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Global Indirect Tax News

Your reference for indirect tax and global trade matters

May 2014

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

Features of this edition include the extension of the China VAT reform to telecommunication services, proposed changes to the taxation of cross-border digital services in Japan, the extension of the domestic reverse charge in Denmark and Finland, and the announcement of a potential increase in the VAT rate in Portugal.

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

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Americas

Canada

Filing of section 156 elections made between closely related persons

It was proposed in the 2014 Canadian Federal Budget that closely related entities that elect to have supplies made between them treated as being made for no consideration (and therefore not subject to sales tax) must file the section 156 election forms with the tax authorities.

Under the current rules, this election does not have to be filed with the authorities, and is retained in the taxpayers' records, until requested by the authorities.

The filing requirement for new elections will take effect as of 1 January 2015. Parties to an election made before 1 January 2015 (that is, in effect on 1 January 2015) will have until 1 January 2016 to file. After that date, any section 156 elections that have not been filed will no longer be valid.

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Mexico

Authorization for joint export of vehicles and parts for certified car assemblers and IMMEX suppliers

On 8 May 2014, the Ministry of Finance published in the Mexican Official Gazette the 10th modification to the Foreign Trade Rules (FTR), according to which certified car assemblers and their suppliers (IMMEX companies) can apply via a common representative for authorization to carry out a common export operation, including the vehicle and incorporated parts.

For this authorization the authorities require:

- A description of the parts that will be incorporated,
- The process,
- The place or places where the process will take place; this cannot be the same as the automotive fiscal warehouse, and
- The agreement signed by both companies (which cannot be related parties).

This authorization will be valid for two years, provided the conditions are fulfilled. During this period, both companies may carry out customs procedures by presenting two export documents processed through the same broker; one for the export of the vehicle and one for the return of the goods temporarily imported by the IMMEX company.

Each of the companies will be liable to the customs authorities for their operations. This means that the assembler will be responsible for the vehicle, while the IMMEX company will remain responsible for the goods imported under the temporary regime to manufacture the parts incorporated in the vehicle.

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United States

CBP clarifies that past acceptance does not equal 'established and uniform practice'

In a ruling issued on 3 February 2014 (HQ H15556), U.S. Customs and Border Protection (CBP) stated that prior acceptance of a product's tariff treatment by a single port for a single importer does not constitute a 'de facto established and uniform practice' with regard to the tariff

treatment of the product, and thus, CBP may change its interpretation on the matter without the need to publish a public notice of the proposed change in interpretation.

In this case, the importer was the only party that imported the type of goods (embroidered fabric) into the U.S. using preferential tariff claims under the Dominican Republic-Central America-U.S. Free Trade Agreement (DR-CAFTA) 'short supply' provisions. In 2008, the Port of Newark investigated the DR-CAFTA claims, and ultimately agreed with the importer's classification and DR-CAFTA claims. The Port investigated the DR-CAFTA claims again in 2011, and found that the claims were not valid even though there was no material change in facts. The importer tried to argue that past acceptance of the DR-CAFTA claims by the Port, combined with the subsequent liquidation of 81 entries of the goods at the Port, was deemed an 'established and uniform practice' requiring formal notification before any change in the treatment of the goods.

CBP, relying on *Siemens America, Inc. v. United States*, 2 CIT 136, (1981), which involved similar circumstances, found that there was insufficient evidence to support that a 'de facto established and uniform practice' existed, and affirmed the Port's finding that the importer's goods do not qualify for DR-CAFTA preferential tariff claims.

U.S. enhances restrictions on exports to Russia

On 28 April 2014, the U.S. Bureau of Industry and Security (BIS) announced additional restrictions on exports to Russia due to the ongoing concerns with Russia and the crisis in Ukraine.

BIS stated that it is denying all "pending applications for licenses to export or re-export any high technology item subject to the EAR [Export Administration Regulations] to Russia or occupied Crimea that contribute to Russia's military capabilities," and is "taking actions to revoke any existing export licenses which meet these conditions." BIS will evaluate all other pending applications and existing licenses to determine their impact on Russia's military capabilities.

BIS also added 13 companies to the Entity List, which requires a license for the export, re-export or other transfer of items subject to the EAR to the designated entities.

These new restrictions enhance the initial export control restrictions for Russia announced on 26 March 2014, which "placed a hold on the issuance of [all] licenses that would authorize the export or re-export of items to Russia until further notice."

USA-Korea Free Trade Agreement

Please refer to the heading **Simplification of origin procedures under Korea-USA Free Trade Agreement**.

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Uruguay

VAT implications of new Financial Inclusion Law

A law passed recently by the Uruguayan Government aims to extend access to financial services to the whole population, promote the use of electronic payments and encourage savings, and introduces a VAT reduction to support these aims. This was to apply from 1 September 2014; however, there is a bill in parliament that intends to change this date to 1 August 2014.

The current standard VAT rate is 22%, with a reduced rate of 10% applying to certain goods and services, and certain VAT-exemptions.

Under the law, there will be a 2% VAT reduction for sales of goods and services to final consumers where payment is made by way of debit card or other means of electronic payment according to a definition that is to be set by decree.

Another important feature of the law is that it authorizes the Executive Branch to increase the reduction for transactions that do not exceed approximately UYU 11,400.

Furthermore, the new legislation authorizes a total VAT reduction where payments are made under special payment methods aimed at Social Plans.

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Asia Pacific

China

VAT reform to be extended to telecommunication services

China's Ministry of Finance and State Administration of Taxation (SAT) announced on 30 April 2014 that telecommunication services will be included within the scope of the VAT reform as from 1 June 2014 (Caishui [2014] No. 43 (Circular 43)). Telecommunications services were subject to the Business Tax (BT) at a rate of 3%.

The highlights are as follows.

Scope and rates

Telecommunication service providers (both companies and individuals) in China will be subject to VAT at the following rates:

- Basic telecommunications: 11%, such as voice transmissions using fixed-line networks, mobile networks, satellites or internet; and the sale or lease of bandwidth.
- Value-added telecommunications: 6%, such as:
    - SMS/MMS or transmission of electronic data, as well as the application of such data, using fixed-line networks, mobile networks, satellites, internet or cable TV networks;
    - Internet access services; and
    - Receipt and delivery of satellite TV signals.

Tax treatment under certain arrangements

The general rules applying to the VAT reform (Circular 106) will continue to apply to telecoms VAT payers, with the following additional guidance provided in Circular 43:

- If the general VAT payer provides telecommunication services, as well as free goods such as SIM cards and telecoms terminal equipment (notably handsets) or other free

telecoms services to the customer, it must separately account for each service and goods and allocate the price and additional charges (if any) to each component to apply the VAT rates (i.e., 17% for goods, 11% for basic telecoms and 6% for value-added telecoms) for output VAT calculation purposes.

Telecom operators commonly bundle the provision of goods and services. Under the existing rules, the 'free supply' of items in a bundled package does not fall within the scope of BT or VAT. The VAT reform will make the treatment more complex and will increase the compliance burden on telecom providers.

- Telecom services provided by domestic parties to foreign entities will be exempt from VAT.

- A free supply of telecom services resulting from a customer's redemption of 'points' under a loyalty program will not be subject to VAT.

- By 31 December 2015, domestic entities that qualify as general VAT payers will be able to elect to apply the simplified taxing method (i.e., by multiplying the gross revenue by 3% without any input VAT credit) to calculate VAT payable for satellite transmission services of voices and electronic data/information.

New customs measures introduced in Pilot FTZ

China's General Administration of Customs (GAC) announced in a press conference on 22 April 2014 that 14 new customs measures are being implemented in the China (Shanghai) Pilot Free Trade Zone (Pilot FTZ). The measures aim to simplify and expedite the customs clearance process and already have been tested on a select group of enterprises in the Pilot FTZ.

The first tranche of the new rules were launched on or before 1 May 2014, with the remainder to be rolled out before 30 June.

Highlights of new customs measures are as follows.

Measures to facilitate customs declarations

- Optional import tax treatment for qualified products (to be implemented): for goods produced in the Pilot FTZ and then sold into the non-FTZ domestic market, relevant enterprises may choose to have the import customs duty determined by reference to the value of the finished goods or to the materials/components imported making up the goods. This measure will enable an enterprise to opt for treatment that best fits its business needs.

- Reducing logistics costs and/or improving the efficiency of customs, e.g.

    - Goods will be allowed to enter the Pilot FTZ before the relevant customs declaration procedures are made (launched on 1 May);

    - Import tax may be paid on a consolidated basis (to be implemented); and

    - A work-order based e-system will be adopted by the customs authorities in the Pilot FTZ to facilitate the monitoring and management of bonded materials imported under the processing trade model (launched on 1 May).

Measures to expand the functions of Pilot FTZ

- Display of bonded goods outside Pilot FTZ (launched before 1 May)

  Enterprises in the Pilot FTZ will be allowed to ship bonded goods outside the Pilot FTZ for display purposes, provided they pay a deposit to the customs authorities. The import taxes due on the goods may not have to be paid until after the goods have been sold. This measure will be especially attractive to enterprises dealing with high value goods, such as goods from auction houses and vehicles.

- Repair and maintenance services (launched on 1 May)

  Previously, repair and maintenance services could be carried out in the Pilot FTZ (or similar bonded zones) only on products that originally had been manufactured in and exported from the zone. The new rules allow qualified Pilot FTZ enterprises to provide 'high-tech, high value-added, non-pollution' repair and maintenance services in the Pilot FTZ, irrespective of where the product was originally manufactured.

- Delivery of bonded goods for futures trading (launched before 1 May)

  Bonded delivery services for futures trading will be provided throughout the Pilot FTZ and for all commodities listed on the Shanghai futures exchange. Previously, bonded delivery was limited to copper and aluminum in the Yangshan port area.

- Finance leasing (launched before 1 May)

  Customs duty and import VAT under a finance leasing arrangement will be collected on an installment basis, subject to the review and approval of the customs authorities.

Destruction and disposal of goods under Processing Trade Relief

In April 2014, the GAC issued the 'Bulletin on Destruction and Disposal of Goods under Processing Trade Relief' (GAC Bulletin [2014] No. 33, (Bulletin 33)), which replaced the existing 'Bulletin on Abandon of Goods under Processing Trade Relief' (GAC Bulletin [2009] No.56 (Bulletin 56)), which was released on 31 August 2009.

Specifically:

- There is clarification of the documents required for the application for destruction and disposal of goods under Processing Trade Relief with the customs authorities.

- PTR enterprises should complete the declaration procedure within the validity period of the PTR handbook or the verification period of the e-handbook.

- There is clarification of the documents required for the verification procedure.

Release of preferential duty rate under China-Swiss Free Trade Agreement

Further to the China-Swiss Free Trade Agreement signed in July 2013, the China Tariff Committee under the State Council issued the preferential duty rate for the FTA, which will be effective from 1 July 2014. This preferential list includes 8277 items.

For more information on the FTA, please refer to the heading **Swiss-China Free Trade Agreement to enter into force on 1 July 2014 as planned**.

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India

Supreme Court holds that supply and installation of lifts to be treated as works contract

The Constitution Bench of the Supreme Court of India in the case of *Kone Elevators* has held that the supply and installation of a lift is a 'works contract' and not just a contract for 'sale' of goods.

The Supreme Court, in its earlier decision on the same matter, had held that a contract for the supply of a lift was to be constituted as a sale and the activities undertaken for installation were only incidental to the sale.

This decision was overruled by the Constitution Bench by observing that the contract was for a supply of goods as well as for the installation of a lift where a labour and service element was involved.

Thus, such a composite contract for supply and installation was to be treated as a works contract.

Levy of service tax on restaurant services constitutionally valid

The Bombay High Court in the case of *Indian Hotels and Restaurant Association* has observed that the levy of service tax on restaurant services is constitutionally valid.

The levy was challenged on the ground that a tax on the supply of food and drinks by a restaurant would attract VAT/sales tax and the authority to levy such tax is vested with the State Government. Thus, the Union Government did not have the authority to levy service tax on restaurant services.

The Court observed that when a restaurant renders a service to a person, there is a supply of goods (i.e., food and drinks) on which VAT/sales tax could be levied by the State Government. As such, service tax was not a tax on the sale of goods, but was a tax on the services rendered by such restaurant and, thus, it was held that the Union Government had the authority to levy service tax on the service component as a part of the restaurant services.

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Japan

Proposed changes to taxation of cross-border digital supplies

In April 2014, the Japanese government launched a full-scale discussion on how to levy Japanese Consumption Tax (JCT) on digital products delivered from foreign suppliers.

For JCT purposes, the place of supply of services is where the services are physically performed. However, if the place of performance is not clear, the services are considered to take place at the office of the service provider. As a result, whether JCT is charged on the purchase of digital content varies depending on whether the supplier is a Japanese company or a foreign company. This inequality places Japanese suppliers at a significant disadvantage. With the JCT rate raised from 5% to 8% in April 2014, and a further rise to 10% scheduled for October 2015, the price disparity between Japanese and foreign suppliers is expected to be even greater.

Against this backdrop, the government has started working on JCT revisions to apply tax to cross-border digital supplies and eliminate price disparity. The changes being contemplated include:

- Defining the supply of digital content (which, under the current rules, can be interpreted as either the provision of services or the lease of copyright) as the 'provision of services via telecommunications networks'; and
- Changing the place of supply of services when the location of the service provision is unclear, to where the service recipient is located.

If these changes are implemented, the distribution of digital products from overseas suppliers to Japanese customers will be subject to standard-rated JCT. Also, to ensure effective JCT collection, the government is considering categorizing cross-border digital supplies into B2C transactions and B2B transactions, and treating them differently for JCT filing purposes:

- B2C transactions: foreign suppliers would be required to collect JCT from Japanese customers, and file and pay JCT through an appointed JCT representative.
- B2B transactions: a reverse charge mechanism would apply and Japanese recipients, instead of foreign suppliers, would be liable to account for output JCT on the transaction.

Amongst these proposed changes, a revision to the place of supply of services rules and the introduction of a reverse charge mechanism are particularly significant, since they could affect the JCT implications of traditional, non-digital transactions as well. The government announced that it would continue to discuss the specifics of the proposed regime, aiming to introduce it in 2015 tax reform.

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Korea

Simplification of origin procedures under Korea-USA Free Trade Agreement

The Korea-USA FTA has been in force since March 2012, but claims for preferential tariff treatment under the FTA have been lower than expected due to stringent application of the origin procedures by the governing authorities.

On 25 April 2014, Korea and USA reached consensus to simplify the origin procedures under the FTA. Both countries agreed that preferential tariff treatment will be conferred for goods without further requiring supporting documents or imposing verification requirements if:

- The goods satisfy the rules of origin
- A certificate of origin can be obtained from the governing authorities for the goods
- The certificate of origin obtained is submitted as a proof of origin.

Companies will not be subject to written or on-site audit for the origin of their goods if they are able to obtain a certificate of origin.

The simplification of origin procedures is expected to increase utilization of preferential tariff treatment under this FTA, and contribute to the expansion of trade between the two countries.

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EMEA

Customs Union between Russia, Belarus and Kazakhstan

Customs declaration of international transportation vehicles

Eurasian Economic Commission (EEC) Board Resolution No 48 dated 25 March 2014 has amended certain Customs Union Commission (CUC) resolutions regarding the customs clearance of international transportation vehicles – EEC Resolution No 422 dated 14 October 2010 and EEC Resolution No 511 dated 18 October 2010. The Resolution entered into force on 27 April 2014.

Amongst other amendments, customs declarations should now be filed for vehicles in the form of a document confirming the state registration and nationality of an international transportation vehicle and the passport or other identity document of the person completing customs formalities.

More detailed information on the resolution can be found on the official EEC website, **http://www.eurasiancommission.org/ru/Pages/default.aspx**.

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Denmark

Deduction for input VAT on hotel accommodation increased from 1 January 2014

From 1 January 2014, the partial deduction of input VAT on expenses for hotel accommodation was increased from 50% to 75%.

The expense must be strictly related to the business' taxable activities. The invoice for accommodation has to specify the price for accommodation and the price for other supplies (e.g., breakfast) separately.

Many companies previously filing VAT returns monthly now able to file quarterly

From 1 January 2014, new limits apply to whether a business has to file VAT returns monthly, quarterly or half-yearly:

Small business	Revenue: DKK 0-5 million (EUR 0-0.67 million.)	Half-yearly VAT returns
Medium-sized business	Revenue: DKK 5-50 million (EUR 0.67-6.7 million)	Quarterly VAT returns
Large business	Revenue: DKK above 50 million (EUR above 6.7 million.)	Monthly VAT returns

VAT registered companies can apply to the tax authorities for shorter periods, for example, half-yearly or quarterly, which can be advantageous for medium-sized export business whose input VAT exceeds their output VAT.

Domestic reverse charge to apply to supply of certain IT equipment

From 1 July 2014, the domestic reverse charge will apply to the supply of certain IT equipment (e.g., mobile phones, iPads, iPhones, and laptops) to other businesses.

The change affects both the purchaser of these products, which has to account for reverse charge VAT, and the provider. If the provider is primarily (more than 50%) selling these products to private consumers, the domestic reverse charge rule does not apply. The change has a particular impact on companies that are not VAT registered, because these companies will have to register in order to account for the VAT.

Change in tax authorities' practice regarding payment fees for using debit or credit cards in web shops

The tax authorities are applying a new VAT policy for web shops charging payment fees for using debit and credit cards.

Previously, such payment fees were considered free of VAT as a financial service. However, as a result of the new practice (which applies with retroactive effect from 23 January 2012), the payment fee is considered to be part of the main supply. If the payment fee relates to a supply that is subject to VAT, the payment fee will also be subject to VAT; and if the payment relates to a supply not subject to VAT, the payment fee is also not subject to VAT.

The change in practice is relevant for the many web shops charging payment fees.

2015 place of supply changes

The change from 1 January 2015 in the place of supply rules under Directive 2006/112/EC (the Principal VAT Directive) for electronically supplied services, telecommunications, radio and television broadcasting, and radio delivered to a non-taxable person was passed in the Danish legislation on 27 May 2014.

The legislation implementing the EU rules consists of legislation and amendments to the VAT administrative act, the latter being part of the public hearings in May.

Services to be included in capital goods scheme

According to draft legislation, from 1 July 2014, services will be included in the capital goods scheme rules for adjustments of VAT deductions, in accordance with Article 190 of the Principal VAT Directive.

The services included are those that have characteristics similar to those normally attributed to capital goods, including software and intellectual rights. The rules apply when the cost, excluding VAT, exceeds DKK 100,000 (EUR 13,500), whether it is the purchase or production cost. The adjustment period is five years for the services.

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National Tax Tribunal settles dispute regarding customs debt on oil imports

A focus on oil imports in Denmark by the tax authorities has shed its light on a case where the tax authorities, as seen in other Danish cases, have charged customs debt incorrectly.

The specific case involves a Danish storage operator holding a customs warehouse authorization, which had rented part of the oil storing premises to a Danish oil importer. Upon the import of oil, specific circumstances resulted in the oil being unlawfully introduced into the EU, cf. Article 202 (1) of the EC Customs Code.

Referring to Article 202 (3), 3. indent, the tax authorities claimed the storage operator to be the debtor of the approximately EUR 650,000 customs duty, even though the contract between the two parties specifically mentioned that the lessor under no circumstances should be regarded as importer of the goods. The tax authorities' reasoning was that by owning the premises where the oil was received and stored, and by holding the customs warehouse authorization, regardless of the lease, the storage operator should have known that the oil was unlawfully introduced into the EU.

Upon appeal to the National Tax Tribunal, the case was overturned in favor of the storage operator. Arguing that the storage operator had no legal or right of disposal of the goods at the time of the unlawful introduction, the National Tax Tribunal ruled that the storage operator did not store the goods in accordance with Article 202 (3), 3. indent of the EC Customs Code, and therefore could not be considered as the debtor of the customs duty under the same article. The case was brought before the Tribunal by the company with the authorization from the authorities for the customs warehousing regime, but the agreements between this company and the owner of the goods is of a kind that legally is considered not as an agreement of the storing of goods, but a rental agreement of the premises.

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European Union

Financial Transaction Tax discussed at May ECOFIN meeting

The press release issued in the wake of the May meeting of the Economic and Financial Affairs Council confirmed that 10 of the 11 countries that were permitted to adopt the 'enhanced co-operation' process to adopt a Financial Transaction Tax (FTT) issued a joint statement confirming that relevant issues would continue to be examined by national experts. The statement recorded the intention of participating countries to work on a progressive

implementation of the FTT, focusing initially on the taxation of shares and some derivatives.

It proposed that the first steps would be implemented at the latest on 1 January 2016.

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Finland

Reverse charge mechanism

The Ministry of Finance has published a proposal to extend the scope of the reverse charge mechanism to domestic supplies of scrap metal and waste. If approved by the parliament, the reverse charge mechanism will apply to supplies of scrap and waste of, inter alia, ferrous metals, copper and nickel, with effect from 1 January 2015.

Removal of low value consignment relief

The Ministry of Finance has published a proposal to remove the low value consignment relief (EUR 22) for imports of newspapers and magazines published once a week or less frequently. Further, the provision providing for the minimum payable import VAT amount of EUR 5 would not be applied to such imports. The purpose of the proposed change in VAT legislation is to prevent the circulation of newspapers and magazines via the Aland Islands, which do not belong to the EU tax area and, thus, have a third country status. If approved by the parliament, the new rules would apply from 1 January 2015.

2015 place of supply changes

The Ministry of Finance has published a proposal to implement the place of supply rules for telecommunications, broadcasting, and electronically supplied services in the Finnish VAT legislation with effect from 1 January 2015.

VAT on e-books

Advocate General Paolo Mengozzi has delivered his opinion in the (anonymised) Finnish case of *K OY*, about the treatment of e-books in Finland.

The Advocate General seems to be suggesting that the Court of Justice of the European Union (CJEU) should find that EU law does not prohibit different treatments for paper books and their electronic equivalents (whether on CD, CD-Rom, USB memory stick or some other physical means of support). He does suggest, however, that the position might be different if paper books and their equivalents on some other carrier medium are seen by an 'average consumer' to meet the same needs. It is left to the national court to determine whether this is the case.

Advocate General Mengozzi goes on to suggest that it does not matter whether an e-book is intended to be read or to be listened to, whether there exists a printed book with the same content as a book or audiobook on another physical means of support, or that a book on a physical means of support other than paper can exploit technical features provided by that means of support, such as search functions.

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Hungary

CJEU confirms that EU law provision for bad debt relief has 'direct effect'

The CJEU has gone straight to judgment in the Hungarian case of *Almos Agrárkülkereskedelmi Kft*. about a claim for bad debt relief.

The company delivered rape seed to its customer, which did not pay for it or return it. The tax authorities took the view that since the company had been unable to recover the seed, the situation did not qualify as restoration of the original circumstances. Therefore, there had been a supply of it on which VAT was due, and the authorities refused to allow the VAT adjustment claimed by the company.

The CJEU decided that it is not contradictory to the Principal VAT Directive, if a national legislation does not include all of the possible circumstances in which VAT declarations should be adjusted as set out in Article 90 of the Principal VAT Directive. Additionally, the CJEU decided that the VAT Directive had 'direct effect' and could be relied upon by taxpayers facing contrary national provisions, which could impose only limited restrictions on taxpayers' rights to adjust VAT declarations where there was total or partial non-payment. However, the applicability of the right to deduct VAT on this basis may be subject to formal requirements with regard to proving the fact that the consideration has not been paid.

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Italy

Excise news

Law No 23 dated 11 March 2014 has delegated to the government the review of the Italian excise code with the objective of simplifying requirements, rationalizing the excise duty rates, and merging or canceling particular provisions.

The government has also been delegated the power to introduce new provisions on energy and environmental taxation, mainly taking into account the emission content of energy products. In particular, these new rules are to be enacted in accordance with the rules arising from the proposal to amend EU Directive 2003/96/EC at the time it is approved, and the relevant new Directive will be implemented in Italy.

Guidelines on filling in the Single Administrative Document

In a communication dated 27 February 2013, the Customs and Monopoly Agency listed the codes and information to be included in box 44 of the SAD (Additional information/Documents produced/Certificates and authorizations) to declare and identify phytosanitary certificates.

The payment of import VAT is suspended on goods released for free circulation in Italy and then consumed into another EU Member State. On 1 April 2014, the Customs and Monopoly Agency issued Note No 3540 R.U. clarifying for this purpose that the import shall be followed by a sale or an intra-EU transfer of the goods in another EU country, stating that guarantees are not required, and listing the codes and information to be included in SAD box 44 in such cases.

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Kazakhstan

Temporary ban on export of ferrous metal waste and scrap

Kazakhstan Government Resolution No 373 dated 17 April 2014, which entered into force on 21 April 2014, has introduced a temporary ban on the export of ferrous metal waste and scrap (CN FEA CU code 7204), except for steel alloy waste and scrap, including stainless steel (CN FEA CU codes 7204 21100 0 and 7204 21900 0) and others (CN FEA CU code 7204 29 000 0) between 21 April and 30 June 2014.

Standards for state services provided by Kazakhstan customs authorities

Kazakhstan Government Resolution No 319 dated 4 April 2014, in accordance with the Law On State Services dated 15 April 2013, approved standards for state services provided by the Kazakhstan customs authorities, such as 'Preliminary decisions on the country of origin of goods to apply preferential and non-preferential treatment', 'Preliminary decisions on the classification of goods', 'Issuing acts of reconciliation regarding customs duties, taxes, customs fees and late payment interest' and many others. The Resolution entered into force at the end of 10 calendar days from the date of its first official publication.

Rules for determining country of origin of goods

Kazakhstan Government Resolution No 346 dated 11 April 2014, which entered into force from the day of its first official publication, has amended the Rules for determining the country of origin of goods; drafting and issuing certificates of appraisal for the origin of goods; and drafting, certifying and issuing certificates of origin for goods. The Resolution also amended a list of goods for which a list of conditions, production and technical operations are established (Appendix No 9), approved by Kazakhstan Government Resolution No 1647 dated 22 October 2009.

Among others, sufficient processing criteria include a change in the value of goods, when local content in the price of goods is at least 30% of the value of the finished goods under 'ex-works' conditions.

Appraisals of the origin of goods are carried out by travelling to their place of production.

For companies engaged in the mass production of goods for more than three years and if documents are presented proving the constancy of production techniques, the country of supply of raw materials (materials) and also the cost of raw materials and components in the last three years, certificates of appraisal for the origin of mass produced goods will be valid for three years. By the same token, 'CT-KZ' certificates of origin will be valid for 12 or 36 months from the date they are issued, depending on the validity period of an appraisal of origin.

In addition, commodity positions 1701, 7312 and 8474 32 000 have been added to the list of goods for which a list of conditions, production and technical operations are established.

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Malta

Budget Measures Implementation Act 2014

The Budget Measures Implementation Act, 2014, published on 29 April 2014, introduced a number of changes to the Maltese VAT Act. The changes fit within the government's policy to support economic activity by reducing administrative penalties and by avoiding businesses unnecessarily incurring interest because of unpaid amounts of VAT in respect of past VAT periods.

A brief summary of the two main changes follows.

Removal of 'short payment penalty'

Article 38A of the VAT Act, which imposed an administrative penalty for default in the payment of VAT declared in a VAT return or any other form required to be submitted to the tax authorities (the so-called 'short payment penalty'), has been removed with effect from 1 January 2014.

In addition, where a VAT return is being submitted to the tax authorities without being accompanied by the relevant payment of the VAT due, such return is no longer deemed not to have been furnished.

Appropriation of payment

With effect from 1 January 2014, payments made to the tax authorities are appropriated differently. The new rules are as follows:

- Where a VAT return or other form is timely submitted to the tax authorities and is accompanied by a payment, that payment is deemed to be made on account of the VAT payable on that VAT return or form;

- Where a VAT return or other form is timely submitted to the tax authorities and accompanied by a payment that does not, however, cover the full amount of the VAT declared to be payable therein, the taxpayer may, subject to conditions, pay the remaining amount of VAT in respect of that return/form by submitting to the tax authorities a declaration along with the payment, in which case the payment shall be deemed to be made on account of the VAT declared to be payable in the said return or form;

- All other payments made to the tax authorities are appropriated, firstly, to any interest due, subsequently, to any administrative penalties still payable and, lastly to any amounts of VAT due (provided that where VAT became due on more than one occasion, the payment shall be appropriated to that amount of VAT that became due at the earliest of those occasions before it is appropriated to the VAT that became due on subsequent occasions).

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Poland

Tax point recognition on local supplies

As covered in previous editions of this newsletter, from 1 January 2014 the tax point on local sales is detached from the invoice issuance date and is upon goods' delivery/service completion. To determine the time of goods delivery (when the economic ownership to the goods is transferred from the supplier to the purchaser), the tax authorities rely on, amongst others, the Incoterms applied. However, in practice some doubt has arisen as to how to determine the time of goods' delivery.

Recently, the Minister of Finance issued a ruling (in an individual case) on tax point recognition for local supplies. The case concerned a supplier who provided goods to its customers via courier, who was to deliver the goods to an agreed destination. The arrangements between the parties did not govern when exactly the economic ownership to the goods was transferred from the supplier to the purchaser. As a result, the authorities concluded that the parties had chosen to apply the general rules (based on civil law), under which the economic ownership is transferred from the seller to the buyer upon release of the goods to the courier.

The above ruling might be used by taxpayers as support when determining the time of goods delivery if no specific regulations are mentioned in the agreements.

Nevertheless, how to properly recognize the tax point on local sales in Poland is not always straightforward and requires analysis of each individual case.

'Empty' invoices issued before completion of supply of goods/provision of services

According to the new VAT regulations in force from 1 January 2014, taxpayers must issue invoices no later than on the 15th of the month following the month when the supply of goods/provision of services took place. However, taxpayers are also allowed to issue invoices up to 30 days before the supply/provision of services. In practice, the regulations generate some problems for Polish taxpayers. In particular, there are no clear regulations to determine how taxpayers should behave if there is no supply (of goods/services) after the lapse of 30 days from the issuance of an invoice.

According to the unofficial position of the Ministry of Finance, in such cases, taxpayers should issue a correction invoice cancelling the original invoice (documenting the supply of goods/provision of services that did not take place). If a taxpayer fails to cancel such an invoice (called an 'empty' invoice) before the statutory deadline for filing the VAT return for the reporting period of invoice issuance, the taxpayer must account for the VAT resulting from the invoice. The supply shall be documented with a new invoice upon its completion.

There is an exception to this rule if the supply would take place between the lapse of the 30 day deadline and the statutory deadline for filing the VAT return for the reporting period of invoice issuance – in such a case, the invoice is not considered to be an 'empty' one and the tax point is recognized upon completion of the goods delivery.

'Bought in' facilities may create a 'fixed establishment'

Advocate General Julianne Kokott has delivered her opinion in the Polish case of *Welmory sp z.o.o*. The case is about an internet auction site operated by a Cypriot company using infrastructure located in Poland that belonged to Welmory.

The Polish tax authorities decided that the services supplied to the Cypriot company were

subject to Polish VAT on the basis that through its relationship with Welmory, the Cypriot company had a fixed establishment in Poland at which those services were received.

The opinion suggests that although the Cypriot company would need to have 'human and technical resources' in Poland to be viewed as having an 'establishment' there, the provision of those resources by a third party (such as Welmory) may be sufficient, if the local infrastructure can be used as if it belonged to the offshore company.

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Portugal

Government announces possible VAT rate increase

The government has announced that the standard VAT rate is likely to be increased from 23% to 23.25% as a sustainability measure for the public pension system.

It is predicted that this change will be to enter in force as of 1 January 2015.

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Switzerland

Swiss Supreme Court decision on notice of assessment issued after VAT audit

The Swiss Supreme Court has ruled that the established practice of the Swiss Federal Tax Administration (SFTA) – VAT Department of considering a notice of assessment issued after a VAT audit to be a ruling without verifying whether the circumstances of the specific case justify a ruling under Article 82 of the VAT Law is neither in line with the spirit of the new VAT Law nor with the principles of promptness, legal certainty and equal treatment between tax authorities and taxpayers.

According to the Swiss Supreme Court, a notice of assessment can only be considered a ruling in the presence of one of the following scenarios, which jeopardize tax collection (Article 82, VAT Law, 'SFTA rulings'):

- Extraordinary circumstances (such as a declaration of the taxpayer to immediately dispute the findings of the tax authorities);
- In case of fraudulent activities; and
- By acts in breach of good faith.

Consequently, in the absence of these specific circumstances, a notice of assessment is considered to be equivalent to a preliminary notice that only can have the status of a final ruling where there has been written and formal acceptance/acknowledgment or payment without reservation by the taxpayer.

In case of a dispute or when the taxpayer does not act at all, it is the responsibility of the SFTA to start proceedings in view of a ruling or recovery against the taxpayer.

Therefore, the Court held that the SFTA could not reject an objection by the taxpayer related to a notice of assessment for the year 2010 on the basis that the deadline had expired (as more than 30 days had passed after receipt by the taxpayer of the notice of assessment). The Court

canceled the SFTA's rejection of the objection, but did not declare it invalid, which would have allowed similar decisions issued by the SFTA in the past to be challenged.

Swiss-China Free Trade Agreement to enter into force on 1 July 2014 as planned

The Swiss Federal Department of Economic Affairs, Education and Research and the Swiss Customs Administration officially confirmed the entry into force of the FTA between Switzerland and China on 1 July 2014, as originally scheduled.

Signed on 6 July 2013, the agreement is the first of its kind between a nation of continental Europe and China. It will not only improve mutual access for both countries to each other's respective goods and services markets, but is also set to strengthen legal certainty with regard to the protection of intellectual property rights, also promoting cross-border investments.

Implications

Goods originating in Switzerland may benefit from lower duty rates upon import into China. Goods originating in China may be eligible for improved access to the Swiss market, and eventually to the EU market (after sufficient processing in Switzerland).

Next steps

Swiss and Chinese exporters may assess whether their exports are eligible for the benefits of this new FTA: do their goods benefit from duty free market access in the country of destination; are these part of a transitional, multiple step, elimination scheme or are these, unfortunately, excluded from duty elimination?

In this respect, it is key to check whether the relevant goods meet the FTA's origin rules and criteria, as only originating goods are eligible for the new FTA's improved market access.

To demonstrate that these rules and criteria are met, and that the concerned goods qualify as originating (either in Switzerland or China), exporters will have to obtain a Certificate of Origin from their competent authorities (i.e., movement certificates EUR.1 for Swiss exporters) or, as an alternative, make use of a so-called Origin Declaration (e.g., declaration of origin on the invoice).

For the latter and under the Swiss-China FTA, only 'Approved Exporters' are entitled to validly support the preferential origin of the goods through submission of an Origin Declaration. Moreover, the text of the Origin Declaration differs from previous FTAs concluded by Switzerland, as well the requirement to print a unique Serial-No. (23 character long sequence) with each aforementioned declaration. Consequently, this could require adaptations to ERP systems in order to be compliant on 1 July 2014.

China preferential duty rate

The China Tariff Committee issued the preferential duty rate for the FTA, see the heading **Release of preferential duty rate under China-Swiss Free Trade Agreement.**

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United Kingdom

CJEU dismisses UK's Financial Transaction Tax case

The CJEU has gone straight to judgment and dismissed the UK's application asking the Court to annul the decision of the Council of Ministers that permitted 11 Member States (Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovenia, Slovakia and Spain) to use the EU's enhanced cooperation process to impose a Financial Transaction Tax (FTT). The UK's arguments that the outline design of the tax involved 'extra-territoriality' (since it is expected to affect businesses outside the 11 countries that plan to introduce it) and that it will impose costs on those Member States that do not implement it, were insufficient to convince the CJEU to annul the Council decision.

It concluded that these were issues relating to the implementation of FTT, rather than the decision to authorize the use of the enhanced cooperation process.

It follows that even though the UK's application was dismissed, this does not preclude the possibility of further litigation over the issues identified in the case if they are not addressed in the implementation process.

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