16 April 2002

Mr Stephen BILL
Head of Unit C - VAT and other turnover taxes
Taxation and Customs Union DG
European Commission
rue de la Loi 200
B-1049 BRUSSELS

c/c Cabinet of Mr Frederik Bolkestein
Mr Michel Vanden Abeele

Dear Mr Bill,

Re: FEE Comments to amend article 26 of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment regarding the special scheme for travel agents

We have had the opportunity to examine in detail the proposed directive amending article 26 of the EC 6th VAT Directive, COM (2002) 64 final, to ensure a more even application of the tax, to reduce the possibilities for tax avoidance and to simplify the application of the "margin scheme" for tour operators.[1]

We would like to take the opportunity to welcome the initiative of the Commission in this area to propose, what are on close reading of the proposals, substantial changes. In this regard we wonder whether the proposed time-table for implementation of the changes, being the 1st January 2003 might not be too optimistic. Further, we were surprised to note that only two representative bodies were consulted on this draft, ECTAA and the DRV.

Taking the different proposals in turn we have the following comments to make:

1. The concept of allowing the automatic calculation of an annual margin is to be welcomed, rather than businesses being required to calculate the margin on a transaction by transaction basis. What is not clear is what happens where a business in one year makes a "loss", (this might arise where the business operates on a "cash-basis" rather than on an "accruals" basis), and in the following year a "profit", i.e. where in one year the margin,

[1] We have used in this note the reference to Tour Operators as being those businesses which acquire for on-sale in the same state goods and services for the benefit of travellers.

on which is to be calculated on a tax inclusive basis the VAT due, is negative and in the following year positive. Is any relief for the loss to be allowed against the following period's "profit"? If no relief were to be allowed, this could generate unjust taxation where the net result of an operation was negative.

2. Registration of non-EU operators. We note that the proposals are not consistent with the simplification proposals contained in the Directive on electronic commerce recently adopted in principle by the ECOFIN in February 2002, where for non-EU residents a "single place" of registration has been accepted. The current proposals in the new article 26.2 second paragraph would require the non-EU taxpayer, not having any establishment in the EU to register for VAT in each one of the current 15 member states if the clients were themselves established or resident in each country.

3. Whilst the reasons behind the Commission's decision to not provide a more detailed description of a tour operator's "service", article 26.1 new refers, this is nonetheless to be regretted due to the problems that are caused by the lack of a common definition, including double taxation and non-taxation. An example here is as follows. A German Tour operator organises a voyage to France, on camp-sites rented from French campsite owners. The German tour operator rents tents and caravans from third parties and puts the "package" together for its clients of a stay in a caravan on a French campsite for say 2 weeks. The supply made by the German tour operator is it one of a supply within article 26, a supply of accommodation, within article 9,2 c or a supply of moveable property, see Commission v French Republic C-60/96?

   These issues need to be clarified to avoid potential double impositions where the Germans may take the view that the supply falls within the article 26 regime, whilst France takes the view that the supply is one of accommodation within article 9,2 c.

4. Similarly, issues arise as to whether the existence of certain infrastructures in a country is sufficient or not to create a permanent establishment for VAT, and even direct tax purposes. An example here would be ski chalets, rented in by non-resident tour operators for short period, e.g. several weeks a year which are then on-rented to travellers to France. The French administration has taken the view on a number of occasions that the chalets constitute a fixed establishment of the non-resident operator and that the latter is liable to French VAT on his French turnover, and not the VAT due in the country of establishment of the tour operator, giving rise to potential double taxation.

5. For supplies to customers who are VAT taxpayers the proposals insist that the tour operator has to apply the margin scheme and he will not be required to apply the "normal" VAT rules, i.e. where the place of supply of the services is determined in accordance with the basic rules in article 9,1 and 2 of the 6th Directive, unless the tour operator exercises the option in article 26,7 new. The issue here, is that identified by the Commission, (and unless the option is exercised) that this potentially leads to increased business costs where the traveller using the services under the conditions laid down in article 17,2 of the 6th Directive, is a VAT taxpayer.

6. In relation to the same article, 26,7 new we have had alternative views as to the intent here. Is it that the non-established travel agent has to register for VAT in each country in which the "principal" supply is performed, eg a French travel agent "reselling" a German hotel accommodation, would he apply German VAT to the total price including his margin, or would the French travel agent be able to recover the German VAT under the 8th Directive provisions, but charge French VAT on the total value of the supply. If the latter how would the tax authorities distinguish the role in which the travel agent was acting, ie in a "business" supply or a supply for a final consumer

Whilst the "normal" VAT rules would be difficult to apply and even with the suppression of the requirement to appoint a financially liable tax representative taking effect from 1 January 2002, Directive 2000/65 refers, many tour operators, to maintain their client's business would accept that they would potentially be required to VAT register in each member state within which their clients wish to travel. (This is on the assumption that the position in 5. above is the correct one). This can hardly be viewed as a simplification and would indicate that a fundamental review, (that is already underway as we are aware), is required of the place of supply rules in article 9. In addition for the tour operators and tax administrations this will be difficult to manage, requiring the setting up of a double set of books, one for the "margin" and another for the "normal" supplies as foreseen in article 26.9, new. Member states having discretion this could give rise to fifteen different treatments according to the place of establishment of the tour operator.

We trust that that the above comments are of interest and we would be more than happy to discuss them with you in a meeting.

Yours sincerely,

Stephen Dale
Chairman of the Indirect Tax Working Party