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AUSTRALIAN TAX UPDATE

AUSTRALIAN BUSINESSES SUPPLYING ELECTRONIC, TELECOMS AND BROADCASTING SERVICES TO EU CUSTOMERS NEED TO BE AWARE OF CHANGES TO EU VAT RULES THAT APPLY FROM 1 JANUARY 2015

EU VAT CHANGES FOR E-COMMERCE SERVICES

Australian e-commerce businesses that supply services to European customers need to be aware of important "value added tax" ("**VAT**") changes that will apply across the European Union ("**EU**") from 1 January 2015.

These changes will apply in relation to the following services (which we have collectively referred to as "**e-commerce services**"), to the extent the services are supplied to a non-VAT registered consumer:

- telecommunication services;
- television and radio broadcasting services; and
- electronically supplied services (including software subscription services, such as for games, music and other content).

IMPACT FOR AUSTRALIAN BUSINESSES

While VAT is similar to the "Goods and Services Tax" ("**GST**") that applies in Australia, the above services are taxed differently in the EU as compared to Australia.

Where an Australian business supplies e-commerce services from Australia to a non-resident customer that is outside of Australia, that supply will generally be "GST-free" (i.e. not subject to Australian GST) under certain exemption provisions that apply to exported services.

However, where the customer is based in the EU, Australian businesses need to be aware that they may still be liable for VAT in the EU (at rates between 15% and 27%).

THE CURRENT "PLACE OF SUPPLY" RULES

In a VAT context, the so called "place of supply rules" govern where a particular supply takes place. These rules are used to determine the EU Member States in which businesses are obliged to register, collect and remit VAT due on their supplies.

These rules will change for cross-border supplies of e-commerce services, which are provided to consumers, from 1 January 2015. That is, the

changes will apply to supplies made to a private individual or to an organisation that is not in business, such as certain charities and public bodies, which are not registered for VAT and which make no business supplies (a **"B2C supply"**).

Generally speaking, where the supplier has an establishment in the EU, the place of supply for these services is the jurisdiction where the supplier is established. This enables the supplier to charge VAT at a uniform rate, relevant to its location, to all non-business clients, wherever they are based.

THE CURRENT DISTORTION

There has been a distortion between EU-based businesses and non-EU based businesses under the current VAT rules.

For non-EU businesses, the place of supply has been where the non-business customer is based in accordance with Article 58 of the EU Directive 2006/112. Accordingly non-EU businesses have had to account for VAT at the rate relevant to their customers' location and have therefore had to account for VAT at variable rates, and in numerous jurisdictions. This is a complex task, as there are 28 Member States and the standard VAT rate varies between 15% and 27%.

In contrast, EU-based businesses have been able to charge VAT at a uniform rate to non-business customers.

For electronic services only, a mini "One Stop Shop" was set up to enable non-EU business to select a single jurisdiction for electronic VAT registration. A non-EU business could also submit returns and pay all VAT due electronically in that chosen Member State, which would distribute the VAT due in the other Member States.

However many non-EU businesses have not taken this up. Indeed, a number of non-EU businesses have set up a fixed establishment in low-VAT jurisdictions, typically Luxembourg which has a standard VAT rate of 15%, and been able to charge VAT at a low uniform VAT rate to customers in the EU, taking advantage of the rules for EU established businesses.

THE NEW RULES FROM JANUARY 2015

Accordingly, to end distortion, under the new rules, the place of supply for both EU and non-EU suppliers of e-commerce services will be the non-business customer's place of *"belonging"*.

A non-business customer will generally belong where it is registered, has its permanent address, or usually lives. However, where in relation to these services a particular jurisdiction provides that VAT should be charged where the service is *"used and enjoyed"*, and not where the customer belongs, VAT will be charged in the place of use and enjoyment. We note that the *"use and enjoyment"* rule only applies where the supply is enjoyed in the EU, but the customer belongs outside the EU (or vice versa).

To reduce the onerous requirement on suppliers to obtain evidence of where customers live at the point of sale, EU Regulation (1042/2013) has been introduced to assist suppliers to determine the place of supply of their e-services more easily. Presumptions are made as to where the customer's place of belonging is located.

For example, if services are provided at a location such as a wi-fi hot spot, internet café, restaurant or hotel lobby where the physical presence of the customer is needed, there shall be a presumption that the service is supplied there. This would avoid a hotel providing wi-fi in its lobby needing to register for VAT in every jurisdiction where its guests are resident. These presumptions can be rebutted with evidence and will need to be built into VAT compliance systems. This is dealt with in more detail below.

For business-to-business transactions (**"B2B"**), a customer will still be liable to account for any VAT due through a reverse charge in accordance with current VAT rules. That is, the business customer itself will account for the VAT in the business customer's jurisdiction.

However, in a B2C supply the reverse charge is not an option. As a result, liability to account for any VAT due in a Member State will rest entirely with the supplier and not the customer.

THE NEW ONE STOP SHOP

An important additional change, which is of critical importance to the EU Commission, is that the One Stop Shop (**"OSS"**), which allows payments and returns to be made electronically from a single Member State of Identification, has been extended to EU businesses, and will cover not only electronic

services, but telecommunications and broadcasting services. The OSS as extended will reduce the obvious administrative burdens that the change in the place of supply rules could have led to, because EU suppliers will not have to register in every Member State where their customers belong, and indeed will no longer be liable to be registered in jurisdictions where they do not have establishments.

However, there are a number of issues that will need to be considered and planned for in advance. On 23 October 2013, the EU Commission published guidance on the extended OSS, envisaging that registrations would be applied for by both EU and non-EU business alike from 1 October 2014 to take effect from 1 January 2015. The success or failure of the OSS, not least from a technology point of view, is critical to how VAT accounting may develop in the years ahead. The earlier introduction of an electronic portal for EU VAT refunds proved to be a debacle.

AUSTRALIAN BUSINESSES AND THE OSS

Affected Australian businesses will need to decide how to adapt to the new regime and OSS and beginning making preparatory changes. It must be remembered the OSS is optional. Businesses can instead register in every Member State where they have non-business customers in the usual way.

Issues that will be important to consider include:

- Non-EU suppliers can use the OSS only if they have no EU establishment. This is called the *"Non-Union Scheme"*. They can choose whichever jurisdiction they wish to make their electronic registration. That jurisdiction, called the Member State of Identification, will receive all returns and payments and distribute the VAT payments to the Member States where the customers are based. The applicable VAT rules and rates are those which apply in the Member State of the customer. A Non-EU business cannot use the Non-Union Scheme if it is registered for VAT, or required to register for VAT, in any Member State. If it is so registered or liable to register, then even if it has no establishment in the EU, it will not be able to register under the OSS, but will need to account for VAT under the usual rules. If the Non-EU business is already using the mini OSS for electronic services, it can transfer its VAT registration number to the Non-Union Scheme.
- For EU businesses, they must register for OSS in the jurisdiction where they have their main place of business (**"the Union Scheme"**). They cannot use the OSS for supplies made to non-business customers in jurisdictions where they have either their main place of business or a fixed establishment. Rather, for these supplies, they must account for VAT in the usual way under a VAT registration. Once registered for OSS they must use it for all supplies made to customers in locations where they have no establishment.
- The OSS is simply for output VAT (i.e. VAT payable on supplies made). Input VAT refunds will still be available via the electronic VAT refund mechanism (EU Directive 2008/9/EC for the Union Scheme), or the 13th VAT Directive for non-EU businesses.
- The OSS is optional. Any EU or non-EU business can decide to account for VAT in each jurisdiction where it has customers under a local VAT registration in the normal way. Using normal rules may be particularly attractive to those businesses which have substantial input VAT refunds to recover, or whose customers are based in less than three jurisdictions, or who have fixed establishments in the majority of the jurisdictions where their customers are based (and who therefore cannot use the OSS for those jurisdictions).
- Agents will be able to submit the OSS VAT returns on behalf of their clients, in accordance with the rules and procedures in the Member State of Identification.
- The Member State of Identification selected for an OSS registration retains 30% of the VAT collected from 1 January 2015 to 31 December 2016, 15% for supplies made from 1 January 2017 to 31 December 2018, and nothing thereafter. This is a retention fee from payments of VAT made between Member States. It does not affect the amount of VAT to be paid by businesses.
- Penalties and charges for late payments of VAT are outside the OSS and are the

responsibility of the Member State where the supply takes place.

- There are strict rules of compliance and time limits for delivery of quarterly returns and payments of VAT, record keeping (10 years) and notification of changes. Non-compliance can lead to exclusion from the OSS for a period of time (known as quarantine).

WHERE MUST THE SUPPLIER ACCOUNT FOR VAT?

It is incumbent on the supplier to determine the correct Member State of supply, i.e. where the customer *"belongs"* or, where appropriate, where the service is used and enjoyed by the customer.

There are particular rules to be applied for determining where a customer is located and accordingly where the VAT must be accounted for. The new EU Regulation 1042/2013 provides for particular presumptions and scenarios which a supplier must adhere to in determining where a supply takes place. Obviously consumers move around and may be receiving the service far from home, for example on a mobile device, and there needs to be rules to enable suppliers to know where to account for the VAT, if it is otherwise uncertain.

The main rules are as follows:

- When services are provided at a location such as a telephone box, internet café, wi-fi hotspot or similar, where the recipient must be physically present in order for the service to be rendered to the customer, the presumption is that the customer belongs at that location (and so that is where the place of supply takes place.) If the location is on board a ship, aircraft or train travelling within the EU, the country of departure is deemed to be the country where the supply takes place.
- Where services are supplied via a residential fixed land line, the place of supply shall be wherever the fixed land line is installed.
- Where services are supplied through a mobile network against subsequent collection of payment, the place of supply shall be wherever is the mobile country code of the SIM card.
- Where services are supplied needing a fixed viewing card, the place of supply shall be the place to which the viewing card is sent with a view to it being used there.

To rebut the presumptions, a supplier needs to obtain three pieces of non-contradictory evidence to identify where the customer actually belongs, i.e. where the customer has his or her permanent address or usually resides (and therefore where is the place of supply).

If the presumptions do not apply, the supplier requires two pieces of non-contradictory evidence to identify residence. The non-exclusive list comprises:

- customer details such as billing address;
- IP address of the device used by the customer or any method of geolocation;
- bank details such as the location of the bank account used or the customer's billing address;
- the mobile country code of the customer's SIM card;
- the location of the residential fixed land line through which the service is supplied; and
- other commercially relevant information that is obtained by the supplier.

Currently, the UK and Dutch tax authorities accept that a business making B2C supplies can rely on the customer's self-declaration for where the customer resides combined with a reasonable level of verification. That verification can include the postal address for goods delivered, or verification of payment method (ie bank account details). Building verification processes capturing these indicators into a supplier's IT system will need to be considered. The new Regulation includes the presumption that customers are non-business if they cannot provide a valid VAT number.

Impact of presumptions

The presumptions are largely sensible and should result in VAT being levied in the Member State of consumption of the e-service, and should remove some of the administrative burdens from suppliers.

But where the presumptions do not apply, suppliers will need to obtain additional evidence of residence at the point of sale. Furthermore, given that new EU Regulations in the telecommunications sector will permit mobile operators to provide international roaming services to EU customers, it

is anticipated that mobile operators will need to register in all other Member States, such that the OSS will prove very important for them.

Considering relocation

If a non-EU business has relocated to Luxembourg or another low VAT jurisdiction to take advantage of the current place of supply rules for EU-based businesses, that business may now wish to contemplate relocating again, either out of the EU or to another jurisdiction that offers efficient direct tax regimes such as the UK or the Netherlands.

Australian businesses will be aware of the increasing importance of ensuring realistic transfer pricing arrangements are in place, to ensure that the appropriate amount of corporate income taxes are paid in the jurisdictions where the business has operations. The key point is that a low VAT rate will no longer be a factor which influences non-EU businesses involved in providing e-commerce services to relocate to a particular jurisdiction.

CONCLUSION

From 1 January 2015, e-commerce services will always be taxed in the jurisdiction where the customer belongs, irrespective of whether (i) the customer is a business or consumer, and (ii) the supplier is based in or outside the EU.

Following this change to the VAT place of supply rules, a new simplification measure, an extended One Stop Shop, comes into force on 1 January 2015. The One Stop Shop allow a business supplying e-commerce services to non-taxable persons in Member States, in which the business does not have an establishment, to account for the VAT due on those supplies via a web-portal in a Member State in which they are identified. Although the scheme is optional, it is beyond question that for all businesses supplying these services in the EU the implementation of the new VAT place of supply rules requires new verification and validation processes to be built into their financial models and VAT compliance systems.

MORE INFORMATION

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