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Americas

United States

State sales and use tax remote seller legislation presented to U.S. Congress

Senate Majority Whip Richard Durbin, D-Ill, along with a group of bipartisan Senators and Representatives, has introduced remote seller legislation for consideration by U.S. lawmakers. The Marketplace Fairness Act of 2013 (S. 336, H.R. 684) would authorize states that have complied with the requirements of the Streamlined Sales and Use Tax Agreement (SSUTA) to collect and remit sales and use tax from remote sellers (i.e. Internet sites and catalog retailers that sell to customers in states where the sellers are not physically located). The proposed law also would allow states that are not SSUTA members to adopt alternative minimum simplification requirements. The bill includes a small-seller exception that generally would apply to sellers with annual gross U.S. remote sales of less than USD 1 million.

Various other bills, including the Marketplace Equity Act of 2011 (H.R. 3179) and a prior version of the Marketplace Fairness Act (S.1832), were introduced in the last Congress, but the proposed legislation lacked sufficient support to move forward.

Outlook

While disagreements over previous iterations, including the appropriate threshold for a small business seller exception and simplification requirements, have been resolved, a crowded congressional legislative agenda may make it unlikely that this legislation will be passed in the near term. However, Senate Majority Leader Harry Reid, D-Nev, has spoken favorably of remote seller legislation and if Durbin could garner 60 votes to avoid a filibuster, the chances of remote seller legislation being brought up for a vote in the chamber could increase. Currently, the legislation has 18 sponsors in the Senate and 35 in the House.

Brian Ertmer, Partner, Deloitte United States

Uruguay

New regulations for hydrocarbon exploration and extraction companies

Following the signing of four contracts for the exploration and extraction of hydrocarbons with four companies in October 2012, the Uruguayan government has published a decree that promotes hydrocarbon exploration activities carried out under the contracts; the decree includes tax benefits for both contractors and subcontractors.

Both contractors and subcontractors already are exempt from output VAT. To prevent an input VAT cost, the decree grants a credit for VAT included in purchases of goods and services related to the cost of promoted activities. The decree also includes an exemption from customs duties related to the import and re-export of machines, equipment, materials, tools, vehicles and supplies necessary for exploration and extraction activities.

Javier Bugna, Senior Manager, Deloitte Uruguay
Cecilia Valverde, Top Senior, Deloitte Uruguay

Asia Pacific

China

Tax base for EIT withholding at source for nonresident enterprises under VAT pilot reform clarified

The State Administration of Taxation recently issued guidance (Bulletin [2013] No. 9) that clarifies the calculation of the tax base for enterprise income tax (EIT) withholding at source for nonresident enterprises under the VAT pilot reform. The guidance, which applies as from 19 February 2013, is expected to have a significant impact on nonresident enterprises that have Chinese-source interest, rent, royalties, etc., as well as their domestic payers.

Under the EIT and business tax (BT) rules, Chinese-source interest, rent, royalties, etc. derived by a nonresident enterprise normally is subject to a 10% EIT (unless the rate is reduced under an applicable tax treaty) and a 5% BT, both of which are withheld at source by the domestic payer.

BT cannot be deducted from gross income in calculating the withholding EIT. However, under the pilot VAT reform, certain items of income may be subject to a 6% or 17% VAT (rather than BT). Hence, there has been considerable debate as to whether VAT should be included in gross income in calculating the withholding EIT, and various tax authorities have taken divergent positions.

Bulletin 9 clarifies that VAT is excluded from the tax base when calculating the EIT liability where the relevant income is covered by the pilot VAT reform program. The clarification generally will allow more funds to be remitted out of China and has clarified what have been inconsistent practices across China. Affected companies should assess the impact of Bulletin 9 on their profits, and take it into account when negotiating and concluding the tax terms in their contracts.

Administrative rules announced for airline companies in VAT pilot period

On 20 February 2013, the State Administration of Taxation issued guidance (Bulletin No. 7) for airline companies participating in the VAT pilot reform program. The bulletin implements previous guidance (Circulars No. 84 and No. 9) that allows airline companies headquartered in pilot regions to compute and pay VAT on a "consolidated basis" with respect to their VAT-able pilot program services. Bulletin No. 7 clarifies the following:

- Calculation formula for the computation of VAT payable on consolidated basis:
  - *For a head office*: VAT payable = VAT liability on pilot services – VAT already paid by branches in pilot areas – business tax (BT) already paid by branches in non-pilot areas
  - *For a branch*: VAT payable = VAT-able income x 1% provisional VAT rate.
- A branch must collect the relevant VAT/BT information on a monthly basis and include the data in a "transfer form" that must be confirmed by the relevant tax authorities.
- Head office and the branches must verify the VAT special invoices or other VAT deduction supporting documents with each in-charge tax authority, and deduct the input VAT.
- The VAT consolidated filing must be made by the head office on a quarterly basis.

Bulletin No. 7 also requests the tax authorities to conduct regular tax examinations of branches. Airline companies using the consolidated VAT filing facility should review their current VAT/BT computation and filing process in light of the new guidance and ensure that their internal control procedures are in compliance.

Bulletin No. 7 applies only to airline companies headquartered in pilot areas; it is unclear whether companies from other industries can request to use the consolidated VAT payment and filing method.

Sarah Chin, Partner, Deloitte China

India

Union Budget 2013-14

The Finance Minister presented the Union Budget 2013-14 to parliament on 28 February 2013. The key indirect tax features of the budget proposals are the following:

- The peak rate of excise and service tax maintained at 12%;

- The scope of advance rulings is to be expanded:
    - Advance rulings for excise and service tax can now be obtained by resident public limited companies;
    - The definition of ‘activity’ is expanded to include any new business by an existing producer/manufacturer;
    - Questions on the admissibility of CENVAT credit on input services can be sought by a manufacturer;
- An amnesty scheme in respect of service tax due is to be introduced by way of Voluntary Compliance Encouragement Scheme.

Detailed analysis of Budget proposals can be viewed at: **http://www.deloitte.com/view/en_IN/in**.

Prashant Deshpande, Partner, Deloitte India

EMEA

European Union

Pan-European Environmental Taxes Guide

Deloitte has launched an Environmental Taxes Guide, a web-based product that provides a single source of information on the key national (and where appropriate, regional) environmental taxes operating in the 27 EU member states, Norway and Switzerland. This tool will allow businesses to take a more strategic approach to environmental taxes because the guides will help to identify areas of potential risk and opportunity across multiple countries.

Deloitte’s Environmental Taxes Guide is designed to provide businesses with a user-friendly knowledge management tool. It allows users to access information on environmental taxes – such as the tax base, tax rates and key compliance obligations – either by country or by type of environmental tax (including, for example, energy taxes, emissions taxes, waste taxes and water taxes). The Guide will be reviewed and updated at least every six months.

For more information, see **Environmental Taxes**.

Zoe Hawes, Manager, Deloitte United Kingdom

VAT Expert Group

As part of the strategy for a simpler, more robust and efficient VAT system, the European Commission set up the VAT Expert Group in September 2012. The 40-member Group is comprised of individuals and organizations representing businesses and tax practitioners to assist the Commission in the development and implementation of EU VAT policies. As a member of the VAT Expert Group, Deloitte is represented by Piet Vandendriessche, Global Indirect Tax Leader, and Justin Whitehouse, Global Public Sector Tax Leader, as his alternate.

The VAT Expert group has held four meetings during which it discussed three topics:

- B2B supplies of goods -- taxation at destination (discussed in three of the meetings)
- Standard VAT returns
- VAT in the public sector and exemptions in the public interest.

The VAT Expert Group is assisting the Commission on the proposal on the definitive regime of taxation of intra-EU trade, based on the destination principle. Various options for the future VAT treatment of intra-EU supplies are being discussed, ranging from retaining the status quo to full harmonization of the EU VAT system with a harmonized rate. An option for the supplier being liable for charging VAT on intra-EU supplies also is under consideration.

The VAT Expert group meeting in January 2013 addressed standard VAT returns and VAT in the public sector. The discussion on the latter is focusing on the main distortions of competition caused by the current VAT treatment and the options for future changes. The Commission has committed to publish a proposal for a standard VAT return by the end of 2013.

The Commission publishes the VAT Expert Group discussion documents (within a couple of months after a meeting) on their **webpage**.

Aili Nurk, Manager, Deloitte UK

Czech Republic

VAT rate on health care products

An amendment to the Czech Republic's VAT Act that became effective on 1 January 2013 limits the application of the reduced VAT rate to a narrower range of health care products than was previously the case. The tax authorities issued guidance in February that provides for a broader application of the reduced rate. The scope of applicability of the reduced rate is relevant for pharmaceutical companies, health care institutions, pharmacies, etc.

Register of unreliable payers

The Czech Republic VAT Act has introduced a public register of "unreliable payers". A VAT payer can be declared unreliable if it seriously breaches its obligations to the tax administration.

If a company receives a supply from a provider that is published as an unreliable payer at the time of the supply, the company must guarantee the unpaid VAT arising from the supply.

Register of reliable accounts

A public register of reliable accounts will be launched on 1 April 2013.

If a company makes a payment for the delivery of goods or the provision of services to a bank account that is not recorded in the register of reliable accounts, the account will be considered unreliable and the company will be required to guarantee the payment of Czech VAT if it is not paid by the supplier.

When making a transfer to a bank account that is held outside the Czech Republic, the customer may be requested by the tax authorities to guarantee any Czech VAT not paid by the supplier, even if the account was published in the register of reliable accounts. However, in these cases, the guarantee can be effectively challenged. By contrast, the guarantee cannot be successfully contested if the relevant foreign account is not published in the register of reliable accounts.

Radka Maskova, Director, Deloitte Czech Republic

France

Partial exemption calculations do not include overseas activities

The Advocate General of the CJEU has delivered his opinion in the French case of *Société le Crédit Lyonnais*, about whether the partial exemption calculation the bank must make should take account of the turnover of its overseas branches.

The bank argued that the overseas activities should be taken into account in determining the level of French input VAT recovery, while the tax authorities took the position that only domestic turnover should be included in the calculation.

The opinion suggests that the Sixth VAT Directive does not include compulsory provision requiring member states to take the activities of branches in other countries into account when the amount of deductible input VAT is computed.

It is remains to be seen whether the CJEU will follow the AG’s opinion when it decides the case.

Michel Guichard, Partner, Deloitte France

Germany

Advisory services can be exempt as management of special investment funds

The CJEU has followed the Advocate General’s opinion in the German case of *GfBk* (GfBk Gesellschaft für Börsenkommunikation mbH), regarding the scope of the VAT exemption for charges for the “management” of special investment funds.

GfBk provided advice on the investment of the fund to its manager, which itself executed the trades proposed by GfBk after determining whether they were in accordance with its broader investment policies, etc. The CJEU confirmed that advisory services of the kind supplied by GfBk amounted to "management" of the fund and can qualify for the exemption.

Whilst this decision may reduce VAT costs for certain special investment funds, managers may be facing increased VAT costs as a consequence of making exempt supplies.

Intra-community supplies of goods

A simplification rule has provided for the splitting of a direct intra-community supply into an intra-community transfer of own goods for the supplier's own disposal and a subsequent domestic supply in the destination country.

The German tax authorities issued a decree in November 2012 with the intention of limiting the scope of the simplification to supplies of goods where the goods are transported by the supplier itself to customers in the destination country. The German tax authorities granted a transitional period until 31 March 2013, but from 1 April 2013, the simplification rule was only to apply where goods are transported by the supplier itself to customers in the destination country.

However, the German Federal Ministry of Finance has issued an additional decree extending the application of the simplification rule for intra-community supplies. The German Federal Ministry of Finance has extended the transitional period until 30 September 2013.

Marcus Sauer, Director, Deloitte Germany

Greece

Ministry of Finance proposes favorable import VAT rules to attract foreign business

Greece's Ministry of Finance has proposed the introduction of a beneficial VAT regime to encourage foreign businesses to use Greece as the entry point for their goods originating from third countries. The regime would apply at the time the goods are imported and when the goods are subsequently delivered within Greece.

Under the proposed rule, instead of imposing VAT upon import, VAT would be assessed, but would not be collected by the competent Customs authorities; the movement of the goods would be tracked until they reach their final destination outside Greece.

To qualify for the favorable regime, more than 90% of the volume of the goods would have to be destined for other EU member states or third countries and their value would need to meet the thresholds to be set by law. The value of the imports would have to be at least equal to EUR 120 million per year for the first five years the regime applies and EUR 300 million thereafter. Group companies may, upon certain conditions, also fall within the scope of this regime.

Provided the importer meets the above requirements, and after taking into consideration specific data (such as solvency), the General Secretariat of Public Revenue would issue a license allowing group companies to benefit from the procedure.

The Greek parliament has voted on the law, but Ministerial decisions and circulars are still to be issued.

Professional leases

As from 1 January 2013, a right to opt to tax as a supply of services subject to VAT has been introduced for the lease of property to be used for the exercise of professional activities, either independently or in joint procurement, provided the lessee is subject to VAT. Previously, the option was available only for the leasing of shopping centers and merchandise hubs if certain conditions were satisfied. The option for tax can relate to an entire building complex or a part thereof.

To qualify, the lessor must submit an application to the competent tax authorities by a specific deadline (30 June 2013 for cases subject to VAT for the first time). VAT applications relating to the commercial use of shopping centers that were submitted by 31 December 2012 also fall within the scope of these provisions, although a new application is not required.

Businesses that charged VAT on leases for the exercise of professional activities before 1 January 2013 are subject to the new rules provided an application to opt to VAT taxation is submitted by 30 June 2013. Further clarifications on the interpretation and the practical application of this latter case are required.

Other requirements, procedures and application details will be determined by Ministerial Decisions.

Kyriaki Dafni, Senior Manager, Deloitte Greece

Italy

Cash VAT scheme

The Italian tax authorities issued a circular on 15 February 2013 (Circular No. 1) that clarifies the cash VAT scheme introduced by Law Decree No. 83 of 2012. The circular confirms that a sale of credit, with or without recourse, does not give rise to a VAT charge. Consequently, VAT becomes due, in principle, only when the debtor actually pays the consideration to the purchaser of the credit. The seller must be informed when payment takes place or, to avoid penalties, the seller can pay the VAT in advance in the period in which the credit is transferred.

When payment of the consideration is made by means other than cash (e.g. via a bank transfer), the payment will be deemed to be received when the funds are actually available (e.g. by a credit entry in the bank account), regardless of when the creditor is informed of the payment (such as in a bank statement).

The circular also clarifies the treatment of credit/debit notes:

- If the credit/debit note is issued within one year of the date of the transaction, the original tax due must be amended.
- If the credit/debit note is issued more than one year after the transaction takes place, the VAT must be amended in the first possible VAT computation.

Finally, the circular clarifies that, for taxpayers that opt for the cash VAT regime, VAT on purchases is deductible at the time consideration is paid for all purchases, including those relating to transactions excluded from the cash VAT regime, unless the transactions accounted for under the cash VAT regime are managed as a separate activity under Italy's VAT law.

Restriction of ability to set off VAT credits for companies in a "continuous tax loss position"

Circular No. 1 also further clarifies the application of the rules relating to companies in a "continuous tax loss position."

In response to a question as to how to determine when VAT credits are no longer able to be set off, the tax authorities have clarified that, where a company is in an income tax loss for three consecutive years or in an income tax loss for two consecutive years with a further year where income is lower than the minimum set by law for non-operating companies and no disapplication conditions apply in this three year period, the company must be regarded as non-operating in the fourth year. As a result, the company will be deemed to be a non-operating company from the beginning of the fourth year and restrictions on the use of the VAT credits will apply.

In particular, the VAT credit cannot be refunded and it cannot be offset against other taxes. After three years of such a situation (and a VAT turnover under the operative threshold amount), the VAT credit will be lost.

Joint liability of contractor and subcontractor for withholding taxes and VAT due by subcontractor

In Circular No. 2/E, dated 1 March 2013, the Italian tax authorities provided further clarification (following that published in Circular No. 40/E of 2012) of the joint and several liability of contractors and subcontractors for the payment of withholding taxes on employment income and VAT due by the subcontractor. The liability is limited to the amount of the consideration due (introduced by Article 13-ter of Legislative Decree No. 83, 2012).

The tax authorities have clarified that the new provision is not limited to the building sector, but is applicable to all contracts and subcontracts regardless of the economic sector in which the contracting parties operate. In particular, the rule relates only to contracts as defined in Article 1655 of the Civil Code, namely "*the contract by which one* *party undertakes, with the necessary resources and organization management at its own risk, the completion of a work or service for a consideration in money"*, and the authorities provide examples of contracts not falling within the scope of the new provisions.

The tax authorities also have confirmed that, in the case of multiple contracts between the same parties, the statement certifying the timing of payments of withholding tax on income from employment and VAT relating to the contract need be issued only once. The certification may also be supplied on a periodical basis at the time of payment, certifying the timing of all payments relating to withholding tax and VAT due if this information was not previously stated.

Clarifications also have been made regarding the statement certifying payments that are made by bank transfer or other means that do not allow the recipient immediate availability of the amount paid, and cases in which the contractor or the subcontractor have sold their credit to third parties.

Antonio Piciocchi, Partner, Deloitte Italy

Barbara Rossi, Partner, Deloitte Italy

Lithuania

Changes related to import VAT

As from 1 March 2013, the accounting of import VAT via the VAT return is allowed in most cases, i.e. VAT payers can increase the amount of output VAT reported in the VAT return for the relevant tax period by the amount of import VAT calculated on the imported goods instead of paying the import VAT to the customs authorities at the time of import.

Notification of tax investigations and audits

Two orders issued by Lithuania's tax authorities require that taxpayers be notified in advance of an impending tax investigation or tax audit. Notification must be made via regular mail or email at least five days before the investigation/audit, although there are some exceptions to the notification requirement.

Tatjana Vaičiulienė, Senior Manager, Deloitte Lithuania

Netherlands

New domestic reverse charge rules

The Dutch State Secretary for Finance has made combatting VAT fraud a key policy initiative. The State Secretary announced that the compulsory reverse charge regulation for the supply of mobile telephones and computer chips will take effect as from 1 April 2013. The compulsory reverse charge also applies to game consoles, tablets and laptops.

Reduced VAT rate on refurbishment and renovation in housing market

The Dutch government has reached an agreement with the opposition parties on measures to boost the housing market. This means that the reduced VAT rate of 6% can be applied to the labor part of refurbishment and renovations as from 1 March 2013 for one year (until 1 March 2014).

Willem Kronjee, Senior Manager, Deloitte The Netherlands

Poland

No interim provisions in respect of abolition of reverse charge mechanism

As from 1 April 2013, the reverse charge mechanism in respect of local purchases of goods from foreign entities registered for VAT in Poland will be abolished, so that foreign entities registered for VAT in Poland will have to charge Polish VAT on local supplies of goods. However, there are no provisions that regulate the VAT treatment of supplies made in March 2013 but invoiced in April 2013.

Joint and several VAT liability for sellers and buyers

The Polish Ministry of Finance is working on changes to the VAT Act that would allow the tax authorities to claim VAT from a buyer if the seller does not pay the relevant VAT. This rule mainly would affect the sale of steel and fuel. The buyer could be held responsible if the buyer was aware or could reasonably know that the seller would not pay the VAT.

The changes are planned to take effect from 1 July 2013, but a draft law has not yet been submitted to parliament.

Michał Kłosiński, Partner, Deloitte Poland

Portugal

Communication of invoices and transport documents

On 21 February 2013, Portugal’s tax authorities issued new instructions regarding the communication of transport documents. (The instructions were updated on 14 March.) According to the instructions, as from 1 May 2013, transport documentation (regarding transportation taking place in Portugal) must be communicated to the tax authorities before the transport commences. The goods and means of transport are to be seized if, during transport, the authorities discover that the required communication has not been made. This seizure should be temporary until the situation is regularized.

This requirement does not apply, however, where the transport document is also the invoice for the sale; in this case, no additional transportation documents have to be issued nor need to be communicated to the Portuguese tax authorities.

The instructions of the tax authorities regarding the communication of invoices (which entered into force on 1 January 2013) was updated on 28 February 2013.

Excise duties

Excise duties applied to heating oils (nomenclature code 2710 19 45) have been updated. The tax is now EUR 330/1,000 litres, which represents an increase of around EUR 0.04 per litre (the rate previously established was EUR 292.46/1,000 litres). These changes came into force on 28 February 2013.

Afonso Arnaldo, Partner, Deloitte Portugal

United Kingdom

Court decides for taxpayer in case on business promotion schemes

The UK Supreme Court has decided (by a majority of three to two) that Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited), the company that runs the Nectar points scheme, is entitled to reclaim VAT on the cost of redemption goods/services delivered to Nectar cardholders. Following a reference to the CJEU by the House of Lords in 2008, the CJEU decided that payments made by Aimia/Loyalty Management to the businesses supplying the redemption goods and services were "third party consideration" for supplies made to the cardholders.

However, the Supreme Court has now concluded that the CJEU decision did not take account of the full circumstances of the case and that, when the full facts (as found by the VAT and Duties Tribunal in its decision) are taken into account, there is a supply to Aimia on which input VAT is deductible.

Whilst the Supreme Court's decision emphasises that consideration of the "economic reality" of the situation is all important, and so conclusions will be very dependent on the facts of particular cases, this decision is likely to have far-reaching implications, not just for loyalty schemes such as the Nectar scheme, but also in other situations where the commercial arrangements result in what is arguably double taxation.

CJEU rules management of a defined benefit pension fund is not VAT exempt

The CJEU has delivered its decision in the case of *Wheels Common Investment Fund Trustees Ltd and Ors* about the scope of the VAT exemption for the management of pension funds. The Court decided that the defined benefit fund was not a "special investment fund" and, hence that the management of it cannot qualify for VAT exemption.

Among the factors that led to the CJEU's conclusion was the fact that members of defined benefit pension schemes have no interest in the performance of the manager, since their benefits do not depend on it. That is not the case with defined contribution schemes where the members bear the investment risk. The CJEU is expected to consider the treatment of the management of such funds in the Danish case of *ATP PensionService A/S* and will be ruling on the scope for employers to recover VAT on the costs of running pension schemes, in the case of *Fiscale eenheid PPG Holdings BV,* which was heard by the CJEU in February.

VAT on corporate acquisitions

The UK Court of Appeal has decided against the taxpayer in the *BAA* case, a case involving whether Airport Development and Investments Limited (ADIL), the company formed to take over BAA, was able to recover VAT on the transaction costs after it joined the BAA VAT group following the takeover. The Court of Appeal upheld the Upper Tribunal's decision against the taxpayer, concluding that "... the UT correctly overturned the decision of the First-tier Tribunal as erroneous in law. The input tax was not incurred on supplies to BAA and there was no direct and immediate link between the services supplied to ADIL which incurred the input tax, and the outward supplies made by BAA, on which VAT was charged. …".

The court went on to add a further point against ADIL and BAA, that "... at the relevant date, ADIL had no economic activity enabling it to recover the input tax … it simply existed and acted to acquire the shares in BAA without carrying on any economic activity that involved actual taxable supplies in its own right and without forming any intention, prior to the completion of the takeover, either to do so, or to join the BAA VAT group."

Carbon Price Floor: CCL and duty changes

The UK tax authorities have published further information about the carbon price floor that becomes effective on 1 April 2013. There will be changes to the Climate Change Levy (CCL) regime in the case of gas, solid fuels and liquefied petroleum gas (LPG) used in electricity generation. Changes include the setting up of new carbon price support (CPS) rates of CCL. For electricity generated using oil fuels, the carbon price floor is being achieved through an adjustment of the fuel duty regime.

Donna Huggard, Senior Manager, Deloitte UK

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