications for entities throughout the real property (real estate) sector, particularly for those who have sold or acquired property subject to lease, and potentially for existing tenants in such properties as well.

In *MBI Properties*, an entity acquired several leased apartments within a serviced apartment complex. The “going concern” provisions enabled the supply of each apartment to the entity to be treated as GST-free. At issue was whether the entity became liable for a GST increasing adjustment because it intended that the supplies to be made through each enterprise would be neither taxable supplies nor GST-free supplies. In the context of finding that the entity did not have a GST increasing adjustment, the Full Court ruled that an entity acquiring the reversionary interest in a property does not make a supply. The relevant supply was the grant of the lease by the vendor of the property, and that supply is complete once the lease comes into existence. Although the subject of the supply (i.e., the lease) continues for the lease term, the supply itself (i.e., the grant) does not.

On the basis of this decision, other GST registered entities who have invested in serviced apartments under comparable arrangements may be entitled to a refund of GST increasing adjustments previously paid to the Commissioner.

More generally, the finding that an incoming landlord makes no supply to an existing tenant is at odds with the Commissioner’s application of the law and has raised some significant GST issues. For example, the decision suggests that landlords who purchased premises subject to a taxable lease have no GST liability in relation to rent received from continuing tenants. However, landlords who wish to protect their position by collecting GST from continuing tenants may face problems doing so, depending on the terms of the lease contract. There is also uncertainty about whether the entity that granted the taxable lease continues to bear the GST liability on rental payments even after selling the premises. These and other issues require urgent clarification.

The Commissioner of Taxation has applied to the High Court for leave to appeal the Full Court’s decision. The Commissioner has also published details of his proposed administrative treatment of affected transactions until the dispute is finally resolved.

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## China

### Beijing issues local implementation rules on VAT exemption for cross-border services under VAT reform

Further to the national implementation rules, and Shanghai’s local guidance on VAT exemption for cross-border services under the VAT reform (Bulletin 52 and Bulletin 3 respectively), Beijing State Tax Bureau has issued local implementation rules (Bulletin 22). This is also the result of the recent 3rd Plenary Session of the 18th Communist Party of China (CPC) Central Committee, which confirms the commitment to roll out the VAT reform.

Bulletin 22 applies retroactively as from 1 August 2013. It clarifies the application details for the exemption for taxpayers registered in Beijing. In general, it follows Bulletin 52 and confirms that:

- The service provider must enter into a written contract with the service recipient;
- The service income must be derived on or after 1 September 2012, which is when Beijing joined the VAT pilot;
- The taxpayer must apply for the exemption by submitting the contract and relevant documents to the tax authorities;
- The services must be provided to overseas entities for some specific VAT exempted services (see the appendix to Bulletin 22 for details); and
- The service income must be collected from overseas for some specific VAT exempted services (see the appendix for details);
- If the VAT exemption has not yet been applied for, the taxpayer may apply for the exemption by submitting the documents required by Bulletin 22. Any overpaid tax may be refunded or offset against tax payable in the future. However, if the VAT exemption has been applied for, the taxpayer must submit the required documents by 31 March 2014 or the exemption will be clawed back.

Following Shanghai's issuance of Bulletin 3, it was expected that Beijing would also follow suit and provide their local guidance to Bulletin 52. The issuance of Bulletin 22 is welcomed as it provides more detail implementation guidance and thus enables Beijing taxpayers to benefit from the VAT exemption with more certainty. In particular, Bulletin 22 allows Beijing taxpayers slightly more time to submit the documentation to apply for the exemption. Affected taxpayers in Beijing should carefully assess and determine their tax positions relating to cross-border services under the VAT reform and prepare the required documents according to Bulletin 22. If a taxpayer is unclear as to whether it is eligible for the exemption, it is recommended to contact the relevant tax authorities and/or obtain professional advice.

**Postal services and railway transportation to be covered under the VAT reform pilot**

During the executive meeting of China's State Council on 4 December 2013, it was decided that postal services and railway transportation would be included within the scope of the VAT reform pilot program on 1 January 2014.

"Postal services" is understood to include the provision of courier services – some companies providing courier services have experienced confusion in the past months as to whether they are within the scope of BT or VAT.  For railway transportation, which is generally operated by state-owned providers, the rollout of the VAT pilot will impact general businesses on the input VAT side and a deduction of the associated VAT will depend upon whether the costs can be attributable to an onward VATable supply.

The relevant regulations are expected to be released in the near future.

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## India

### Delhi High Court rules on calculation of service tax

The taxpayer challenged the notification granting abatement to construction services on the ground that the abatement was computed on the gross amount charged (which included the value of goods and materials) and thus had the effect of imposing service tax on a “composite or works contract”, which was not covered by the then main statutory provision.

The Delhi High Court rejected the taxpayer’s challenge and observed that:

- Service tax is payable on the service element of a contract for construction services and in the case of a composite contract, the service element should be bifurcated, ascertained, and then taxed.
- The computation of the service element is a matter of detail, and not a matter relating to the validity of the imposition of service tax.
- The aim and purpose of the notification is to provide a convenient, alternative, optional and hassle-free method for the payment of service tax, provided the requirements mentioned in the notifications are satisfied.
- The notification meets the tests laid down in the law as they relate to the manner and mode of the computation of service tax.

### Liquidated damages factored into value for excise duty purposes

The Larger Bench of the Central Excise and Service Tax Tribunal has held that when a buyer is liable to pay an amount less than the agreed price because:

- The supplier is liable for “liquidated damages” due to a delay in the delivery of manufactured goods, and
- The liability arises under a clause in the agreement,

the resultant price is the value that is subject to excise duty.

### Amendment to Central Excise Valuation Rules

Rules 8, 9 and 10 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 dealing respectively with the valuation of goods captively consumed, goods sold through a related person, and goods sold through an interconnected undertaking have been amended to provide that the valuation provisions prescribed in the Rules shall apply where the whole or part of the excisable goods are captively consumed, or sold through related persons or through an interconnected undertaking.

### Changes in monetary threshold for electronic payment of excise duty/ service tax

Presently, a manufacturer or a service provider that has paid total excise duty or service tax of INR 1 million or more (including the amount of duty paid by the utilization of a Cenvat credit) in the preceding financial year, is required to deposit the excise duty or service tax electronically, through internet banking.

With effect from 1 January 2014, the monetary threshold of INR 1 million has been reduced to INR 100,000.

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## EMEA

### Poland

**CJEU confirms that taxpayer cannot pick and choose between domestic and EU law**

The Court of Justice of the European Union (CJEU) has followed the Advocate-General's opinion in the Polish case of *MDDP Sp. z o.o., Akademia Biznesu, Sp. Komandytowa* and confirmed that taxpayers cannot “pick and choose” between provisions in EU and domestic law. The case concerned MDDP’s contention that, even though Polish VAT law exempted its “educational” activities (possibly wrongly as a matter of EU law), the “direct effect” of the VAT Directive meant that it was entitled to recover input VAT that it incurred. The CJEU’s judgment confirms that taxpayers cannot claim exemption on the basis of domestic law and then rely on EU law to claim input VAT recovery. It also confirms that where the domestic exemption is incompatible with EU law, taxpayers can rely on the “direct effect” of EU law to override it, account for output VAT on their supplies and then (and only then) they would be able to reclaim related input VAT (since it would then relate to taxable, and taxed, supplies.

**European Commission grants derogation for input VAT on cars and fuel**

The European Commission has granted Poland a derogation from the European VAT provisions concerning input VAT recovery on cars and fuel purchases for the period from 1 January 2014 to 31 December 2018.

As a consequence, input VAT recovery right will be limited to 50% of the input VAT amount (without a value cap) incurred on the acquisition, production, import, lease, and rent of cars used for both private and business purposes. However, if the abovementioned cars are to be used for business purposes only, the derogation will not apply. The derogation will also allow partial (50%) input VAT recovery for purchases of fuel for cars encompassed by it and for other expenditures (repairs, etc.).

However, due to Polish legislative procedures, the Polish parliament will be unable to implement the required regulations as of 1 January 2014. Accordingly, for a short period of time (from 1 January 2014 until the introduction of the derogation) 100% VAT recovery will be allowed in respect of certain groups of cars and fuel and other expenditures.

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## Portugal

### Amendments introduced to requirements for certification of invoicing software

Decree-Order nr. 340/2013, published on 22 November, has introduced several amendments to Decree-Order nr. 363/2010 (published on 23 June), which regulates invoicing software certification. One of the most significant changes is that invoicing and transportation documentation software developed internally by a taxable person or by an entity from the same economic group will have to be certified by the tax authorities as from 1 January 2014.

### Filling instructions for new annexes to VAT return

Ruling nr. 30155/2013, published on 14 November, clarified the filing instructions for the new annexes to the VAT return that must be filed when VAT adjustments are made (boxes 40 and 41 of the VAT returns), namely when credit notes are issued to a non-VATable entity, it is not necessary to identify the entity's fiscal VAT number in the annex.

### Amendment to VAT regime for sales to national exporters

An amendment to the Budgetary Law Proposal for 2014 amending the VAT regime applying to sales to national exporters has been approved (although not yet published) to clarify the concept of "national exporter". The concept of "national exporter" will include exporters with a head office, a permanent establishment, domicile or a VAT registration in Portugal.

This special regime for sales of goods to national exporters provides for a VAT exemption provided a number of specific requirements are met (such as timing, documentation and warehousing requirements).

### VAT rates in the Autonomous Region of Azores

An amendment to the VAT rates applicable in Azores as from 1 January 2014 has been approved (although not yet published).

The VAT rates will be:

- 5% (reduced), increased from 4%;
- 10% (reduced), increased from 9%;
- 18% (standard), increased from 16%.

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## Serbia

### Increase in reduced VAT rate

On 8 September 2013, the Serbian Government announced its plan to increase the reduced VAT rate from 8% to 10%, and to tax the supply of personal computers (including incorporated hardware, monitor, keyboard and mouse) at the standard rate of 20%. Currently, personal computers are taxed at the reduced rate if sold as a whole, whilst computer equipment and hardware traded separately are taxed at the standard rate.

The amending law entered into the National Assembly's proceedings on 26 November 2013 and is expected to be adopted in the next couple of weeks. The change should be effective from 1 January 2014.

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**United Kingdom**

**CJEU judgment on VAT on fraudulent credit and debit card payments**

The CJEU has gone straight to judgment in the case of *Dixons Retail plc*. The case concerned whether the transfer of goods to a purchaser who has fraudulently used a bank card as a means of payment constitutes a supply of goods and whether the payment by a third party (such as the card issuer) constitutes consideration for those goods.

Dixons was seeking to recover VAT paid to the tax authorities (HMRC) on such transactions, on the basis that there was no "transfer of the right to dispose of tangible property as owner", and therefore no supply for VAT purposes. The CJEU decided that as Dixons had received payment (there was no chargeback by the card issuer to Dixons) and the customer had received the goods, there was a supply for consideration. Any issue as to whether the payment was fraudulently made was a matter for the card issuer to resolve with the customer.

The CJEU noted that the receipt of goods by a customer in these circumstances is not theft, as if it were a theft, the retailer would not have received any payment.

**Autumn Statement**

The UK's **Autumn Statement** was delivered on 5 December. The main indirect tax announcements were**:**

- A freeze on fuel duty, so the increase planned for September 2014 will not go ahead.
- The introduction from 1 October 2014 of a facility to pay vehicle excise duty by direct debit, annually, half-yearly or monthly, and from the same date, the abolition of the paper "tax disc".
- Confirmation that the proposal to register wholesalers of alcohol products, to reduce the problem of excise duty frauds, will go ahead, starting in 2016 and that from 2014, businesses involved in trading in alcoholic products will need to carry out due diligence on suppliers and customers.
- The introduction of a climate change agreement for data centers, that will reduce the amount of climate change levy that eligible centers are obliged to pay.
- Confirmation that certain Aggregates Levy reliefs are to be suspended from 2014 while the European Commission investigates them, that provision will be made to reinstate the reliefs if the Commission confirms that they are permitted under EU law, and that refunds of revenue collected during the suspension might be paid.

- A consultation on regulatory changes to define the circumstances in which businesses are relieved of the obligation to file VAT returns on-line.

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