



10 February 2009

Mr Laszlo Kovacs
European Commissioner
Taxation and Customs Union
B-1049 Brussels

Email: laszlo.kovacs@ec.europa.eu

Ref.: ITA/HvD/PW/MB*

Dear Mr Kovacs,

Re.: “VAT package”, in particular Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services

- 1 FEE (Fédération des Experts Comptables Européens – Federation of European Accountants) has considered the “VAT package” and in particular the Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services.
- 2 FEE represents 43 professional institutes of accountants and auditors from 32 European countries, including all of the 27 EU Member States.
- 3 In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 500.000 professional accountants, working in different capacities in public practice, small and big firms, government and education, who all contribute to a more efficient, transparent, and sustainable European economy. Many of them are tax specialists.
- 4 FEE supports the European Commission’s objective to ensure that VAT on services will accrue to the country of consumption. FEE appreciates the substantial amount of work that the Commission’s services have undertaken in producing this Directive; however we feel that the new rules could have been drafted in a more precise and specific way, leaving less room for differences in interpretation by Member states.
- 5 In particular FEE is of the view that some of the expressions used in the above-mentioned Directive could benefit from further definition. One possible approach would be to (i) complete the directive with provisions to be implemented in the Member States, by (ii) a regulation with directly applicable rules that contains the definitions - a concept that has been used by the Commission in the proposals regarding insurance and financial services (dated 28 November 2007).



The notion of “supply of services”

- 6 The Directive deals with the place of supply of services. A supply of services is defined as any transaction which does not constitute a supply of goods.¹ However, the borderline between what is a supply of goods and what is a supply of services is often unclear, leading to inconsistencies, for example regarding the supply of software. In certain Member States, there are different treatments of a supply of standard software depending whether it is provided on a CD (supply of goods) or electronically (supply of services), whereas a supply of ad hoc software specifically programmed is always deemed to be a supply of services regardless of the medium used to provide it to the customer. Difficulties also arise in relation to certain leasing transactions, in relation to work carried out on goods etc.
- 7 As the distinction between a supply of goods and a supply of services is the basis for the determination of the place of supply, a clear definition of what is a supply of services is fundamental and should be the same in all Member States in order to facilitate cross-border transactions in the Internal Market.

Taxable person

- 8 A further fundamental requirement to determine the place of supply of services is the requirement to determine whether the supply is made to a taxable person or to a non-taxable person.
- 9 Basically, a taxable person is defined as any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.² Regarding the place of supply of services, it is further required to determine whether the taxable person is “acting as such”.³
- 10 Generally, it seems that a person that disposes of a VAT identification number and uses it for the relevant transaction could be regarded as a “taxable person acting as such”. It is however still unclear and left to the implementation process of the Member States, as to where the burden of proof lies and which steps a taxpayer has to undertake to identify his customer and check his status as a taxable person. Further definition of the terms used by Council Regulation would be helpful to avoid cases of double taxation or non-intentional non-taxation. As regards the identification of the recipient of the services supplied, which is critical to determine the place of supply of the services rendered, to date in certain countries, e.g. France, the recipient was determined as the person invoiced. Again, this rule could be fixed by Council Regulation as some countries consider the recipient as the payer of the service which could again lead to double or non-taxation.

¹ Article 24 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

² Article 9 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

³ Article 44 of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services



Fixed establishment

- 11 The place of supply of services changes, when the service is provided to or from a fixed establishment.⁴
- 12 The fixed establishment as such is not a new expression and there is already a reasonable volume of ECJ case-law in this regard. However, the opportunity could be used to clarify questions that still remain open, in particular regarding the importance of the level of activity that is required to consider a branch, for example, as a fixed establishment. An example here might be a branch that is only involved in pre-sales marketing and then refers the customer to the head-office for the actual sale; is the branch a fixed establishment for these purposes of the non-resident head-office?
- 13 Furthermore, it would be helpful to be very precise as to how to decide which establishment is the recipient of a service if several establishments exist. For example, a global telecom contract signed between two US groups, but with the recipient of the services disposing of a number of branches in the EU. The new article 44 would suggest that each establishment of the recipient of the services, if each one of them uses the services provided by the US telecoms provider will be required to account for a reverse charge. How will this be carried out and on what basis if the costs incurred by the US head office are not recharged to the EU branches.

Use and enjoyment

- 14 Member States may for certain supplies of services consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community if the effective use and enjoyment takes place outside the Community.⁵
- 15 Member states may also consider that a supply normally situated outside the EU may be considered as situated within the EU if the effective use and enjoyment is within the EU.
- 16 There is some room for clarification, in particular in the case of complex services. For example, regarding a Swiss bank that receives IT services and uses part of them in an EU Member State. It is assumed that this rule will not apply to supplies falling within articles 306 to 310 (Travel Agencies) which have their own place of supply rules.

Particular provisions

- 17 There are a number of particular provisions for certain kinds of services⁶ such as services by intermediaries, where the opportunity could be used to clarify questions that remain open and to take into account relevant decisions of the ECJ.
- 18 New article 192(a) of the Directive 2006/112 could also be clarified. The circumstances within which the place of supply is shifted depending upon the degree of “involvement” (or

⁴ Articles 44 and 45 of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services

⁵ Article 59a Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services

⁶ Articles 46 to 59 of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services



in French “participle” in the Directive – although in the draft French law this notion is more narrowly defined) of the establishment in the same territory as the recipient of the service.

- 19 In total, all of the above-mentioned issues are particularly relevant in cross-border transactions, therefore a Council Regulation with directly applicable rules in all Member States for the definitions would provide a good opportunity to clarify these important questions, to provide the necessary legal certainty to Member States and taxpayers across the European Union, and enhance the EU’s competitive position in the global economy.

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We would be pleased to discuss any aspect of this letter you may wish to raise with us. For further information on this letter, please contact Ms Petra Weymüller from the FEE Secretariat.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'H. van Damme', written over a horizontal line. The signature is stylized and includes a large loop at the beginning.

Hans van Damme
President