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From the editor

Tennessee and other states, including Hawaii, South Carolina, Indiana, Michigan and Utah appear to be emboldened to enact click-through nexus legislation during their current legislative sessions. These states are proposing legislation similar to the New York law that will adopt a rebuttable presumption that out-of-state retailers have nexus in the taxing state. *Brett R. Carter Esq* from Bradley Arant Boult Cumming, LLP in the US explains the continued uncertainty in this area of the law despite the decision by the United States Supreme Court not to review the New York law in our lead article this month.

Base broadening, tougher administration and numerous court decisions regarding the fundamental building blocks of the tax have been recurring features of the Australian stamp duty regime in recent years. *Costa Koutsis* from PwC explains why this year is expected to be no different.

In our third article this month, *Juliane Neumann* from PwC in Germany looks at how exports as well as intra-Community supplies of goods are zero-rated if certain conditions are met. The taxpayer has to provide evidence by recording certain information and by providing documents in accordance with the requirements of the German VAT Ordinance (UStDV). Those rules have been essentially reformed since January 1, 2012 and October 1, 2013.

On February 27, the Court of Justice of the European Union (CJEU) published its judgment in Case No. C-82/12, declaring the Spanish regulations on the Tax on Retail Sales of Certain Hydrocarbons (IVMDH), popularly known as the "healthcare cent" to be contrary to Community law. *Javier Blázquez* from Baker & McKenzie in Spain examines the nature of the IVMDH, how this tax made it to the CJEU, and the consequences which the judgment may have on Spain's Public Treasury.

Indirect Taxes strives to ensure diversity, essential information through professionalism, and value in all of the articles included in each month's publication. Should you have any suggestions or if you are interested in submitting an article to the journal, please do not hesitate to contact BBNA.

R. Bird

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US: Click-through nexus legislation – developments from Tennessee

Brett R. Carter, Esq
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Tennessee and other states, including Hawaii, South Carolina, Indiana, Michigan and Utah appear to be emboldened to enact click-through nexus legislation during their current legislative sessions. These states are proposing legislation similar to the New York law that will adopt a rebuttable presumption that out-of-state retailers have nexus in the taxing state. This article explains the continued uncertainty in this area of the law despite the decision by the United States Supreme Court not to review the New York law.

Brett R. Carter, Esq, is Partner at Bradley Arant Boult Cumming, LLP in Tennessee and practices in the area of state and local tax.

I. Background

The General Assembly in Tennessee and legislatures in other states, including Hawaii (HB1651), South Carolina (S870), Indiana (SB269), Michigan (HB 4202), and Utah (SB226), appear to be emboldened by the United States Supreme Court's denial of the cert petition in *Overstock-.com Inc. v. Dep't of Taxation and Finance et al.* and *Amazon.com LLC et al. v. Dep't of Taxation and Finance et al.*, 987 N.E.2d 621 (N.Y. Ct. App. 2013), cert denied (Dec. 2, 2013), on December 2, 2013. Those states are proposing legislation similar to the New York law that will adopt click-through nexus provisions, which adopt a rebuttable presumption that out-of-state internet retailers have nexus in a state if the seller enters into an agreement with an in-state resident to refer customers to the online retailer's website.

II. Tennessee

The proposal in Tennessee (SB2298), for example, was introduced by two influential legislators, Senator Randy McNally and Representative Charles Sargent, immediately lending credibility to legislation that had been summarily dismissed in prior legislative sessions. In those prior sessions, the Tennessee Department of Revenue had been clear that it believed that it already had the audit authority to pursue internet retailers with nexus in Tennessee and that the "Amazon" legislation was unnecessary.

Times appear to have changed, however, as the Amazon laws, once believed by some to be destined for defeat in the courts have survived judicial scrutiny in New York. Moreover, Amazon has opened multiple distribution centres in Tennessee (and in other jurisdictions), cutting deals that delayed its agreement to begin collecting sales and use tax to a later date. In Tennessee, Amazon agreed in 2012 to begin collecting

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Tennessee sales and use tax on Tennessee sales effective January 1, 2014. Significantly, with Amazon no longer championing the opposition to click-through nexus provisions in Tennessee, and probably now tacitly promoting the bill in order to "level the playing field" with its out-of-state competitors, the click-through nexus proposal in Tennessee appears to be well on its way to passage. Indeed, the Department of Revenue in Tennessee appears to be taking a passive approach to this legislation, letting the General Assembly decide whether to enact the law or not. It is likely that this same scenario will also play out the same in other states.

If passed, the applicable provisions would establish a rebuttable presumption that an out-of-state online retailer has nexus with Tennessee if the seller enters into an agreement with a Tennessee resident to refer customers to the online retailer's website for a commission (e.g. via a link on the resident's website). The threshold for enforcement of the rebuttable presumption would be equal to the cumulative gross receipts exceeding US$10,000 in the preceding calendar year from traffic routed to the online retailer's website. The bill provides that the presumption may be rebutted by "clear and convincing evidence" that the resident with whom the seller had an agreement did not engage in any activities in Tennessee that would substantially contribute to the online retailer's ability to establish and maintain a market in the state.

If legislation in Tennessee passes, it would be following the lead of states such as Arkansas, California, Connecticut, Georgia, Illinois, Maine, Missouri, Kansas, Minnesota, New York, North Carolina, and Rhode Island (among others), which have enacted click-through nexus laws. Other states, including Florida and Mississippi, have proposed legislation addressing click-through nexus in prior legislative sessions only to see those measures fail.

> "taxpayers in states other than New York should continue to vigorously challenge the constitutionality of click-through nexus provisions"

III. Illinois

While New York's click-through laws have been upheld by the New York courts, *Overstock.com Inc. v. Dep't of Taxation and Finance et al. and Amazon.com LLC et al. v. Dep't of Taxation and Finance et al.*, 987 N.E.2d 621 (N.Y. Ct. App. 2013), cert denied (Dec. 2, 2013), the Illinois Supreme Court held in late 2013 that the Illinois click-through nexus law was pre-empted by the Internet Tax Freedom Act, which prohibits states from imposing discriminatory taxes on electronic commerce. *Performance Marketing Association Inc. v. Hamer*, 998 N.E.2d 54 (Ill. 2013). The Illinois Supreme Court did not rule on the Commerce Clause argument of the taxpayer, leaving the question open as to whether the reasoning in *Amazon* will be followed in other state courts.

IV. Colorado

Colorado has taken a different approach to the nexus issue faced by states enacting legislation in 2010, requiring retailers that do not collect and remit Colorado sales and use tax to notify customers at the time of purchase and then at the end of the year that the customer is liable for Colorado use tax on the purchase. Colo. Code Ann. § 39-21-112. Retailers that failed to provide this notice would face stiff penalties. Under the legislation, the retailer was also required to file an annual report with the Department, reporting the total amount each Colorado customer paid for its untaxed purchases. Any retailer failing to do so would amass penalties that could quickly rise to as much as US$250,000 for the first year and can exceed this cap in later years. There were certain de minimus exceptions to the requirements of the Colorado law (gross sales less than US$100,000).

The Direct Marketing Association quickly moved to enjoin the Colorado Department of Revenue from enforcing the notice and reporting requirements, arguing that the requirements were unconstitutional under the Commerce Clause, among other grounds. *Direct Marketing Association v. Huber*, Case No. 10-CV-01546-REB-CBS (D.C. Colo. 2011). A preliminary injunction was granted in favor of the Direct Marketing Association while the suit was pending and was applicable to out-of-state companies with no physical presence in Colorado. The grant of the preliminary injunction was indicative of the strength of the taxpayers' position in these notice cases as a high burden must be met to obtain a preliminary injunction of this nature. Thus, it sent a strong signal that the taxpayers' were well positioned to prevail in this case, leaving the click-through nexus legislation as the more likely course of action for state legislators.

The Colorado case, however, has taken a procedural turn and was dismissed based on the District Court's conclusion that the federal suit violated the federal Anti-Injunction Act. The Direct Marketing Association is appealing the dismissal and has also filed a companion state court case raising the same constitutional challenges as were set forth in the federal case. The preliminary injunction has also been granted in the state court case. Thus, the taxpayers remain in a strong position.

Despite the less certain status of these notice provisions, other states have still chosen to enact legislation similar to the Colorado notice requirements, including Oklahoma (Okla. Stat. tit. 68, § 1406. 1.), South Dakota (S.B. 146, Laws 2011) and Vermont (Vt. Stat.

Ann. Tit. 32, § 9783). Thus, it is apparent that states will continue to take varying approaches to reaching out-of-state retailers, whether it is through click-through nexus legislation or notice/reporting legislation.

V. Conclusions

While the argument that notice and reporting legislation is unconstitutional is strong, questions also remain as to whether the click-through legislation is constitutional under the Commerce Clause. Accordingly, taxpayers in states other than New York should continue to vigorously challenge the constitutionality of click-through nexus provisions. Taxpayers may also be able to assert federal preemption as a ground for relief depending on the applicable state statute. With no federal legislation to resolve this dispute, and with the continued growth of internet retailers, this debate is hardly over and will be played out in state courts across the country over the coming years.

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What lies ahead for stamp duty in Australia?

Costa Koutsis
PwC in Australia

Base broadening, tougher administration and numerous court decisions regarding the fundamental building blocks of the tax have been recurring features of the stamp duty regime in recent years. We expect this year to be no different.

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In this article we look at what is coming down the legislative pipeline, upcoming land mark appeal decisions and recent trends and developments which we expect will shape the stamp duty landscape in the next year.

I. Budget season begins

Like all things state taxes, the various States and Territories will deliver their budgets at different times – kicking off in early May and ending in mid-June.

While budget measures are notoriously difficult to predict, an update would be welcomed on when the long overdue abolition of duty on non-land business assets and other nuisance duties is likely. Given continued fiscal constraints, whether these duties are abolished will probably depend on broader tax reform – for example, changes to the GST threshold for online goods. A decision on this is expected in March 2014. NSW has suggested that it may scrap inefficient taxes once the GST threshold for online goods is lowered.

II. Landmark appeals

A. Cross City Tunnel

The NSW Court of Appeal will hear the Commissioner's appeal in the Cross City Tunnel case (CCT) (*CCM Holdings Trust Pty Ltd v Chief Commissioner of State Revenue; CCT Motorway Company Nominees Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 1072) in late February 2014. In *CCT*, the Supreme Court found that the tolling right in question was not an item of property separate from the land lease. The Court also found that if the tolling right was a separate item of property it would not have been a land asset (and accordingly, not dutiable).

The upcoming appeal is likely to shed further light on the character of a tolling right and more fundamentally, the limits to the meaning of "land" for stamp duty purposes. In the landholder landscape the breadth of what is land, together with the valuation of it, are the principal areas for engagement with the various revenue offices.

CCT is important for investors in the road, rail and port sectors, as well as other assets that are held under a concession or franchise arrangement (for example, social infrastructure). And in the wider world of income tax, it should also be watched closely by foreign investors looking to invest in toll roads and privatised assets more generally, insofar as those assets may include taxable Australian real property.

B. Lend Lease

The Victorian Commissioner has applied for special leave to the High Court to appeal the Victorian Court of Appeal's decision in the Lend Lease case (*Lend Lease Development Pty Ltd v Commissioner of State Revenue* [2013] VSCA 207). It is expected that the special leave application will be heard by the High Court in April 2014.

In *Lend Lease*, the Court of Appeal ruled that the consideration for the transfer of land did not include contractual obligations to make payments relating to the development of infrastructure and construction works on the contracted land and surrounding areas. The consideration was limited to the contract price for the land. Whereas the Supreme Court took a particularly broad approach to the question of what constitutes consideration, the Court of Appeal took a more focussed approach and sought to characterise the payments in light of the broader development transaction taking place between the parties (namely the development of a whole precinct, not just the acquisition of a parcel of land).

While the concept of consideration is a fundamental building block of the stamp duty legislation and clarification is always welcomed, it will be interesting to see if special leave will be granted, given the High Court recently considered the meaning of "consideration" in 2005 (See *Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496). If indeed an appeal occurs, the decision will be particularly relevant for property developers and the infrastructure sector, particularly where the transaction takes place in the circumstances of a multi-party broader development project.

III. Here come the WA Interim Assessments

We expect to see the Western Australia Office of State Revenue accelerating revenue collection by widely using its new interim assessments powers. The new interim assessment regime was no doubt introduced in response to the increasing number of disputes (and associated delays) arising in relation to the valuation of land-related assets.

Effective from September 2013, the Commissioner can issue an interim assessment for high-value, complex transactions. We have seen, and continue to expect to see, interim assessments in landholder transactions in the mining, infrastructure and utilities sector.

Clients who currently have or are expecting to make WA lodgements need to consider their strategy on valuation and the degree and timing of revenue engagement. The most immediate "stick" in the regime is the inability to object to an interim assessment for three years, even though the Commissioner can effectively nominate his own value for the interim assessment. Together with the ability to recharge valuation costs and impose penalties for "under-valuations" taxpayers simply can't afford to "go in low" and hope for the best when it comes to valuations.

IV. When will the long-pending NSW amendments become law?

The State Revenue Legislation Amendment Bill 2013 (NSW) is expected to finally pass through Parliament sometime in February or March 2014. Introduced in May 2013, the Bill proposes to abolish the exemption from landholder duty on just and reasonable grounds, abolish the landholder duty exemption which currently applies to land used for primary production, and expand the definition of "land" to capture a wider range of mining tenements (for example, assessment leases and exploration licences) and ensure certain transactions involving options to purchase land are dutiable.

The legislation is of particular interest to those looking to invest in agribusinesses (either to continue to run the business or where there will be a change in use of the land – for example, mining or property development). The changes to options principally affect the property industry, particularly residential developers.

One of the things that need to be monitored as the Bill makes its way through Parliament is whether there will be any change to the commencement arrangements. The amendments were to have effect from July 1, 2013 and the date of assent. Given the extended length of time since the Bill was introduced it will be interesting to see if there are any modifications to the timetable – in particular if some or all of the provisions will have a retrospective effect.

V. The release of statutory land valuations

Finally, we expect statutory valuations to be issued by the various valuer-general offices in early 2014. The valuations are principally used for land tax and rating purposes. However recent experience suggests the revenue offices in some states are also using valuations to assess at a high level if the value attributed to land in transactions is reasonable.

Review your valuations carefully – historically, errors have been known to arise (for example, properties being incorrectly described, failing to take into account heritage, zoning or contamination issues). When you receive your valuation, you have the opportunity to object to it but with short deadlines (generally 60 days) you need to act quickly.

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German VAT Ordinance: New obligations for exports and intra-Community supplies

Juliane Neumann
PwC in Germany

Exports as well as intra-Community supplies of goods are zero-rated if certain conditions are met. The taxpayer has to provide evidence by recording certain information and by providing documents in accordance with the requirements of the German VAT Ordinance (UStDV). Those rules have been essentially reformed since January 1, 2012 and October 1, 2013.

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I. Exports

A. Evidence by documents

(i) General principle

The VAT Ordinance generally differentiates between transport scenarios (i.e. the goods are transported by own means of transport by the seller or the purchaser) and dispatch scenarios (i.e. the goods are transported by an independent third party such as a carrier).

In any case the confirmation of export electronically issued by the ATLAS system (the so called *Ausgangsvermerk*) is the required standard proof for VAT purposes. If the goods are dispatched by a third party (e.g. by an independent carrier), the exporter should correspondingly request the respective documents from that party.

Alternatively, it is still possible to submit the alternative confirmation of export as proof. This is also an electronic confirmation transmitted by the customs office of export (*Ausfuhrzollstelle*); if the message "exit confirmation/control result" of the customs office at the point of exit (*Ausgangszollstelle*) is not received by the customs office of export. In this case, the export process cannot end automatically with the PDF document *Ausgangsvermerk*. However, in contrast to the previous legislation, it is sufficient proof of export by itself. It does not need to be accompanied by further evidence as it was previously required.

(ii) Exceptions

In case the ATLAS procedure is not permissible or cannot be applied, e.g. in cases of minor economic importance or in case of a system failure, the German VAT Ordinance allows the following documentary evidence:

In **transport scenarios,** evidence then (exceptionally) can be provided by means of other documents. According to this provision, at least the following information needs to be stated on these documents:

- name and address of the supplier;
- quantity and usual trade description of the exported goods;
- location and date of export;
- confirmation of the export customs office of exit.

In practice, in case of a system failure, the copy No. 3 of the Single Administrative Document (SAD) will be sufficient if the export is confirmed by means of a dated official stamp of the customs office of export at the back of the document. In the other cases mentioned above, it is also possible to provide a commercial document (bill of lading, invoice, etc.) if it is equally dated and stamped. The above information must be shown on such documents in any case.

The export evidence may again be different in certain other cases, e.g. if the Carnet TIR procedure is applied. Please note that even the above evidence may differ in case certain goods are exported. For instance, in case cars registered for road traffic are exported, certain additional information must be shown on the export document, including but not limited to the car identification number.

As regards dispatch scenarios, the evidence in such exceptional cases can be provided by dispatch documents, particularly by a commercial document such as a bill of lading (e.g. a CMR document if signed by the party who ordered the freight forwarder or, on his behalf, by the freight forwarder himself) or other similar documents exemplarily. However, where a freight forwarder is involved, the export ought normally to be proven by means of a certificate issued by the transport agent containing certain mandatory details. According to a new circular of the Federal Ministry of Finance (MoF) on January 6, 2014, the proof of dispatch can also be provided electronically *without* the signature of the customer. It has to be recognisable for the supplier that the transmission started within the field of authority of the evidence's author. The process can be done e.g. by mail, computer fax, web download or by way of electronic data interchange (via email: an archiving of the email is necessary to ensure the correct evidence of the origin; it can be done in a printed form; in general: online provided certificates are recognised if they are archived in a printed form).

In dispatch scenarios where the export actually has been accounted for electronically via ATLAS but it turns out to be impossible or unreasonable for the supplier to provide the confirmation of export issued by the ATLAS system (as may be the case in chain supply scenarios where the supplier is not the exporter of records), the evidence can also be provided by the aforementioned documents provided that the Movement Reference Number (MRN) is shown on them. If the latter evidence is not possible or unreasonable as well, the export may be proven like in transportation cases (in practice, by means of copy No. 3 of the SAD).

Finally, even in dispatch scenarios certain particular cases may require special proof, for instance if cars registered for road traffic are exported.

B. Proof by bookkeeping records

The export documents need to be linked with the corresponding accountancy entry. In this respect, certain information must be recorded; if that information is not yet shown on the linked export documents, certain information needs to be recorded in addition. Since the revised VAT Ordinance has come into effect, the records and the export documents need necessarily be made in the way prescribed by the VAT Ordinance. Although the records may be provided differently "in certain exceptional cases", it is strongly recommended to keep to the evidence required by the VAT Ordinance if at all possible.

C. Transition period

Although the amended VAT Ordinance entered into force on January 1, 2012, the evidence provisions formerly in place could still be applied until March 31, 2012. Since April 1, 2012, the new export provisions are compulsory (see circular letter of Federal Ministry of Finance issued on December 9, 2011, file number: IV D 3 - S 7141/11/10003, DOC 2011/0995084).

II. Intra-Community supplies of goods

The evidence for the conditions of zero-rated intra-Community supplies of goods have likewise been subject to substantial change. Originally, it was said that the documentation required for VAT purposes will be abolished and replaced by a single document (in conjunction with the double of invoice), the so-called "Certificate of Entry" (*Gelangensbestätigung*). The corresponding new rules entered into force on January 1, 2012 (formally), just like the provisions on export evidence. But due to substantial criticism from almost the whole economy in charge of intra-Community trade of goods, and transport businesses, the application of the evidence in place before January 1, 2012 was prolonged until another amendment of the VAT Ordinance came into force. After a long proceeding the Federal Council in Germany (Bundesrat) passed a new version of the VAT Ordinance, which came into force on October 1, 2013 and includes a few changes. For the interpretation of the new rule the MoF announced a circular on September 16, 2013, which contains the details about how the evidence has to be provided.

A. Evidence by documents

Also, regarding intra-Community supplies of goods, a differentiation between transport and dispatch scenarios is made.

In both cases, the supplier has the opportunity to provide evidence by the "Certificate of Entry".

The latter is a confirmation of the recipient that he has received the goods in the member state of destination. Therefore the declaration occurs after the execution of the transport.

The confirmation has to be joined with a copy of the invoice and in particular contains the following information:

- name and address of the recipient;
- quantity and usual trade description of the goods supplied (for vehicles: including the vehicle identification number);
- transport/dispatch by the entrepreneur or dispatch by the customer: location and date (it is sufficient to provide the month and the year) of receipt of the goods/end of the transport;
- transport by the customer: place and date (it is sufficient to provide the month and the year) of the end of the transport in another EU member state;
- date of issue of the certificate; and
- signature of the recipient or of his representative (for example employees, independent warehouse keepers, the last recipient within chain transactions; but not an independent third party engaged for the transport of goods).

The new VAT Ordinance includes, in particular, the following points:

- The "Certificate of Entry" could also be transmitted electronically, without the signature of the customer. It has to be recognisable for the supplier that the transmission of the "Certificate of Entry" started within the field of authority of the recipient or of his representative.
- There is no need that the "Certificate of Entry" consists of a single document. It can be provided in each form and also with multiple documents, as long as the required information is included.
- It is not necessary to create the "Certificate of Entry" for each individual shipment, as it can also be used in the form of a collective receipt for a maximum period of one quarter.

In **transport scenarios** the evidence is exclusively provided by the "Certificate of Entry". But there are also exceptions, for example:

- **Transport within the Community transit procedure**
  There is also the opportunity to use the *affirmation of the departure office* regarding the transport.
- **Supply of excisable goods**
  - For the transport under deferral of payment of tax and the use of the IT-process EMCS (Excise Movement and Control System) the proof can be provided by the *EMCS completion message* of the appropriate customs authority of the other member state.
  - For goods of the tax-free circulation, the proof can be provided by the *triplicate of the accompanying document*, which has to be submitted to the competent customs authority for the purpose of the excise discharge.
- **Supply of vehicles by the customer**
  The "Certificate of Entry" could be replaced by the *confirmation of a certificate of registration of the vehicle* of the purchaser in the country of destination. The alternative proof has to include the vehicle identification number. In case of the dispatch by the customer and the presence of reasonable doubts that the goods were really delivered to other parts of the Community territory the entrepreneur could use the other mentioned documents to provide evidence.

In contrast to that, in **dispatch scenarios** it is also possible to lead evidence with alternative proofs in certain cases from the start. For example:

- **Dispatch by the entrepreneur or by the customer:**
  - The proof can also be made by a *dispatch voucher*, in particular in the form of a CMR consignment note (including the signing in box 22 [by the client of the freight forwarder] and 24 [by the customer as the receiver of the goods]) or a bill of lading.
  - It is also possible to use customary evidence like the *certificate of the instructed carrier*. It has to include, in particular, the month and the year in which the dispatch has ended in a country of the Community territory. In the case that this proof is transmitted electronically, there is no need for a signature of the customer, but it has to be recognisable for the supplier that the transmission of the evidence started within the field of authority of the evidence's author.
  - In the case of transport by a courier service, the proof could be provided by a courier order together with a *tracking and tracing protocol* and without a signature of the customer.
  - In case of sending by a postal service, it is sufficient to prove with a *post-delivery certificate* of the good which is addressed to the customer and a proof of payment of the underlying supply of goods.
  - This evidence can also be used in the form of a *collectivereceipt* for a maximum period of one quarter and can be provided with multiple documents, as long as the required information is included.
- **Dispatch by the customer:**
  The proof can be provided by a *proof of payment* (of the customer's bank account) of the delivery item with the certificate of the instructed carrier, which includes (*inter alia*) a confirmation that he delivers the good to the destination. Apparently, the evidence cannot be provided electronically by reason of lack of an appropriate explicit regulation or reference.

The Circular issued by the MoF on September 16, 2013 includes the main aspects for using the new regulations of the VAT Ordinance and the permissible evidence. These are, for example:

- If the "Certificate of Entry" is used in the form of a collective receipt, it is not necessary to provide the evidence for each delivery item. In the case of shipments with several goods and of invoices with several shipments invoiced to one receipt it is in general sufficient if the certificate refers to the respective complete delivery/collective invoice.
- If the certificate is provided with multiple documents (for example, of a combination of a consignment note with an appropriate confirmation about the receipt of goods) no cross-references are necessary in the documents.
- If the certificate is provided electronically, it can be done e.g. by mail, computer fax, web download or

by way of electronic data interchange (via email: an archiving of the email is necessary to ensure the correctly evidence of the origin; it can be done in a printed form; in general: online provided certificates are recognised, if they are archived in a printed form).

- The "Certificate of Entry" can be drawn up in German, English or French, other language versions require an official translation.
- Also the evidence via consignment note, freight forwarders certificate, courier and postal services may consist of several documents, which do not need a cross-reference.
- In the case of transport by a courier service it can be renounced to use a *trackingand tracingprotocol*, if the evidence can also be provided by a courier order together with a proof of payment regarding the reward made for the supply of the underlying goods with a maximum total value of EUR500.
- Regarding the written/electronic order in courier service cases it can be referred to general agreements or confirmations of the courier services (both in a written form).

Furthermore, the circular of the MoF contains the following samples, which can be used for reasons of simplicity:

- "Certificate of Entry" (in German, English and French);
- carrier's certificate;
- carrier's confirmation;
- EMCS input message of the shipment of excisable goods; and
- simplified accompanying document for the transport of excise goods.

The application of the samples is not necessary. The MoF's purpose was to simplify the process and to show, which data the evidence has to include.

Despite these simplifications, there are still problems which have to be noted, such as the following:

- In case the customer picks up the goods with his own vehicle the "Certificate of Entry" is, in general, the only evidence that can be used. Also, it might, from case to case, be difficult to explain to the customer whythey have to provide the document, as customers might e.g. suspect that the certificate has legal effects beyond the mere evidence for VAT purposes (they might, for instance, fear that the goods are considered to be approved if the Entry Certificate is signed). Beside this, there can be a language barrier if the customer does not speak German, English or French. In such cases, it might be helpful to create a bilingual certificate. It should also be noted that, particularly in case of a one-off supply relationship, the customer might, once they have received the goods, be less willing to assist with the necessary evidence.
- In case of a dispatch by the customer, documentary proof can also be provided by proper confirmation of the carrier as outlined in a sample by the tax authorities. However, obtaining such proper confirmation may be difficult, since the entrepreneur lacks a contractual relationship with the carrier that would oblige the latter to provide such confirmation. In this regard it has to be noted that based on the opinion of the tax authorities, the carrier confirmation cannot be utilised as documentary proof, if any reasonable doubts remain as to whether or not the goods were actually dispatched to another EU member state. Tax authorities would then require documentary proof to be provided by other means. Since VAT audits may be performed several years after the actual supply was carried out, relying on the carrier confirmation may therefore be risky and should be avoided where possible at all. The whole purpose of the carrier confirmation thus remains questionable.
- A courier service keeps the information usually for no longer than 60 days. The user of the tracking and tracing protocol has to ensure that they receive and archive all necessary data within this period.
- If the enterprise uses a service provider for the procedure of furnishing and storage of proof, the enterprise still remains the subject liable to the tax authorities. For this purpose, the enterprise has to install organisational structures and control measures to ensure that any documents are properly stored by the service provider and available as proof whenever needed by the enterprise.

B. Proof by bookkeeping records

Also, regarding the evidence by bookkeeping records of intra-Community supplies, the necessary documents as well as the certain information needs to be recorded and linked with the corresponding accountancy entry. This includes the VAT Identification Number of the entrepreneur, too, for example. The proceeding of the bookkeeping follows the way prescribed by the VAT Ordinance, which also provides special cases like the supply of vehicles and the required designation of the vehicle identification number.

C. Transition period

The VAT Ordinance came into force on October 1, 2013. Also the circular of the MoF is to be applied for all intra-Community supplies from Germany carried out from this date.

The circular refers to the transition period regarding the application of the new evidences regulated in the new version of the VAT Ordinance. For an intra-community supply made between January 1, 2012 and September 30, 2013 the documentary evidence *could be* provided with a proof on the basis of the old regulations applied until December 31, 2011. The transition period was prolonged for deliveries made before December 31, 2013.

III. Summary

The amendment of the provision on evidence for export supplies of goods largely attributes to the adaptation of the regulations on the EU-wide electronic export procedure, but also, inter alia, with respect to the export of cars to combat VAT fraud. With regard to the intra-Community supplies of goods, it is to be welcomed that the VAT Ordinance (in contrary to the original intention of the legislature) also accepts further evidence in addition to the so-called *Gelangensbestätigung* besides the numerous simplifications for companies.

The transition period until December 31, 2013 was a simplification for the companies to implement the regulations into their processes as well as to inform and involve the customers. If the necessary measures were not taken yet it has to be caught up as soon as possible as there is the risk that the evidence is not complete or not permissible from the start. However, as the evidence for cross-border supplies of goods generally is in the focus of tax audits and the risks resulting from a denial of the VAT exemption usually are material, it is recommended that one always has a clear picture of the regulations in place. It makes sense to check whether already implemented processes of evidence actually meet the VAT law requirements or may need adaption. Future VAT law developments should always be monitored thoroughly.

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CJEU decision opens doors to reclamation of EUR13bn tax collected from "Healthcare Cent"

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On February 27, the Court of Justice of the European Union (CJEU) published its judgment in Case No. C-82/12, declaring the Spanish regulations on the Tax on Retail Sales of Certain Hydrocarbons (IVMDH), popularly known as the ''healthcare cent'' to be contrary to Community law. This article examines the nature of the IVMDH, how this tax made it to the CJEU, and the consequences which the judgment may have on Spain's Public Treasury.

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I. What is the healthcare cent?

In 2001, the creation of a new tax was planned within a new framework for financing the Autonomous Communities. It would be granted to and collected entirely by the Autonomous Communities. This was the IVMDH.

The tax was, in the end, defined in Article 9 of Law 24/2001, of December 27, on tax, administrative, and social order measures. The healthcare cent was introduced primarily to provide the Autonomous Communities with a financial instrument to cover the expense generated by the public healthcare system (which is a governmental power generally transferred to the Autonomous Communities by the Spanish State).

The healthcare cent is an indirect tax on the consumption of fuels, and it is passed onto the consumer by the service stations, regardless of whether the consumer is a company, a professional, or a final consumer.

The Autonomous Communities which were the first to apply the tax were Madrid, Cataluña, Castilla-La Mancha, Galicia, the Comunidad Valenciana, and Asturias. The tax, between EUR0.012 and EUR0.048 per litre of fuel, was implemented in 13 of Spain's 17 regions.

Therefore, the consumption of fuel was subject to three taxes in Spain:

1. the Value-Added Tax (VAT);
2. the Hydrocarbon Tax (IH); and
3. the IVMDH in the Autonomous Communities that applied it.

However, the Spanish Parliament (after the reasoned opinion issued by the Commission in 2008, for-

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mally requesting that Spain adjust the regulations on the healthcare cent to Community law and predicting a possible unfavourable ruling by the CJEU) amended the regime of the healthcare cent by means of the General Budget Act for Fiscal Year 2013. Nevertheless, from the practical point of view, the amendment of the healthcare cent consisted mainly of the elimination of the IVMDH and its subsequent integration in the Hydrocarbon Tax.

II. Background to Transportes Jordi Besora, S.L.

The company Transportes Jordi Besora, S.L., which engages in the transportation of merchandise and has its establishment in Cataluña, paid EUR45,632.38 for the healthcare cent.

The company held that the imposition of the tax was not in accordance with Directive 92/12/EEC, of February 25, on special taxes, and requested that Spanish tax authorities return the amount paid. The tax authorities refused, and the case made it to the Higher Court of Justice of Cataluña, which sought a preliminary ruling by the CJEU on the compatibility of the healthcare cent with the Community regulations on hydrocarbons.

III. EC framework for indirect taxes other than the IH

A. Directive on special taxes

The European Directive on special taxes acknowledges that the member states have the power to introduce indirect taxes which are not harmonised with EC regulations on products already subject to special taxes, provided that they meet two conditions:

1. that the tax have a specific purpose; and
2. that it respects the applicable rules on special taxes or the VAT in order to determine the taxable base, the assessment, the taxable event and the monitoring of the tax.

B. CJEU. Case No. C-437/97, EKW and Wein & Co.

In 2000 (two years before the healthcare cent came into effect), the CJEU declared an Austrian tax on drinks to be contrary to Community law. That case was in many ways parallel to the regime of the healthcare cent. In addition, it is a ruling often invoked by the CJEU in its pronouncements.

IV. CJEU judgment

Based on the above, the CJEU declared the healthcare cent to be incompatible with the Directive on special taxes, as it fails to meet the two requirements established in the rules for unharmonised taxes.

The CJEU specifically points out the following:

(i) The healthcare cent does not have a specific purpose. The CJEU considers that an exclusively budgetary purpose does not constitute a specific purpose. The CJEU also points out that assignment of the income from the healthcare cent to cover certain public expenses is a means of internal budget organisation in Spain and is not sufficient motive to be deemed a specific purpose, since accepting this consideration would allow any purpose pursued by the member states to be considered specific. This would bring about the collapse of the effective harmonisation of the special taxes provided for in the Directive.

(ii) The healthcare cent does not meet the second requirement under the Community regulations, as it does not respect the general system of special taxes or the VAT to determine the amount to be collected. Specifically, the healthcare cent is to be paid when the hydrocarbons are sold to the consumer. In contrast, special taxes are paid when the product leaves the excise warehouse and the VAT in each phase of production and distribution.

V. Consequences of the ruling for Spain

According to the Government's official figures, EUR13 billion was collected as the healthcare cent from 2002 to 2012.

The Spanish Government requested that the effects of the ruling (if it were determined that the healthcare cent were contrary to Community law, as has finally proven to be the case) be limited in time due to the devastating effect it would have on the finances of the public healthcare systems of the Autonomous Communities. The CJEU refused, saying that that would be an exceptional measure in light of the bad faith of the Spanish Government agencies which maintained the tax for more than 10 years, even after the Commission opened formal procedures in 2003 following the healthcare cent's coming into effect in Spain.

In summary, the tax would be returned under the following conditions:

- that the taxpayers requesting the return of the tax have the pertinent invoices; and
- a specific timeframe for the returns.

Accordingly, the possible recovery of the tax can be made by the following means:

- A procedure for the return of monies unduly paid, which would cover the last four years. From a practical point of view, this would be from March 2010 to December 2012 (the date on which the healthcare cent was integrated into the IH).
- A longer and more complex procedure would involve reparations by the Spanish State, which would allow the return of monies paid in time-bound fiscal years. There is a one-year deadline from the publication of the judgment to pursue this path.

VI. Conclusions

The repercussions of the judgment for the Public Treasury could be serious, although the amounts actually returned will be far less than the EUR billion collected. This is due to the obstacles mentioned above, such as keeping the invoices, limiting returns of the tax to four years, and uncertainty regarding returns of monies paid prior to March 2010 under the reparations procedure of the Spanish State.

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In Brief

Australia

The GST-free treatment of going concerns is going and a concern

On December 14, 2013, the Assistant Treasurer, Senator Arthur Sinodinos, announced that the Federal Government intends to replace the GST-free treatment for the supply of both going concerns and farming businesses with a "reverse charge" mechanism.

Following the Board of Taxation's recommendations made in December 2008, a Treasury discussion paper was released by the Rudd Government in May 2009 proposing this measure but it was not implemented. Now it has been adopted by the Abbott Government.

Proposed legislation

A draft Bill has not yet been released and the timing for its introduction to Parliament is unknown, although the indication is "during 2014".

Furthermore, this measure was treated by the Rudd Government as a change to the GST base, requiring the unanimous agreement of the State and Territory Governments. If this is so, unanimous agreement is likely to be forthcoming, since the proposal will increase GST revenue where purchasers cannot claim input tax credits.When the Bill is introduced, it is expected to include transitional provisions, allowing contracts entered into before the legislation takes effect to proceed with the GST treatment intended by the parties.

The reverse charge mechanism

The proposal for the supply of going concerns and farming businesses is to:

- remove the GST-free treatment, rendering each taxable; and
- introduce a voluntary system permitting parties to agree to reverse the GST burden, making the purchaser liable to pay the GST, not the supplier.

In reality, this mechanism produces the same result as occurs for an ordinary taxable supply, where a contract either contains a GST-inclusive price or requires the purchaser to reimburse to the supplier the GST payable in addition to the price. In this sense, the mechanism is unlikely to be "voluntary", but dictated by market forces.

However, the reverse charge mechanism differs from an ordinary taxable supply as follows:

- once the parties agree to reverse charge the GST, provided all parties are registered for GST, the agreement has legislative backing in addition to contractual enforceability;
- the purchaser is directly liable to the Commissioner of Taxation to pay the GST, it is not reimbursed to the supplier (therefore, a tax invoice is not required); and
- the purchaser reports its reverse charged GST liability in its next Business Activity Statement (BAS) and (to the extent the purchaser is entitled to) claims an input tax credit for that liability in the same BAS for the same tax period, which should produce a neutral cashflow position.

Adverse consequences

Among the adverse consequences of the proposal for purchasers are:

- **GST burden:** for those purchasers not entitled to an input tax credit, the price for going concerns and farming businesses will increase by the GST payable.
- **Stamp duty:** purchasers will pay more stamp duty, as the reverse charged GST is likely to be included in the dutiable value of the transaction.

One argument is, because the reverse charged GST is payable directly by the purchaser to the Commissioner, it cannot form part of the consideration received by the supplier. However, State and Territory Revenue Offices are likely to treat an agreement to reverse charge GST itself as additional consideration provided by the purchaser. This is because, in the absence of that agreement, the supply would be an ordinary taxable supply meaning GST would be received by the supplier and form part of the dutiable value.

- **On-sales:** for purchasers wishing to develop and on-sell land forming part of a going concern or farming business, the advantage of the current GST-free status of the supply of that land is the ability to apply the margin scheme in the future, if GST has not been paid in the chain of acquisition of the development land. It may be necessary to carve out eligible land from the supply of a going concern or farming business and apply the margin scheme on its acquisition, thereby preserving the application of the margin scheme for the future.

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Bulgaria

Proving a supply of goods has taken place

A recent Bulgarian case involves a company incorporated under Bulgarian law (the taxpayer) and their main economic activity is the trade in animals. The taxpayer declared nine invoices concerning the supply of calves for slaughter, in order to obtain, in the form of a tax credit, the deduction of the VAT relating to those invoices.

In addition, the taxpayer declared that it had exported live calves to Albania and provided proof of their purchase by invoices and by producing customs declarations, veterinary certificates indicating the animals' ear tags and veterinary certificates for the transportation of the animals on national territory.

In order to provide proof of the acquisition of the animals, in addition to the nine invoices, the taxpayer produced weight certificates, bank statements relating to payment of those invoices and the contract concluded for the supply of calves.

The taxpayer was subject to a tax investigation and the Bulgarian tax authorities requested the supplier to provide information on the supplies which it had invoiced to the taxpayer. The taxpayer revealed certain gaps in its accounting and in its compliance with the veterinary formalities relating, in particular, to titles of ownership of the animals and to their ear tags. The tax authorities took the view that it had not been proven that those supplies had in fact been carried out and that, consequently, the taxpayer was not entitled to claim a right to deduction of the VAT relating to those supplies. Accordingly, the Bulgarian tax authorities denied the taxpayer the right to deduct, in the form of a tax credit, the VAT relating to the invoices issued by the supplier.

The taxpayer lodged an administrative appeal against that decision refusing the deduction and then appealed against the tax assessment. In particular, it claimed before the court, that the information which it had communicated was sufficient to prove that the supplies invoiced by the supplier had been carried out.

The administrative court for the city of Sofia decided to stay the proceedings and to refer the following questions to the court of justice for a preliminary ruling.

The CJEU held that for the purpose of claiming VAT input tax deductions, satisfaction of formal ownership rules is not required to prove the supply of goods was made.

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European Union

European Union: New studies strengthen the case for boosting flood protection and switching to greener taxes

The following is a press release from the European Commission

Two studies published by the European Commission at the beginning of March show how environmental policy can spur economic growth by boosting flood protection and making more of a switch to greener taxes. One produces more evidence about the overall economic benefits from timely investment in defences against flooding, and the other highlights the advantages of moving the tax burden away from labour and towards resource use and pollution.

EU Environment Commissioner Janez Potoènik said,

> "Investing in flood protection can bring overall benefits to the economy, especially through nature-based solutions which are highly cost-effective. And environmental fiscal reforms have the potential to almost double the revenues they currently bring to national treasuries, with benefits for our environment as well as scope for cutting taxes on employment or cutting the deficit. That's a powerful argument for changing the status quo."

The study on the potential for greener taxes, which pools data from 12 member states, suggests that moving taxes away from labour and towards pollution (increasing taxes on the causes of air and water pollution, for example) would bring in revenues of EUR35 billion in real terms in 2016, rising to EUR101 billion in 2025, with far higher figures involved if steps were also taken to remove environmentally harmful subsidies. The potential revenues range from just over 1 percent of GDP per annum through to just over 2.5 percent of GDP per annum in 2025, depending on the member state concerned.

The second study looks at various links between environment and economic policy, including the macroeconomic impact of floods, best practices in supporting SMEs focusing on resource efficiency, and environmental expenditure in all member states. The approximate total cost of damage from flooding in the EU over the 2002-2013 period was at least EUR150 billion. Investing in measures to reduce flooding is highly effective, on average costing some 6-8 times less than the damage caused by flooding. Better still, the benefits of investing in green infrastructure – i.e. restoring natural features to help manage and store flood water include better outcomes for biodiversity and could help reduce construction costs.

Background

The studies will feed into the European Semester, a mechanism established in 2010 to improve the co-ordination of economic policies in European Union countries. It was one of the EU's responses to the financial and economic crisis, which has resulted in economic contraction and rising unemployment in many EU countries. The European Semester is based on the idea that, because EU economies are highly integrated, enhanced policy co-ordination can help boost economic development in the EU generally.

By 'Greening the European Semester', the Commission is aiming to ensure that macroeconomic policies are sustainable, not only economically and socially, but also environmentally. An earlier study highlighting the economic benefits of environment, which looked at implementing waste legislation to boost green growth, showed that full implementation would save EUR72 billion a year, increase the annual turnover of the EU waste management and recycling sector by EUR42 billion and create over 400,000 jobs by 2020.

Press Release No IP/14/202 dated March 03, 2014
European Commission, Brussels

European Union

European Union: Operation "Warehouse" – major joint customs operation prevents large losses to the EU's and member states' budgets

The following is a press release from the European Commission

Almost 45 million smuggled cigarettes, nearly 140.000 litres of diesel fuel and about 14.000 litres of vodka were seized during a major Joint Customs Operation (JCO). The Operation code-named "Warehouse" was carried-out in October 2013 by the Lithuanian Customs Service and the Lithuanian Tax Inspectorate in close cooperation with the European Anti-Fraud Office (OLAF), and with the participation of all 28 EU member states. As a result of Operation "Warehouse", a significant potential loss to the budgets of the European Union and its member states was prevented. According to preliminary estimates, this would have amounted to about EUR9 million in the form of evaded customs duties and taxes. The final results of the Operation were discussed by the participants last week at a debriefing meeting in Vilnius and were made public today across Europe.

Algirdas Semeta, Commissioner for Taxation, Customs, Anti-fraud and Audit, welcomed the very good results of the operation. "The fight against the smuggling of excise goods is one of our political priorities and we have launched a number of initiatives to better equip Europe against such harmful practices being run by organised criminal networks. JCO Warehouse is a good example of how the EU and member states' authorities can cooperate effectively to protect their revenue. Joint Customs Operations safeguard the EU's financial interests and also protect our citizens and legitimate businesses", he said. "Such operations also highlight the added-value of OLAF in helping facilitate the exchange of information between our partners across Europe and in providing effective operational support."

Operation "Warehouse" focused on cargo movement by road transport. It targeted the smuggling and other forms of illegal trade of excise goods such as mineral oil, tobacco products and alcohol throughout Europe. By using several complex scenarios in multiple EU member states, fraudsters lawfully import goods into the EU but request a VAT and excise exemption by declaring the goods as subject to tax and duty exemption regimes (e.g. declaring the goods to be in transit). The trace of the goods is then lost through the fictitious disappearance of the traders or through a fictitious export. Fraudsters avoid paying VAT and excise duties, but the goods remain in the internal market, causing a substantial loss to the EU's and member states' revenues.

JCO "Warehouse" was the first operation carried-out in close cooperation with tax authorities to target excise and VAT fraud specifically, besides customs fraud. For the first time, customs and tax authorities cooperated on a European scale in a JCO. This is a significant achievement since the different competences and legal regimes applicable at national and EU level make it difficult to address complex fraud schemes with uniform measures. In this operation, customs and tax authorities joined their expertise, resources and shared intelligence to prevent losses to the EU's and member states' budget.

Eight seizures were made during the Operation. Among these, authorities seized 6.617.400 cigarettes in Sweden and Lithuania; 135.831 litres of diesel in Poland and the United Kingdom, and 14.025,6 litres of vodka in United Kingdom alone. Overall, 44.957.160 cigarettes were seized.

During the entire operation "Warehouse", OLAF provided organisational, logistical, financial and technical support to allow for an exchange of information and intelligence in real-time. This was coordinated from the Physical Operational Coordination Unit (P-OCU) at the OLAF premises in Brussels which facilitated direct communication with the national contact points. A group of liaison officers from some member states representing all the participating 28 EU countries, worked from here during the operation and experts from the Commission's Directorate-General for Taxation and Customs Union provided support.

EUROPOL participated as an observer in the operation. A representative of the office was present at the P-OCU during the operational phase of the operation. It was also possible to make direct cross-checks of suspect individuals and companies appearing during the JCO with EUROPOL via a secure internet connection.

European Commission Press Release No: IP/14/37
Brussels, January 21, 2014

Finland

Whose input tax is it anyway?

The Finnish Supreme Court has addressed the issue of 'whose VAT input is it anyway'? A Finnish parent company (FI Oy) had paid an invoice issued by a German consulting firm (DE Co) which did not have a fixed establishment in Finland and which had not voluntarily registered itself to the Finnish VAT register. The invoice was addressed to FI Oy and related to a due diligence investigation which DE Co had performed on a German company, whose shares in a German subsidiary of FI Oy (DE Sub) had been acquired. The tax authorities imposed VAT on FI Oy based on the reverse charge mechanism. The issue was whether services which related to the subsidiary's business activity (i.e. acquiring another subsidiary), but where paid by a parent company, were deductible for the parent company. The Court held that FI Oy did not have the right to deduct the VAT as the consulting services did not have a direct link to FI Oy's own business but the business activities of its German subsidiary.

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France

Modifications to VAT rates

In mainland France the standard VAT rate has increased from 19.6 percent to 20 percent, the reduced rate from 7 percent to 10 percent. The reduction of the reduced rate of VAT from 5.5 percent to 5 percent which was adopted in 2012 has been cancelled. In Corsica, the specific rate of 8 percent ruled by Article 297.I.5 of the CGI has increased to 10 percent while in the French Overseas Districts the situation remains unchanged. The modification to the VAT rates has entered into force for all transactions for which the tax point (the transfer of ownership for goods and the performance for services) occurs after January 1, 2014.

VAT payable in 2013 on supplies performed in 2014 will still be calculated at 2013 rates. For example, a supplier of a service who is liable for the VAT on a cash basis has to pay tax at the rate of 19.6 percent on instalments received in 2013; these payments will remain subject to the 2013 VAT rate while the balance of the price to be paid in 2014 will be subject to 20 percent, regardless of the fact that the service will be carried out in 2014.

Rate cuts are applied when the tax is due after January 1, 2014, except for transactions involving works of art. Transitional measures have been adopted for a number of operations such as some sales of buildings, building construction contracts, renovation works, social housing and goods placed under tax and customs warehouses.

In the context of the increase in VAT, specific measures have been adopted for environmental, social and cultural purposes. Fertilisers, for example, are now subject to different treatment. When they are used in ecological farming they are subject to the reduced rate of 10 percent while others are now subject to VAT at 20 percent. Is this the beginning of a new trend for a taxation system which is more focused on protecting the environment or just a political gift granted to the Green Party (which is currently a member of the government coalition)? Beyond this, the validity of such discrimination is questionable. The European Court and the French Constitutional Court do not seem to be on the same page. This could become a hot topic very quickly as, in February 2014, France also expanded the super reduced rate of 2.1 percent to electronic newspapers (previously subject to the standard rate), despite a clear infringement with the VAT Directive.

Measures against fraud

The year that France is celebrating its 60th birthday of VAT is also a time when the compatibility of the traditional VAT mechanisms with the modern and global economy is questioned. As did other member states of the EU, France suffered a VAT loss a few years ago of EUR1.6 billion (EUR5 billion for all EU members) during the VAT carrousel fraud on carbon credit certificates. Since this dramatic failure in the VAT system, which probably represents the biggest VAT evasion in French history, resources have been mobilised to find the right method for fighting against fraud without jeopardising the main characteristics of the VAT system.

In recent years more powers have been granted to the tax authorities to challenge the recovery of VAT on certain transactions when the operator is involved in a fraudulent scheme, or to declare the joint responsibility of all involved parties. However, the best way to prevent fraud is to reduce the VAT collection by bad VATpayers. In this regard, in recent years, the most symbolic change seems to be the conversion of France to the reverse charge procedure which scope has been expanded little by little. Being the promoter of the old VAT process, where VAT is collected from the customer by the supplier acting on behalf of the Treasury, France has traditionally been reluctant to shift the VAT liability on to the customer through the reverse charge mechanism, except for cross-border transactions on goods or services. However, since 2006 when the reverse charge was expanded to all local supplies carried out by non-resident entities with VAT-registered customers, new reverse charge scenarios are periodically adopted and, as a good example, this year, real estate subcontractors have been asked to stop invoicing the VAT to their principal. In addition, France has also adopted a mechanism allowing the tax authorities to expand this mechanism in reaction to a sudden and massive fraudulent scheme without waiting for the previous approval of the Parliament or the EU VAT authorities. This is obviously evidence that there is no good age to move forwards.

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France

Loans and input tax credit

In a recent case the CJEU held that a company principally established in a member state may not take into account the turnover of its branches established abroad when determining VAT deductibility. The taxpayer is a bank which has its principal establishment in France and branches in EU member states and in third states.

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Following an examination of the accounts of the taxpayer, the tax administration decided the taxpayer had a tax deficiency for VAT. Those arrears result from the administration's refusal to take account of the interest on loans granted by a taxpayer's establishment of its branches established outside France. The taxpayer objected to the declaration claiming that the amount of the interest in question could be taken into account in calculating the deductible proportion of VAT.

Those complaints were rejected by the tax administration and the taxpayer appealed to the tribunal and then to the French council of state. In support of its appeal the taxpayer claimed that, in order to determine the deductible proportion of expenses of its principal establishment for VAT purposes, the income of its branches established in other EU member states and in third states should be taken into account as a single taxable person. The taxpayer maintained that the branches established in an EU member state are themselves subject to VAT and must be taken into account, in determining their own deductible proportions of VAT. The Court held that the fixed establishment situated in a member state and the principal establishment situated in another member state constitute a single taxable person subject to VAT and it follows that a taxpayer is subject, in addition to the system which applies in the state of its principal establishment, to as many national systems of deduction as there are member states in which it has fixed establishments. Under the taxpayer's position there would be overcrediting of input tax. Thus the foreign branches were to be ignored in the calculation of the input tax credit.

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Luxembourg

VAT to help boost public finances

Recently, the new government in Luxembourg confirmed a future increase of the VAT rates. This assertion is in accordance with the Luxembourg authorities' willingness to improve public finances through, amongst other, the increase of fiscal receipts. To keep up with this trend, a Grand Ducal Decree was already issued in April 2013 and provides for amendments regarding the optional VAT exemption scheme for so-called "small businesses", whilst also modifying the filing periodicity rules.

Increase of the VAT rates

On January 14, the Luxembourg Finance Minister confirmed a 2 percent increase for the main VAT rates (15 to 17 percent, 12 to 14 percent and 6 to 8 percent), whereas the 3 percent rate applied on basic necessity products would remain unchanged. The new rates would not apply before 2015, though this is still under discussion at Government level.

Amendments to the so-called "small businesses" scheme Based on the Grand Ducal Decree, taxable persons subject to the exemption regime must therefrom declare and pay VAT due on intra-Community acquisitions and on supplies of services subject to the reverse charge mechanism, as well as declare services they supply in other EU Member States. Furthermore, they are also liable to communicate their annual turnover to the VAT authorities on a yearly basis, before March 1 of the following year. Taxable persons subject to the exemption regime may opt for the standard regime on taxable transactions, but may no longer benefit from the graduated tax relief as provided in the former Grand Ducal Decree. Conversely, taxable persons subject to the standard regime may request to benefit from the exemption regime. The transition from the standard regime to the exemption regime shall take effect on January 1 of the year following the reception of the request by the VAT authorities. If the VAT has not been collected at the time where the exemption regime becomes applicable (i.e. revenue regime), a recapitulative VAT return should be filed in order to perform any VAT regularisation before the coming into effect.

The effect of these new provisions is to limit the application of the exemption regime to businesses suffering local costs only. Hence, it clearly imposes taxation on the intra-Community acquisitions of goods and acquisitions of services which was not the case under the previous regime. Finally, the obligation to register for VAT is new.

Modifications to the VAT filing periodicity

The new provisions extend the filing obligation of the periodic VAT returns regarding transactions for which the taxable person is liable for VAT (i.e. acquisition of intra-Community goods and non-VAT exempt services subject to the reverse charge mechanism), while relieving the compliance burden for companies supplying electronic services. Regarding the filing obligations, the Grand Ducal Decree sets the following new thresholds for the filing of the periodical VAT returns by taxable persons:

- **Monthly VAT return:** if the net annual turnover or *the total amount of intra-Community acquisitions of goods and acquisition of services* subject to the reverse charge mechanism is above EUR 620,000. An annual recapitulative VAT return should be filed before May 1 of the following year;
- **Quarterly VAT return**: if the net annual turnover or *the total amount of intra-Community acquisitions of goods and acquisition of services* subject to the reverse charge mechanism is equal or below EUR 620,000. An annual recapitulative VAT return should be filed before 1 May of the following year;
- **Annual VAT return**: if the net annual turnover or *the total amount of intra-Community acquisitions of goods and acquisition of services* subject to the reverse charge mechanism is equal or below EUR 112,000. This return should be filed before March 1 of the following year. However, the above thresholds do not apply to taxable persons supplying e-services. In this respect, the filing periodicity of the VAT returns may be modified based on the following:
  - **Monthly (and annual) VAT returns**: if the net annual turnover (*eservices excluded*) is above EUR 620,000 per year;

- **Quarterly (and annual) VAT returns**: if the net annual turnover (*eservices excluded*) is equal or below EUR 620,000 per year;
- **Annual VAT return**: if the net annual turnover is equal or below EUR 112,000 per year.

These measures enable the VAT authorities to collect VAT effectively due to the Luxembourg State on a more regular basis, ensuring budgetary receipts throughout the year. Practical details on the implementation of the new periodicity rules (i.e. potential changes to the VAT return forms) have not yet been specified by the Luxembourg VAT authorities, but this point should most likely be clarified shortly by authorities.

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UK

Ruling on Fiscale Eenheid PPG Holdings BC cs te Hoogezand

HM Revenue & Customs ("HMRC") recently released a Brief following the CJEU's decision in *Fiscale Eenheid PPG Holdings BC cs te Hoogezand ("PPG")* outlining their analysis of the impact of the decision and inviting claims for under-recovered input tax to be made by employers in certain circumstances.

Background

In *PPG*, the CJEU decided that an employer was entitled to deduct input tax it paid on services relating to the administration of its employees' pension fund and the management of the assets of the pension fund. This applied in circumstances where there was a direct and immediate link between the services received and the employer's business activities.

To date, HMRC has allowed UK VAT registered employers to deduct input tax relating to the general management of an occupational pension fund (i.e. the setting up and day-to-day administration of the fund). However, VAT incurred on investment management services has not been treated as VAT which could be recoverable by the employer – it has been treated as VAT of the pension fund. In circumstances where there is a single invoice covering administration and investment management services, HMRC has permitted employers to recover VAT on a 30/70 split in line with their Notice 700/17.

HMRC's Brief

Following the decision in *PPG,* HMRC is changing its policy on the recovery of input tax concerning the management of pension funds by removing the 30/70 split with immediate effect (albeit there is a six-month transitional period for scenarios where the pension fund is currently invoiced for services). In summary:

- HMRC has stated that VAT incurred on investment management services can now be treated as input tax of the employer, provided they can demonstrate a direct and immediate link between the services received and the supplies it makes.
- HMRC, however, does not consider the VAT will be input tax of the employer where the supplies were not made to the employer or where the supply is limited to investment management services only (i.e. not a combined supply of investment management and administration services).
- In cases where the employer receives the supply but it is the pension fund that bears the ultimate cost, HMRC has stated that output tax will need to be accounted for by the employer (as they consider this will amount to a recharge to the pension fund).

Next steps

Employers should:

- review the VAT recovery arrangements currently in place for pension fund management services (administration and investment related) with a view to considering (i) whether claims should be submitted in respect of the past; and (ii) whether the arrangements should be adjusted going forward; and
- reassess claims submitted to date in light of the content of HMRC's Brief.

Providers of relevant services should consider whether the VAT treatment applied to their services is in line with HMRC's analysis of the implications of the decision in *PPG* or whether adjustments need to be made to their processes as a result.

Pension funds should review:

1. the VAT incurred currently treated as being their input tax; and
2. the VAT incurred treated as input tax of the employers; with a view to determining the potential impact of the changes outlined in the Brief.

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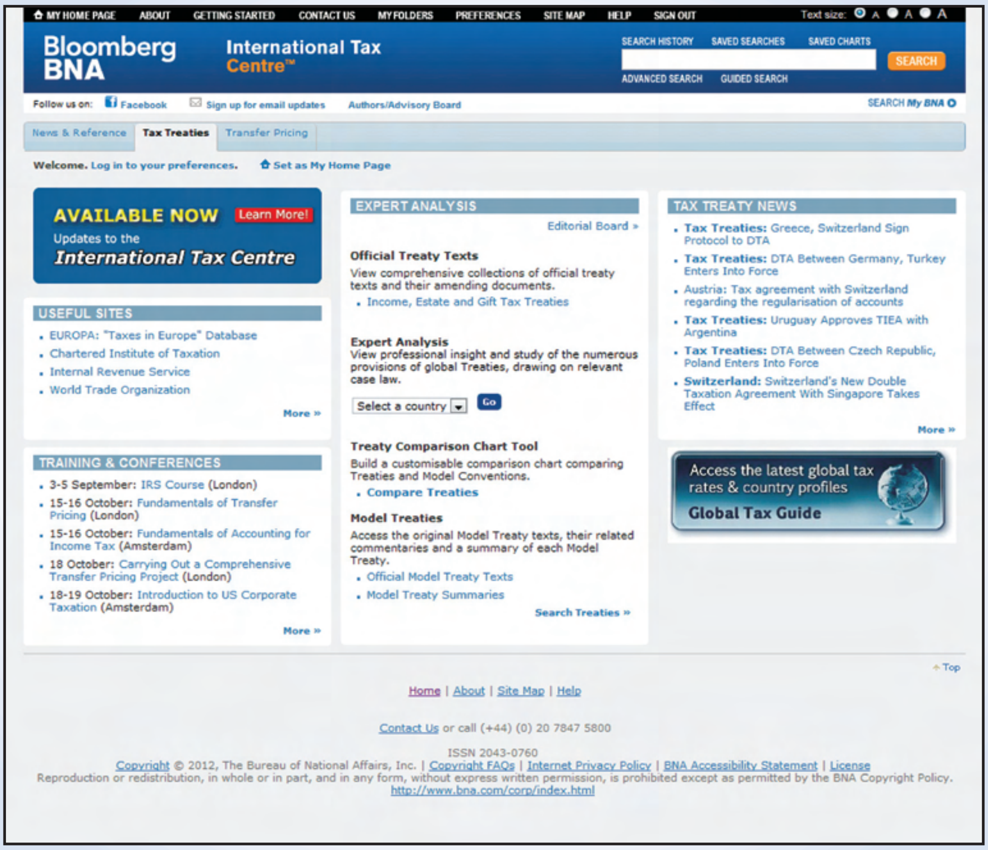

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