Federation of European Accountants
Fédération des Experts comptables Européens

Mr. Stéphane Buydens
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OECD Consumption Taxes Unit
2, rue André Pascal
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Ref.: ITA/RKO/PWE

Dear Mr. Buydens,

Re: OECD International VAT/GST Guidelines – Draft Commentary on the International VAT Neutrality Guidelines

FEE[1] (the Federation of European Accountants) is pleased to provide you below with its comments on chapter 1, sections 1 – 3 of the OECD international VAT/GST guidelines - draft guidelines on neutrality.

FEE welcomes the concept of commenting on the International VAT Neutrality Guidelines in order to achieve neutrality in practice. The draft commentary does not contain any statement FEE would object to, nor does it completely leave out aspects which our organisation considers important.

There are, however, some minor points upon which we should like to comment as follows, referring to the paragraph numbers used in the draft commentary.

Reciprocity, paragraph 10

FEE fully supports the view that „Where jurisdictions adopt such requirements, reciprocity could only be applied between two countries that each has a VAT system".

[1] FEE is the Fédération des Experts comptables Européens (Federation of European Accountants). It represents 45 professional institutes of accountants and auditors from 33 European countries, including all of the 27 EU Member States. In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 700.000 professional accountants, working in different3 capacities in public practice, small and big firms, government and education, who all contribute to a more efficient, transparent and sustainable European economy.

Some countries operate a mixture of a "VAT System" within the meaning as defined in note 1 of the commentary[2] and other indirect taxation systems, e.g. only at the retail level. If such "non-VAT system" does not provide relief for non-resident businesses, other countries might be tempted to use this fact as an excuse to refuse any VAT relief to businesses from such countries, even if there is a relief in the "VAT system".

To discourage such behaviour, we suggest to include a further limitation on reciprocity requirements, e.g. by saying "Where jurisdictions adopt such requirements, reciprocity could only be applied between two countries that each has a VAT system and with strict reference to this VAT system" or "Where jurisdictions adopt such requirements, reciprocity could only be applied to the extent and between two countries that each has a VAT system".

Groups of countries, paragraph 12

Does this rule apply also to a common legal framework which is not specific to a VAT System?

For example, the General Agreement on Trade in Services[3] requires each of its members to grant other members the Most-favoured Nation Treatment (MFN), unless the member concerned has claimed an exception (Art. II, paragraphs1 and 2). There are two general exceptions regarding „the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of service or service suppliers of other Members" and „the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound". No single GATS member has listed an individual exception regarding indirect taxation.

Is the fact that one GATS member grants the Most-favoured Nation Treatment to another GATS Member, but not to non-GATS members, inconsistent with the OECD VAT Guidelines on neutrality?

If this is not the desired result, we recommend to delete the words "for their VAT system": Based on the principle set out in the Guidelines on Consumption Taxation of Cross-Border Services and Intangible Property (in the context of e-commerce) and in accordance with the Ottawa Taxation Framework Conditions, where specific measures are adopted by a group of countries bound by a common legal framework for their VAT system, such measures may apply to transactions between those countries. If this gives rise to a difference of treatment between member countries of such a group and non-member countries, and the treatment of non-member countries would not otherwise be inconsistent with the International VAT Neutrality Guidelines, that should not be regarded as being inconsistent with these Guidelines".

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[2] "In the context of the OECD International VAT/GST Guidelines, the term "VAT" (for Value Added Tax) covers all taxes on consumption intended to be paid, ultimately, by final consumers and collected by businesses based on tax collection in a staged process, with successive businesses effectively paying tax only to the extent that the tax liability for (or value of) their outputs exceeds the tax on (or value of) all goods and services used as inputs for their business operations".

[3] Annex B to the "Agreement Establishing the World Trade Organisation - MTN/FA II", 1994.

Guideline 1, paragraph 18, second bullet point

According to several judgments of the Court of Justice of the European Union, there are transactions which do not fall within the scope of VAT, but still give right to full or partial input VAT recovery, for example the issue of new shares of a corporation accepting the interest of a new partner in a partnership.[4]

The OECD might consider to distinguish between those cases of a transaction outside the scope of VAT and without consideration, which give rise to input VAT deduction, and those which do not, by adding a wording similar to "This could be the case when the business makes transactions that fall outside the scope of the tax (e.g. transactions without consideration unless such transaction is recognised as giving right to input VAT deduction, such as issue of shares) or the input tax relates to purchases that are not wholly used for furtherance of taxable business activity".

Guideline 2, paragraph 26

The OECD might consider issuing a statement whether two businesses employing the same square footage or the same number of staff per unit of turnover are in a similar situation or not.

Guideline 3

Regarding Guideline 3 in general, we refer to our letter dated 17 March 2011.[5]

Guideline 4, paragraph 41

The draft commentary states: "This Guideline deals with the ultimate application of VAT on businesses. Foreign businesses should not be subject to irrecoverable VAT compared to domestic businesses, however that outcome is achieved, e.g. through application of zero-rate rules, refund mechanisms, etc. Nor would the creation of a tax advantage, in terms of the final tax burden, for foreign businesses compared to domestic businesses acting in similar circumstances be consistent with this Guideline. When legislation provides a refund or other form of relief mechanism to foreign businesses, in such a way that they are not advantaged or disadvantaged compared to domestic businesses, Guideline 4 is met".

Sentences 1 through 3 clearly refer to the final tax burden and do not seem to take cash-flow disadvantages into account.

The wording "they are not advantaged or disadvantaged" equally does not give leeway for "small" or "reasonable" [dis]advantage. This appears to be in contrast to paragraph 46, where De-Minimis-Rules are dealt with.

[4] CJEU, judgements of 23 June 2003, C-442/01, KapHag, [2003],ECR I-6851; and of 26 May 2005 C-465/03, Kretztechnik, [2005] ECR I-4357;
[5] http://www.fee.be/fileupload/upload/FEE%20response%20OECD%20Draft%20Guidelines%20VAT-GST%20110317173201171 03.pdf

We believe there should be a clear statement in paragraph 41 whether such application of De-Minimis-Rules, different refund periods or other measures having an impact on cash flow to foreign businesses are considered to constitute a violation of Guideline 4 or not.

For further information on this letter please contact Mrs Petra Weymüller, FEE Senior Manager at +32 (0)2 285 40 75 or via e-mail: petra.weymuller@fee.be.

Yours sincerely,

Philip Johnson
FEE President