

Opinion Statement FC 6/2015
on two new elements of the
OECD International VAT/GST Guidelines

Prepared by CFE Fiscal Committee
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The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries (16 OECD member states) with more than 100,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

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Introduction

This Opinion Statement responds to the OECD public consultation of 18 December 2014 on two new proposed elements of the OECD International VAT/GST Guidelines¹. The proposed changes are related to the OECD work on taxation of the digital economy (BEPS Action 1)². The CFE has previously commented on the draft consolidated VAT/GST guidelines (Opinion Statement FC 3/2013³) and on BEPS Action 1 (Opinion Statements FC 7/2014 and FC 17/2014⁴). The numbering of the paragraphs below refers to the paragraphs in the OECD discussion drafts of 18 December 2014.

We will be pleased to answer any questions you may have concerning our comments. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

Chapter 3- determining the place of taxation for cross-border supplies of services and intangibles

3.3 The preliminary issue, prior to the determination of the place of taxation, is to qualify exactly which are the supplies at stake, and to differentiate them in categories.

Within the list of recommended approaches, also the effectiveness of the VAT system that implies the taxation under the destination principle has to be considered and the correct exercise of the right of deduction has to be ensured.

3.8 The supplier does not have to make reasonable efforts. It is the receiver of the supply who must provide elements of proof of his status. Reference has to be made to the situation of the taxable person: A customer can be a business but may not necessarily be acting as a business, when purchasing a service as a consumer. We suggest using the presumptions applied for supplies of telecommunications, broadcasting or electronically supplied services (see Art. 24b Implementing Regulation (EU) [No. 282/2011](#), as amended by Implementing Regulation (EU) [No. 1042/2013](#)).

3.13 It is not clear whether the place of performance rule is identical to the use and enjoyment rule or whether for digital supplies it only represents the place of download of the service.

3.24 The information provided by the customer generally may be considered as important evidence bearing on the determination of the jurisdiction of the customer's usual residence, but this criterion does not comply with the use and enjoyment rule. Accordingly, it would be better to establish a priority of the principles that have to be applied to the supply (e.g. first, the use and enjoyment, second, where the use and enjoyment it is not applicable, the usual residence) with the aim to avoid double taxation or non-taxation.

3.25 In EU countries, there is the MOSS for that purpose (Mini one stop shop), which allows a taxable person who supplies digital services to be registered in one member state.

¹ <http://www.oecd.org/ctp/consumption/discussion-draft-oecd-international-vat-gst-guidelines.pdf>.

² <http://www.oecd.org/tax/addressing-the-tax-challenges-of-the-digital-economy-9789264218789-en.htm>

³ <http://www.cfe-eutax.org/node/3157>

⁴ <http://www.cfe-eutax.org/node/3671>

3.27 Such a reverse charge mechanism does not offer an appropriate solution for collecting VAT on business-to-consumer supplies of services and intangibles from non-resident suppliers. This mechanism could not be applied to B2C transactions, because it provides for a shift of the tax liability on the consumer, who is not registered for VAT purposes, making it extremely difficult for tax authorities to control the supplies.

3.28 For non-resident suppliers, the best solution (simple and effective) is to be registered with the MOSS.

3.29 When implementing a registration-based collection mechanism for non-resident suppliers, it is recommended that jurisdictions consider establishing a simplified registration and compliance regime to facilitate compliance for non-resident suppliers. The highest feasible levels of compliance by non-resident suppliers are likely to be achieved if compliance obligations in the jurisdiction of taxation are limited to what is strictly necessary for a proper collection of the tax. Appropriate simplification is particularly important to facilitate compliance for businesses faced with obligations in multiple jurisdictions. Maintaining traditional registration and compliance procedures for non-resident suppliers of business-to-consumer services and intangibles would risk creating barriers that may lead to non-compliance or to certain suppliers declining to serve customers in jurisdictions that impose such burdens.

3.30 The concept of neutrality does not only refer to the distortion of competition but also to the taxation at consumption through the right of deduction.

3.33 The use of spontaneous exchanges of information is not sufficient. The principle to be applied for the exchange of information is reciprocity.

3.34 The exchange of information can be effective only if the tax authorities recognise the evidential value of specific information, which should be established on a common basis for all countries. This is essential to keep the amount of data to be requested from the taxpayer reasonable, but also to prevent the exchange of large amounts of non-relevant information which may create an obstacle to effective administrative cooperation.

3.36 The problem is still the acceptance of the same rules/proxies in all countries.

3.37 Referring to the second step, it is to be recalled that the only common result that has to be achieved is the taxation at the place of consumption, so that the specific rule will be applied only in cases in which the general rule does not produce that effect. The aim of the two-step approach is to find an appropriate result, not to compare two possible outcomes with a view to identifying the “better” result.

3.57 Contrary to what is stated in the discussion draft, the terms should be understood narrowly within the meaning of national civil laws, because that is the only criteria which provides legal certainty and avoids conflicts of interpretation, as these are well-established terms in countries’ legal traditions.

3.59 Referring to the utilisation of immovable property, if each jurisdiction would be able to choose whether to apply a specific rule, this would be detrimental to legal certainty. Moreover, countries could use this freedom as an instrument of tax policy, leading to frequent changes in the law, or

choose to apply turnover thresholds for transactions, leading to further divergences among countries.

Annex 3 [to chapter 3] - main features of a simplified registration and compliance regime for non-resident suppliers

Invoicing

11. It is not possible to eliminate invoice requirements because with the invoice, the supply is proven and traceable for the supplier. This requirement has to be maintained.

Use of third-party service providers

14. It is necessary to establish a joint and several liability between the non-resident supplier and the third party with the aim to tackle VAT fraud and tax evasion.

Application in a business-to-business context

15. The reverse charge provides a sort of derogation from the principle of taxation at the place of consumption.

It is not possible to accept that jurisdictions, in their general rules, do not differentiate between business-to-business and business-to-consumers supplies in their national legislation because it is necessary to apply the rules of taxation, in order to ensure the right of deduction.

17. Implementing a threshold of digital supplies to require the registration of the supplier may cause distortion of competition.

Chapter 4 - mutual cooperation, dispute minimisation, and application in cases of evasion and avoidance

4.5. It is not clear what “economic substance” of a transaction intends to say, because a transaction is economical in itself. One might consider speaking about juridical substance, meaning the coincidence between the economic substance and the legal form.

4.20 Advance ruling procedures in that field could produce undesirable effects such as the distortion of competition in cross border trade due to the tax policy of a State.