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LETTER FROM THE EDITORS

Dear Reader

This issue of INDIRECT TAX NEWS contains information on various indirect taxation topics of practical interest from all over the VAT/GST world that may help advisors and taxpayers to act in compliance with their respective VAT legislation.

In particular, simplification rules are the main topic in this INDIRECT TAX NEWS. You will be informed about a simplified VAT scheme in Norway, the implementation of the reverse charge mechanism for specific construction services in Finland, and the new business to business (B2B) place rules regarding services in respect of cultural, artistic, sporting, scientific, educational, entertainment or similar events and admissions. We will also look at some new European Council regulations.

The VAT specialist of your BDO Member Firm will be pleased to advise if further information on a specific issue is needed.

Ulrich Grünwald
Chair, BDO VAT Centre of Excellence

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BELGIUM

EX WAREHOUSE CONDITIONS IN CHAIN SUPPLIES: THE EMAG RULES REFINED

To determine whether a supplier of goods correctly invoiced its customer without VAT by means of an exempt intra-Community supply of goods in the case of two successive supplies between different taxable persons, but of a single intra-Community transport, the European Court of Justice (ECJ) refined its principles laid down in the EMAG Case (C-245/04) in its judgment of 16 December 2010 (C-430/09). Our below analysis suggests that the existing Belgian regulations are in accordance with this decision.

Factual circumstances

Company A makes ex-warehouse supplies from the Netherlands to company B in Belgium. Company B immediately resells the goods to company C also in Belgium even before collecting them at company A's warehouse. Company A is informed of company B's Belgian VAT identification number. Both parties contractually agree that the transport is for the account and at the risk of company B. The latter regularly provides signed declarations to company A stating that the goods were transported to Belgium. Company A only found out afterwards that the goods were shipped to company C instead of Company B by means of a lorry and driver supplied for consideration by company C to B.

Following a tax audit, the Dutch VAT authorities claimed VAT on the supplies of company A. The ECJ was asked to issue a preliminary ruling on whether the conditions for a VAT-exempt intra-Community supply of goods were fulfilled in the hands of company A in the particular circumstances.

Decision of the European Court

The ECJ first confirmed the principles laid down in the EMAG judgment, stating that in the case of two successive supplies involving a single intra-Community dispatch from company A to C, the transport can be assigned to only one of the two supplies.

However, in the case at issue the ECJ states that this rule is not sufficient to determine whether the conditions for a VAT-exempt intra-Community supply are satisfied. An overall assessment of all the specific circumstances is required to make an adequate analysis. For these purposes the ECJ takes the following into consideration:

- One of the conditions for a VAT-exempt intra-Community supply is that the *right to dispose of the goods as owner* is transferred to the purchaser. Company B can only transfer this right to the second buyer if it has previously been transferred to him by the first vendor. But this does not automatically imply that the transport is ascribed to the supply from A to B, as B could already transfer this right prior to the commencement of the intra-Community transport (in the Netherlands);
- *The purchaser's intention* at the time of acquisition must be taken into account: company B showed substantial intention to ship the goods to Belgium by communicating its Belgian VAT identification number and providing the signed declarations stating that the goods were being transported to Belgium;
- The supplier may only be held liable to VAT if he had been informed of the fact that the goods would be sold to another taxable person before they left the State of supply (the Netherlands). In this regard it is required that the supplier acts in good faith and takes every reasonable measure in his power to ensure that the transaction does not lead to his participation in tax fraud.

The ECJ finally decided that the transport should be assigned to the first supply (A to B) if company B, having obtained the right to dispose of the goods as owner in the Member State of supply (the Netherlands), expresses its intention to transport the goods to another Member State, and the right to dispose of the goods as owner has been transferred to the second purchaser in the member State of destination of the goods. It is up to the referring court to establish whether those conditions have been fulfilled.

Impact in Belgium

According to the Belgian tax authorities, transport organised by or for the account of A is in any case deemed to relate to the supply between A and B, and transport by C is in any case deemed to be assigned to the supply from B to C. Where the transport is organised by B, the Belgian VAT authorities are of the opinion that the contractual arrangements will decide to which supply it is to be assigned. These principles seem to be in line with the above conditions set by the ECJ.

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BULGARIA

SUMMARY OF SOME OF THE AMENDMENTS TO THE VAT ACT TAKING EFFECT IN 2011

Supplies of services associated with cultural, artistic, sports, scientific, educational, entertainment or other similar events

From 1 January 2011 when services related to cultural, artistic, sports, scientific, educational, entertainment or other similar events (including fairs and exhibitions) are supplied to a taxable person, the place of taxation will be the country where the customer is established.

These services will be subject to taxation in the country where the event takes place in the case of:

- supplies of services for providing admission (in exchange for tickets or consideration covering the entry fee, including when the entry fee is included in a subscription) and services accompanying the granting of admission, when the services are provided to a taxable person; and
- supplies of services to a non-taxable person.

Granting of concessions for construction, service or extraction/mining

From 1 January 2011 the granting of concessionary rights for construction, services or extraction by the State and local bodies is treated as a taxable supply. Up to the end of 2010 such grants were not subject to VAT.

Hotel accommodation

From 1 April 2011 the provision of hotel accommodation is subject to a reduced VAT rate of 9%, notwithstanding whether this is part of an organised package tour or bought separately.

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FINLAND

THE REVERSE CHARGE IN THE CONSTRUCTION INDUSTRY

Finland introduced a compulsory reverse charge mechanism for certain construction services from 1 April 2011. The aim of the rules is to reduce the risk of tax fraud in the construction industry.
Based on the instructions published by the tax authorities, the new rules will concern the following services:

Excavation and foundation work, construction work, installation work, finishing work, plant hire or rental contracts covering both equipment and operator, on-site cleaning work, and supply of contracted employees to a site.

On the other hand, the new rules do not concern the following services, although they are quite closely related to construction services:

Installation of plant used for production, architectural services, planning and design work, other engineering and technical services, plant hire or rental contracts covering only the equipment, outdoor cleaning services (including roads, driveways, parks, airports), transport, and building maintenance.

The reverse charge will apply to services that are supplied in Finland, i.e. when the construction work is performed in Finland or when people are contracted by a Finnish business to perform construction work. The most essential condition for the applicability of the new rules is the status of the buyer: the reverse charge mechanism will apply to the supplies only if the buyer is a construction company, i.e. if it sells construction services on an ongoing basis, not only occasionally.

And naturally, the buyer must be a taxable person. Hence, the new rules apply to cases where the supplier is acting as a subcontractor for a construction company, or for any other taxable person who can be regarded as a construction company.

The new rules apply to work that began on or after 1 April 2011. After that date, invoices must not show VAT. The seller is not allowed to charge VAT, and similarly the buyer is not allowed to claim VAT charged by the seller. However, if work started before 1 April 2011, but remained unfinished at that date, the reverse charge mechanism will not apply.

With regard to foreign construction companies – if they act as subcontractors - the reverse charge mechanism means that they are still obliged to register for VAT in Finland if their work in Finland lasts over 9 months, although they are not obliged, or even allowed, to charge VAT.

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GERMANY

VAT CHANGE FOR SERVICES IN RESPECT OF CULTURAL, ARTISTIC, SPORTING, SCIENTIFIC, EDUCATIONAL, ENTERTAINMENT OR SIMILAR EVENTS AND ADMISSIONS

With effect from 1 January 2011, the German VAT law has changed regarding the place of the supply of services in respect of cultural, artistic, sporting, scientific, educational, entertainment or similar events, such as fairs and exhibitions to entrepreneurs acting as such. Up to that date, services and ancillary services relating to those mentioned above, including the supply of services of the organisers of such activities, were deemed to be supplied at the place where those activities actually took place. Since 2011 under the B2B place-of-supply rule - laid down in Article 44 of the VAT Directive - these services are taxed at the place where the service recipient (if a business customer) is established. The recipient has to account for VAT under the reverse charge mechanism. Exceptions to this rule are the renting of conference halls (which could be VAT exempt) and catering services.

The rule for the place of supply for B2C relationships is unchanged, being still the place where the event takes place. Therefore the organisation of an exhibition to a non-taxable person is deemed to be supplied where the exhibition takes place.

An exception exists for admissions to cultural, artistic, sporting, scientific, educational, entertainment or similar events. Unfortunately, the VAT treatment and its interpretation are controversial. The German VAT treatment of sales of admissions/tickets for cultural, artistic, scientific, teaching, sport, entertainment or similar events depends inter alia on the person who sells the admissions.

Where an event organiser sells the admission, the place of supply is deemed to be where the service is actually carried out. This rule applies irrespective of the taxable status of the service recipient (taxable person or private individual). If the admission is sold by an intermediary (i.e. not directly by the organiser of the event) to an entrepreneur, the place of supply is deemed to be where the business customer is established (B2B place of supply rule). If the service recipient is a non-taxable person, the place of supply is deemed to be where the intermediary is established (B2C place-of-supply rule). However it is also possible that the admission is part of several additional services, in which case the VAT treatment changes due to the application of the rules for a service package

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ITALY

VAT: CHAIN TRANSACTIONS – NON TAXABLE TRANSACTIONS IRRESPECTIVE OF WHOEVER TRANSPORTS GOODS ABROAD

In chain transactions, where the first sale occurs between two Italian taxable persons (i.e. Italian companies, permanent establishments in Italy or non-residents registered for VAT purposes in Italy) and the second is to a foreign customer (either EU or non-EU), the first transaction is to be considered non-taxable provided Customs affix the stamp 'Exit' on the invoice or on the transport document.

By so doing Customs declare that the goods sold have indeed crossed the EU border but not that the goods, once at the disposal of the first customer/second seller, have not been 'consumed' in Italy.

This is why the Italian Tax Authority considered non-taxable any transactions for which a transport agreement had been stipulated by the customer/second supplier instead of by the first supplier. Subsequently the Italian Tax Authority reviewed its position, stating that the transaction was to be considered non-taxable even if the second Italian supplier (promoter) stipulated the transport agreement in the name and on behalf of the first supplier, it being understood that the goods had to be collected directly by the transporter from the first Italian supplier. In this way the second Italian supplier would be acting merely as an intermediary for the customer without, however, ever having the availability of the goods.

However, according to a judgment issued by the Supreme Court on 25 March 2011, for the first sale to be considered a non-taxable transaction, what matters is not who transports the goods, but that the goods from the very beginning are destined (proof must be provided) to be transported abroad to a foreign customer. Therefore, according to the Supreme Court, the sale of goods between two Italian taxable persons is considered non-taxable even if the goods are transported outside the EU territory by the second Italian supplier.

VAT REFUND – GUARANTEE

Art. 38-bis of the Italian VAT law states that a guarantee is required for the refund of a VAT credit arising from the annual VAT return.

Such a guarantee may be issued by a banking firm, financial intermediary or an insurance company and it may also be issued by foreign subjects, whose names are available on the websites of the ISVAP and of the Banca d'Italia.

Furthermore, should the claimant belong to a group with a consolidated equity higher than EUR 258,228,449.54, the guarantee can be issued directly by the holding company.

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THE NETHERLANDS

DUTCH SUPREME COURT RULES IN EURO TYRE CASE

In the Euro Tyre case (ECJ c-430/09), a Dutch supplier (A) sold goods to a Belgian customer (B), who subsequently sold the goods to another Belgian customer (C). The ECJ ruled that if B, having obtained the right to dispose of the goods as owner in the Member State of the first supply, expresses his intention to transport those goods to another Member State and presents his VAT-identification number attributed by that other State, the intra-Community transport should be ascribed to the first supply, on condition that the right to dispose of the goods as owner has been transferred to C acquiring the goods in the Member State of destination of the intra-Community transport.

Following the ECJ ruling, the Dutch Supreme Court stated that the supplier (A) might be held liable to VAT on the transaction if he had been informed by B of the fact that the goods would be sold on to C before they left the Member State of supply. Given the fact that A in the underlying case was informed that the goods were sold by B to C, after the goods had left the Member State, the Dutch Supreme Court ruled in line with the ECJ ruling.

Overall assessment of all the specific circumstances

The Euro Tyre ruling may not be the outcome that many wished for, given that the ECJ ruling does not provide us with clear guidelines on how to determine in which chain a VAT exempt intra-Community supply takes place. Instead it refers to "an overall assessment of all the specific circumstances".

However, in the underlying case the supplier (A) proved in court that he was informed by the first recipient (B) that the goods were sold to C, after the goods had left the Member State. This emphasises the importance of a complete and well documented record of transactions when goods are sold using the exemption for intra-Community supplies.

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NORWAY

VAT LIABILITY FOR NON-ESTABLISHED VENDORS SUPPLYING ELECTRONIC SERVICES TO CONSUMERS IN NORWAY (B2C) – SIMPLIFIED VAT SCHEME

Introduction

New Norwegian VAT legislation, making non-established vendors supplying electronic services to consumers in Norway (B2C) subject to Norwegian VAT at the standard rate of 25%, will come into force on 1 July 2011.

As a general rule, non-established vendors supplying electronic services above the threshold of NOK 50,000 during any twelve month period will be liable to register in the Norwegian VAT Register according to the normal registration rules. Such registration requires that the non-established vendor must either establish a place of business in Norway or appoint a fiscal representative.

However, seeking to provide simplified measures, the Ministry has suggested that non-established vendors may opt to use a simplified VAT scheme, as an alternative to registering in the VAT Register. The main features of the simplified scheme are:

- vendors do not have to appoint a fiscal representative;
- vendors do not have to register in The Central Coordinating Register for Legal Entities;
- vendors only have to communicate electronically with one tax office in Norway;
- vendors will have electronic and simplified reporting procedures;
- vendors will not be able to deduct input VAT in the VAT return, but will be eligible to make input VAT refund applications.

Who can opt for the simplified VAT scheme?

Those who will be eligible for the simplified VAT scheme are non-established vendors supplying electronic services to consumers in Norway, who are only subject to VAT on such supplies.

'Non-established' means, as a starting point, that the vendors must not have a place of business within Norway. If an operator establishes a place of business within Norway, it is liable to register in the Norwegian VAT Register.

Electronic services are defined as "services capable of delivery from a remote location which are delivered over the Internet or any other electronic network and in the absence of information technology is impossible to ensure, and the nature of which renders their supply essentially automated." As a starting point the term "electronic services" should be interpreted in line with Council Regulation (EC) No 1777/2005 and Council Directive 2006/112/EC. Please note that vendors currently registered for the supply of electronic communication services to consumer (B2C) also may opt to use the simplified VAT scheme.

Consumers in Norway will include private individuals and other persons not performing economic activity (B2C). Please also note that vendors will not be disqualified from the simplified VAT scheme if they also supply electronic services or other services capable for delivery from a remote location to businesses and public sector bodies (B2B).

Finally the vendors must only be subject to VAT for the supply of electronic services. If the vendors are subject to VAT in Norway for the supply of any other goods or services, the operator cannot opt for the simplified VAT scheme to report VAT on electronic services. The operator must then register in the Norwegian VAT Register and report all supplies on the standard VAT declaration.

Simplified registration and reporting procedures

The reporting procedures, as well as the registration procedures, are linked to the rules laid out in Council Directive 2006/112/EC.

The Norwegian VAT authorities are currently developing a web site for the simplified VAT scheme. Through this web site vendors will be asked to submit certain details regarding the business activity. Vendors who successfully complete the registration will be assigned a unique identification number and will be notified by e-mail.

When registered through the simplified VAT scheme portal, vendors may at any time log in to communicate with the tax office or to submit the simplified VAT return. The simplified VAT return should be completed electronically for each calendar quarter, and

submitted within 20 days after the quarter to which it relates. Vendors must also submit returns for quarters where no supplies have been made. The simplified VAT return must contain the following information:

- Identification number
- Basis for VAT (net value of supplies)
- VAT amount

All amounts must be in Norwegian kroner (NOK) and rounded down to the nearest NOK.

Refund application

The simplified VAT scheme does not provide for the direct deduction of input VAT incurred by the non-established vendor. However the vendor may be relieved from VAT paid on goods or services in Norway through a VAT refund application.

Documentation and duty of disclosure

Vendors opting for the simplified VAT scheme will not be obliged to issue invoices for VAT purposes. In order for the tax authorities to control the numbers stated in the simplified VAT return, the only documentation requirement for vendors is to keep records of transactions. The records of transactions should as a minimum contain the following information:

- With regard to sales documentation, as there are no invoice requirements, the records may contain references to other sources of information, for example electronic logs
- Date of deliveries
- Name and address of customers
- Currency
- Gross value of deliveries (including VAT)
- VAT amount

The records of transactions should be kept electronically and available for Norwegian tax authorities within three weeks notice.

Vendors opting for the simplified VAT scheme will be subject to a general duty of disclosure about circumstances which the tax authorities may find significant for tax control.

Removal from the simplified VAT scheme

The tax authorities will remove an operator from the simplified VAT scheme in the following cases:

- taxable activities have ceased;
- the vendor no longer meets the conditions necessary for use of the simplified VAT scheme;
- the vendor persistently fails to comply with the rules in the VAT Act.

A vendor who is removed from the simplified VAT scheme, and still has taxable activities, must register in the Norwegian VAT Register through a representative, who must be resident in Norway.

A vendor who is removed due to persistent compliance failure, may be re-registered on certain conditions.

Discretionary determination and penalties

Vendors opting for the simplified VAT scheme will be subject to the VAT Act's general provision on determination by discretion: if the simplified VAT return does not arrive, or the return is incorrect or incomplete, the tax authorities will determine the amount of VAT by discretion. Discretion will be as close to the factual situation as possible.

Vendors will also be subject to the VAT Act's penal provisions, including civil penalties and criminal proceedings:

- If a VAT return contains formal errors or is not submitted within the deadline, the tax authorities may impose a surcharge. The penalty charged will range from NOK 250 up to a maximum of NOK 5,000. A surcharge cannot exceed 3% of output tax.
- Interest will be charged if VAT is paid after the due date.
- In the event of contravention of the VAT Act, surtax may be imposed. In serious cases the surtax may be up to 100 per cent.
- Contravention of the VAT Act may also be penalised with fines or a prison sentence.

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PANAMA

NEW VAT EXEMPTIONS FOR SUB-CONTRACTORS OF THE PANAMA CANAL AUTHORITY

To facilitate investment and competitiveness in the Panama Canal Expansion's works and related projects, two new VAT exemptions were recently added.

Under the new law the following are exempt from VAT:

- The transfer of cement and its additives and derivatives prepared by sub-contractors of the contractors of the Panama Canal Authority (ACP) working in the project of design and construction of the Third Set of Locks in the Panama Canal and the new bridge on the Atlantic Coast of the Panama Canal.
- Importation of raw materials to produce concrete by sub-contractors of the contractors of the ACP and of the above-mentioned projects.
- The services of production and delivery of cement and its additives and derivatives executed by sub-contractors of the contractors of the ACP and of the above-mentioned projects.

The ACP is exempt from VAT for all works and purchases, but this exemption did not extend to contractors. Consequently, the VAT charged by sub-contractors represented an increased cost for the projects.

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PORTUGAL

VAT – THE MOST IMPORTANT CHANGES TAKING EFFECT FROM 1 JANUARY 2011

Standard VAT rate change

A new standard rate of VAT has applied since 1 January 2011: the rate increased from 21% to23% (from 15% to 16% in Madeira and the Azores). The remaining VAT rates – reduced and intermediate – were kept unchanged at 6% and 13% respectively (4% and 9% in Madeira and the Azores). Given the widespread economic difficulties in the country, it is quite probable that there will be another increase in the standard rate, until the end of the year, perhaps to 24% or 25%.

Place of supply of services - VAT rules change

Until 31 December 2010, all services relating to supplies of cultural, artistic, sporting, scientific, educational, entertainment or similar events, such as fairs and exhibitions, were liable to VAT in Portugal, if they were materially performed in Portugal.

On 1 January 2011, some changes were made to the place of supply rules. From that date, there is only a liability to VAT in Portugal on the supply of such services to business customers who are established in Portugal, with the exception of **admission fees** and **ancillary services related to admissions**, supplied to a taxable or non-taxable person, which are subject to VAT in Portugal if the event takes place in Portugal.

In view of the subjectivity of the terms 'admission services' and 'ancillary services related to admissions', it is expected that the Portuguese Tax Authorities will issue some internal rulings in order to avoid misinterpretation and grey areas.

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ROMANIA

EXEMPTION FROM VAT REGISTRATION FOR OCCASIONAL SUPPLIES OF GOODS AND/OR SERVICES

Under article 154 paragraph (4) of the Romanian Tax Code, taxable persons not established in Romania who are liable to pay VAT in Romania according to article 150 paragraph (1) of the Romanian Tax Code may be exempted from applying for VAT registration when they:

a) make occasional supplies of services in Romania, if these supplies are not preceded by intra-Community acquisitions of goods in Romania;
b) make occasional supplies of goods in Romania, other than:
   i. distance sales;
   ii. supplies of goods preceded by intra-Community acquisitions of goods in Romania.

The Romanian VAT legislation defines occasional supplies as supplies of goods/ services that are made once in a year. Although there is no specific indication whether the term "year" refers to a calendar year or the time period between two consecutive supplies, the calendar year should be considered as reference in order to be consistent with other provisions of the VAT law.

For the purposes of paying VAT for occasional supplies, taxable persons shall apply to the tax authorities for a ruling on the VAT payment method on occasional supplies of goods and/ or services ("*Cererea pentru eliberarea Deciziei privind modalitatea de plată a taxei pe valoarea adăugată pentru livrările de bunuri şi/sau prestările de servicii realizate ocazional*"). The application must be accompanied by copies of supporting documents such as sale/purchase contracts, invoices or other supporting documents, as the case may be.

The taxable person must submit the application to the tax office responsible for the area where the taxable operation took place, by the last day of the month in which the supplies were made. Tax authorities will then issue a decision on the method of payment of VAT, under the signature of the head of tax office.

The decision is issued in two copies; one is provided to the taxable person and the other is filed in the relevant tax office. The decision is registered in a special register of non-established taxable persons who are exempt from VAT registration as they occasionally perform taxable operations in Romania for which they are liable to pay VAT.

The decision has to be communicated to the taxable person by the 10th day of the month following the month in which the application was submitted. Payment of VAT on occasional supplies of goods and/or services performed in Romania must be made by the 25th day of the month following the month in which the taxable operations took place. The payment must be made in LEI (Romanian currency) and may be in cash, by bank transfer or by post mandate.

The above provisions have been implemented through the Order of Ministry of Finance no. 120/2011 that sets out the standard forms and filing instructions for applications and issue of VAT payment decisions.

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SLOVANIA

NEW CONDITION FOR DEDUCTION OF VAT INPUT TAX

On 16 March 2011 a new condition for deduction of input VAT was introduced in the Slovenian VAT legislation. The change relates to the 'Act on prevention of late payments' which was implemented at the same time and which sets out maximum terms of payment. Under this Act, different maximum terms of payment apply, depending on the nature of the debtor:

- 30 days if the debtor is a public body,
- 60 days (or under certain conditions 120 days) if the debtor is a commercial enterprise.

The new Article 66.a of the Slovenian VAT Act states that if a customer does not pay an invoice to its supplier by the set deadline (agreed individually between the two parties, but not exceeding the maximum deadline specified in the Act on prevention of late payments), it has no right to deduct input VAT shown on the invoice. However, the VAT can be deducted even though the invoice is not paid by the deadline, if the customer (debtor) declares the monetary obligation on the invoice into the public system of obligatory multilateral reconciliation ('ePOBOT'), which at present is offered only by The Agency of the Republic of Slovenia for Public Legal Records and Related Services (AJPES).

If a taxable person deducts input VAT on the invoice, but does not pay the invoice in time and does not declare the monetary obligation into 'ePOBOT', it must reduce the deduction in the tax period in which the payment deadline is exceeded. In addition, the taxable person may not deduct the input VAT as long as the invoice remains unpaid.

Following the above change, taxable persons in Slovenia have the following options regarding purchase invoices which are not paid in accordance with the Act on prevention of late payments:

- to deduct the input VAT at the time of receipt of the invoice and to declare the monetary obligation into 'ePOBOT' as soon as the deadline is missed (no VAT consequences apply in this case),
- to deduct the input VAT at the time of receipt of the invoice and to correct (reverse) this deduction at the time when the payment is delayed,
- not to deduct the input VAT at the time of receipt of the invoice and to deduct it when the invoice is paid.

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SPAIN

CONCEPT OF 'PERMANENT ESTABLISHMENT' IN SPAIN FOR VAT PURPOSES

On 15 March 2011, the European Council enacted Regulation (EU) No 282/2011 implementing measures for Directive 2006/112/EC on the common system of Value Added Tax ('VAT').

The principal objective of this regulation is to ensure uniform application of the current VAT system by laying down rules implementing Directive 2006/112/EC, which, in some cases, could be subject to different interpretations by member states. The Regulation contains specific rules in response to selective questions concerning application. These rules are not conclusive with regard to other cases, and consequently are to be applied restrictively.

This EU Regulation is a binding regulation and directly applicable in all Member States. Consequently, it does not need to be incorporated into national laws for its application. The Regulation will apply with effect from 1 July 2011.

The principal change in the EU Regulation which affects Spanish VAT regulations is the concept of a permanent establishment. This concept and other related concepts, such as the place where a taxable person has established his business, the permanent address of the business and the place where that person usually resides, have been clarified by the EU Regulation, taking into account the case law of the European Court of Justice in order to facilitate the practical application of these concepts.

The concept of a permanent establishment is now defined in the EU Regulation as any establishment other than the place of establishment of a business, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

The above definition is broader than the definition of permanent establishment provided in the Spanish VAT tax rulings, which list different examples of what constitutes a permanent establishment.

This could lead the Spanish Tax Authorities to review the criteria established in its rulings in order to harmonise them with the new EU definition. A practical example of this could be storage facilities. According to the definition of a permanent establishment under Spanish VAT rulings, storage facilities should be considered as permanent establishments. However, under the EU definition, storage facilities themselves should not be considered as permanent establishments unless they have a suitable structure in terms of human and technical resources.

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UNITED KINGDOM

VAT ON DEAL FEES

Whether VAT can be recovered on corporate restructuring costs is an area of increasing contention.

HM Revenue & Customs (HMRC) applies what it calls the 'to whom' and 'purpose' tests (who commissioned the supply – which may differ from who paid for it – and was the supply used by that person for the purposes of their business?). At issue is HMRC's view that a company established for the purposes of acquiring the share capital of another company is not engaged in an economic activity and has no entitlement to deduction of VAT on adviser etc fees.

Inspired by the ECJ decision in Faxworld (Case C-137/02), many advisers and taxpayers in the UK argue that the concept of economic activity has a very wide scope, and certainly wider than HMRC's interpretation.

One of the lead UK cases on this issue is that of BAA Limited, which concerns the costs incurred by a special purpose company (ADIL) established to acquire the share capital of BAA plc. In addition to acquiring the shares ADIL's activities included its direct involvement in the management of the companies acquired. Immediately after the acquisition – and before ADIL made any taxable supplies - ADIL was added to the BAA VAT group, which sought to recover the VAT on adviser's fees associated with the transaction.

At the First Tier Tax Tribunal HMRC argued that ADIL was not involved in an economic activity and that the input tax could not be assimilated to the activities of the VAT group, but ADIL successfully argued that the VAT should be recoverable. However, HMRC recently won its appeal to the Upper Tribunal, which distinguished the circumstances from those in the Faxworld case, and ruled that although ADIL was carrying on an economic activity, it made no taxable supplies of its own before it joined the VAT group, and the supplies made by other group companies were not relevant at a time when it was not a member of the group. The lack of a direct and immediate link between the supplies made to ADIL and any taxable supplies made by ADIL (or attributable to ADIL) meant that ADIL did not have the right to recover the VAT in question.

It remains to be seen whether the taxpayer will appeal this latest decision in the Court of Appeal but, as the Upper Tribunal agreed that ADIL was carrying on an economic activity, advisers in similar cases in the future should note that it may increase the chances of recovering VAT if an intention to join a VAT group is evidenced at the outset, and that, if possible, some taxable supplies are made before joining the group.

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CURRENCY COMPARISON TABLE

The table below shows comparative exchange rates against the euro and the US dollar for the currencies mentioned in this issue, as at 6 July 2011.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
Euro (EUR)	1.0000	1.4481
Norwegian Kroner (NOK)	0.1289	0.1867

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