CONFEDERATION FISCALE EUROPEENNE

Opinion Statement FC 10/2016

on the Communication COM(2016)148 of 7 April 2016 on an Action Plan for VAT

Prepared by the CFE Fiscal Committee

Submitted to the European Commission in August 2016

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 with more than 200,000 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.
The CFE is registered in the EU Transparency Register (no. 3543183647-05).

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

Introduction

On 7 April 2016, the European Commission has issued its Communication COM(2016)148 final "on an Action Plan for VAT - Towards a single EU VAT area - Time to decide" [1] (in the following: Action Plan).

The CFE welcomes this Communication on a European VAT Action Plan that will be developed during the next months. The CFE believes that it is important that consideration is given to changes to the system to reduce fraud but also to reduce the burdens and uncertainties being placed on legitimate businesses undertaking cross-border trade.

The detailed proposals in the Action Plan will require extensive consultation. In their capacity as tax professionals, members of the CFE would like to share their preliminary observations based on their experience. Some of the observations and points made may not be shared by all the members of the CFE Indirect Tax Sub-Committee. However, we hope that all of them may contribute to the development of simple solutions and will be taken into account by the Commission when formulating more detailed proposals. The Action Plan is clearly partly motivated by a desire to prevent fraud. However, one of the objectives of the VAT system is that it should not impose barriers on cross-border trade. Accordingly, it is necessary to ensure that:

- measures adopted to prevent avoidance, abuse and fraud are proportionate and if anything, err on the side of business;
- it is possible to speedily resolve issues as expediency is a significant need of business;
- member states are reminded that policing of the tax system is primarily the responsibility of the tax authorities, not the taxable person.

The Action Plan proposes

- taxing intra-community B2B supplies of goods in the first instance at the rate applicable in the country of consumption. However, with time a similar system might be extended to services;
- that the VAT on such cross-border supplies would be paid to the tax authority of the originating country and transferred to the country where the goods or services are ultimately consumed;
- that the VAT would be collected via an online web portal in their home country;
- that physical movement of the goods will remain the rule for determining which member state is entitled to collect VAT on supplies of goods, but the Recapitulative Statement on cross-border operations would be abolished;
- that no VAT would have to be accounted if the supplies were made to certified customers (considered in paragraph 2 below).

The members of the CFE Fiscal Committee observe that:

Knowledge of the tax rates applicable in other countries, invoicing issues and a VAT web portal

Members do not share the same view on this issue. Some of them consider that it would be easy to find the tax rate applicable in other countries because a business does not frequently supply goods or

[1] http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/action_plan/com_2016_148_en.pdf

services subject to multiple rates to multiple countries. Others fear that the acquisition of knowledge of foreign VAT rates may require a lot of effort. For example, in the United Kingdom the basis upon which packages of services or services and goods should be taxed has generated a lot of disputes about whether the package is one supply or a series of multiple supplies that are taxed at different rates. Other classification disputes have also arisen. One of the issues addressed in the Action Plan is giving member states a greater freedom to fix VAT rates. The CFE has already produced an Opinion Statement endorsing such developments[2]. However, such developments may slightly increase the difficulties for businesses to determine what rates apply in the country where the customer is established.

As a way of minimising any issues, they all agree that binding information should be available on an EU web-portal. Another related issue that needs to be addressed is whose invoicing rules will need to be adopted. It will obviously cause considerable difficulties if businesses established in one country have to start complying with invoicing and other formalities in another country. It will therefore be important that either traders can continue using invoices and accounting for tax in accordance with the rules where they are established or alternatively that completely standardised requirements are introduced.

Evidence of shipment

Under the current system, providing evidence of shipment is a highly complex and costly obligation. It is not clear to which extent this information is useful to the tax authorities in order to collect the tax in an internal market without controls of the physical movement.

This issue has been already examined by the Commission's services with the support of the VAT Expert Group and the GFV. In order to ensure effectiveness of the destination principle and at the same time avoiding making compliance for businesses burdensome, different options have been analysed. The purpose was to give coherence to the place of taxation and the person liable for the payment of VAT. Following the flow of the goods is not the only feasible solution, according to the results of the analysis carried out. It may be envisaged to align such evidence with the contractual flow with the supplier charging the VAT of the member state of destination. In many cases, in particular whether the customer has multiple establishments or the transport of the goods is not organised by or in behalf of the supplier, the juridical approach would be more efficient than the physical approach to establish the place of taxation.

Consideration should be given to simplifying and harmonizing these rules.

Triangular operations, chain transactions, cross-border tolling

Both the current and proposed rules follow the physical movement of the goods when determining where tax should be paid. This has resulted in onerous registration and evidential obligations being imposed upon triangular operations, chain transactions and cross-border tolling. Since the Action Plan proposals are still based on tracking the physical movement of goods as the primary tool of control, it is not clear that they will reduce the current difficulties these obligations impose, in particular for business not established in the country where the supply takes place. Conceivably the

[2] CFE Opinion Statement FC 13/2015 of 13 October 2015 on VAT rates: http://www.cfe-eutax.org/node/5048 .

rules on certification of traders may assist, but this will only be the position if a certified trader can both buy and sell goods without accounting for VAT in a country where he is not established, if his sale is to another certified trader, as an extension of the current triangulation rules.

In order to reduce misalignments between countries on the interpretation of the rules in cross-border transactions, the setting up of a European VAT Agency could be considered. Such Agency should address binding opinions to member states` tax authorities with respect to cross-border transactions.

Audit, system of input tax deduction

From the tax administrations' perspectives, one drawback with the proposals is that they will have to rely on the member state of departure to collect the VAT due on the cross-border supply.

The VAT Action Plan does not address how member states are to be encouraged to undertake audits to collect VAT for another member state when they receive no benefit from the audit. For example, under the new Mini One Stop Shop, the tax authorities of a member state 1 who are auditing taxable persons supplying electronic services to private individuals in member state 2 have no incentive to force the taxable persons to adopt costly procedures in order to pay the VAT to member state 2 instead of member state 1. In 1989, the Commission's proposals for collecting VAT in the country of origin were rejected by the member states for precisely this reason[3]. Some form of charging between tax authorities may be a way of providing the necessary incentive.

We can see that it may alternatively be open to the tax authorities in the customer's member state to correspond or even visit and audit the supplier in the other member state. However, this raises issues of whose rules should apply and what language any correspondence needs to be conducted in. For businesses it will obviously be a significant disadvantage if they have to start instructing advisors in other jurisdictions to advise them about such audits. Particularly smaller businesses may have difficulties in knowing who to seek advice from. They may also have linguistic difficulties in giving relevant instructions. The fact that the audit is being conducted across borders is likely to increase costs for both taxpayers and tax authorities. If one of the consequences of the change is that businesses established in one country are subject to audits conducted in accordance with another countries' rules and in a language with which they are unfamiliar, this could act as a significant disincentive to businesses undertaking cross-border transactions.

It is also important that any changes are linked to improvements in the system for deducting input tax; otherwise it will discourage cross-border trade. It will also be important that either the rules in the suppliers' jurisdiction should govern issues like invoicing and other administrative obligations (including the customer's right to utilise the invoice to recover input tax) or that there should be completely harmonised rules governing such issues. If the changes were linked to new onerous requirements relating to information and supporting documents/proof in order to allow audit of input VAT deductions in the member state of destination, this could also adversely impact on cross-border trade.

[3] Rapport Boiteux 1988 Fiscalité et Marché Unique Européen, Report to the Ministries of State, the Economy and Privatisations (Paris, La Documentation Française).

Litigation

On the issue of audit and dispute resolution, it is important to highlight the linguistic burdens that will potentially arise if a supplier established in one member state has to dispute liabilities in another state. This is particularly true for small business. For example, an Italian small enterprise is likely to have difficulties in conducting correspondence in German or Dutch. If an audit is subject to the rules of the country of establishment, it may also be much easier for a business to challenge abuse or misuse of powers by a tax authority. This becomes much more difficult if the audit is subject to the rules of a different jurisdiction. For these reasons, the CFE considers that it will be important to ensure that audits are carried out in accordance with the rules in and using the language of the country where the business is established.

Even if audits and litigation occurs in the country where the business is established, added complications will arise from the fact that the Courts of one jurisdiction are going to have to make an assessment about foreign laws which will need to be proved. This is likely to increase costs for both sides. However, this is probably to be preferred over imposing the burdens on a possibly small business of having to dispute liabilities in a foreign jurisdiction, which will no doubt impose even greater costs on the business whose representatives would need to travel to the other country. Any extra burdens on the tax authorities should, on the basis of the EY report[4], be more than compensated for by reductions in VAT fraud. It would also be helpful if the proposals contained provisions designed to ensure that no more than one lot of tax can be claimed in cases where more than one tax authority is seeking to collect tax on a supply. Another way of minimising the extra burdens on business may be to have a Commission or state-sponsored insurance scheme relating to cross-border supplies, so that traders have access to insurance cover should disputes arise. Given the potential benefits to member states from the changes, this may be a reasonable and proportionate way of reducing the potential burdens that the changes place on business particularly when disputes arise.

There will also be difficulties in disputing penalties if a supplier established in one state is liable to penalties where his customer is established, and therefore has to mount a challenge applying foreign laws in a foreign language and in a foreign jurisdiction which he is not familiar with. Such a state of affairs may discourage cross-border trade. There is nothing in the EY report that suggests that it gave any consideration to these issues. For these reasons, the CFE also considers that there is a powerful case for having standardised penalties on cross-border matters if these proposals are adopted.

Certified businesses

Many questions have been raised about the criteria that could be applied when determining which businesses should be considered to be trustworthy. There are concerns that any rules are likely to discriminate against new business. What will happen when there is a change of shareholders or management? Is such a measure compatible with the prohibition on discrimination that is a common principle applicable in many EU Member States?

Verifying whether a business is a "trustworthy" business may be a problematic and bureaucratic process. What factors will determine certification and trustworthiness? Some member states may

[4] "Implementing the destination principle to intra-EU B2B supplies of goods", 30 June 2015, EY (link)

not dispose of the resources to make such certification. We can see that a system similar to the VIES system might be adopted, but the VIES system has not always proved to contain reliable and up to date information. Particularly given the benefits that member states will obtain from the system in reducing fraud, if a similar system is adopted, it is crucial that businesses can rely on entries on the system.

The current VAT system that exempts intra-community movement of goods and services can result in financial benefits for customers because they do not have to pay their supplier VAT. However, these benefits are variable from business to business and country to country, depending on the reverse charge procedures that have been adopted and when traders are obliged to account for tax (which may vary from one week to a year). It is not clear how the proposals will impact on these differences in treatment.

As the Community's experience with missing trader inter-community fraud has shown, a system that allows a transaction to be exempted from tax based on evidence of the status of the recipient is potentially open to error, abuse and criminal attack. Clearly procedures will need to be put in place to ensure that a trader's status is subject to periodic review and is reviewed when there is any material change of ownership. The CFE can also see that electronic passwords may be a way of ensuring that a trader´s certified status cannot be so easily hijacked.

More autonomy for member states to choose their own rates policy

In a previous Opinion Statement[5], the CFE has observed that the decision to adopt the principle of taxation in the country of destination meant that it was not necessary to limit the freedom of the member states to choose their own rates policy.

The CFE continues to believe that member states should be allowed as much flexibility as possible to fix the rates at which they tax supplies. This is particularly true if the nature of the supply makes it very unlikely to be supplied on a cross-border basis or if the current system is maintained when it should not cause undue burdens on businesses established in other countries. If controls are imposed to limit member states' ability to adopt different rates, those controls should be proportionate and should not allow another member state to prevent adoption of flexible rates unless it has substantial proof of detriment.

However, the CFE also appreciates, as has already been observed, that allowing states to fix their own rates may increase the burdens on businesses making cross-border supplies if they have to account for VAT on such supplies. Issues related to rates may be less of a problem with goods because these are less likely to give rise to classification issues. Particularly when packages of services or goods and services are provided, the issue of whether there has been one composite supply or multiple supplies taxed at different rates has often proved to be contentious. If the rules are going to avoid fraud in the scale suggested, the CFE considers that there must surely also be a case for contending that there should be some form of binding ruling system.

[5] See above, Opinion Statement FC 13/2015.

Members of the CFE also consider that some indulgence should be provided for innocent errors; for example, a first error or accidental error should not be subject to penalties or interest for late payment.

Support for e-commerce and SMEs

Considerable reservations have been made about some of the proposals especially if generous special regimes are not put in place for small businesses[6]. The EY report noted that they are already potentially adversely impacted by the current rules. Unless generous special provisions are made for them, the proposals will significantly increase the adverse impacts on them. Harmonisation for the SME threshold would also be useful. Indeed there is also a case for some simplification for larger businesses that just make a very small level of supplies in a country.

It has been observed that it would be crucial to have a consistent VAT reporting in terms of formats and due dates, covering advance returns, recapitulative statements, reporting to the MOSS and intra-community supplies.

Some members fear the use of a common database may also pose problems, like the existing problems with the VIES database.

[6] See also CFE Opinion Statement FC 14/2015 on modernising VAT for cross-border e-commerce (link).