

INDIRECT TAX NEWS

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GERMANY

VAT REFUND PROCEDURE VS. GENERAL VAT PROCEDURE

On 7 June 2011 the German Federal Ministry of Finance published a statement concerning the VAT refund procedure and the general VAT procedure (including all VAT filing obligations). This publication states that the VAT refund procedure and the general VAT registration procedure are mutually exclusive within one filing period (in general one filing period is a quarter of a calendar year).

To go into more detail, the German Federal Ministry of Finance outlined that for foreign entrepreneurs the VAT refund procedure and the general VAT registration could both exist in sections within one calendar year. This means that for example if the foreign entrepreneur did not carry out taxable transactions in Germany within the first quarter of a calendar year, but wanted to deduct German input VAT from invoices received within the first quarter, he would have to apply for the input VAT deduction via the VAT refund application.

If the same entrepreneur begins to carry out taxable transactions from the second quarter of the calendar year, he has to register for German VAT. In particular, that means he has to declare and pay German output VAT as well as to declare and deduct the German input VAT, via periodic VAT returns according to the general VAT procedure. In those cases (the requirements for the general VAT registration are fulfilled once in the calendar year) the entrepreneur has to register for German VAT according to the general procedure and has to use the same procedure for the rest of the filing periods of the calendar year. Consequently, if the requirements for the VAT refund procedure are fulfilled later this calendar year (for example if the entrepreneur has no more taxable transactions within Germany) he has no right to change from the general VAT procedure (including the periodic filing obligations) to the VAT refund procedure.

Please note that if the entrepreneur did not deduct the input VAT within a VAT refund application (which arose within a period for which the requirements for the general VAT registration were not fulfilled) he is allowed to deduct the input VAT according to the general VAT procedure beginning from the time when the general VAT rules apply.

Furthermore the German Federal Ministry of Finance announced that if the requirements for the general VAT procedure are fulfilled, the foreign entrepreneur has to file annual German VAT returns in addition to the periodically filed VAT returns.

Please note that an exception exists when the requirements for the VAT refund procedure are fulfilled, but the foreign entrepreneur is liable for incorrectly issued German VAT according to the general VAT rules. According to the German Federal Ministry of Finance the input VAT could only be deducted in those cases under the VAT refund procedure.

Furthermore the Federal Fiscal Court decided in its judgment V R 14/10 dated 14 April 2011 how to handle the input VAT deduction in a similar case. An entrepreneur resident in an EU member state has to register for German VAT, due to the liability to account for output VAT under the reverse charge procedure. The Court clarified that the input VAT for a calendar year is generally deductible within the annual German VAT return which has to be filed for this calendar year (in which the requirements for the general VAT registration exist) at the latest. This also applies to input VAT which is deductible within a period in the calendar year before all requirements for the general VAT registration of the foreign entrepreneur exist (in general the VAT refund procedure will be applicable).

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EDITOR'S LETTER

Dear All,

After eight exciting years as chairman of the BDO VAT Centre of Excellence it's time to hand over the responsibility for the international BDO VAT practice to another person. I am happy that Ivor Feerick, Partner of the Irish BDO Member Firm, is willing to contribute a reasonable part of his time to the international network and will become chairman of this committee.

Since I had the chance to cooperate with him during my entire "BDO-life" I know for sure that he is a brilliant choice.

Those of you who have to deal with international VAT matters already know him as an excellent VAT expert with years of experience and profound knowledge and last but not least as a friendly and pleasant character.

I wish him and the other members of the committee success, interesting clients, fantastic colleagues and enduring enthusiasm for the VAT matters of our clients.

I would like to thank all of you who accompanied me during the last eight years and helped me making the VAT Centre of Excellence playing an active role within the international BDO network.

All the very best to you.

Ulrich Grünwald

BELGIUM

COUNCIL REGULATION IMPLEMENTING THE EU VAT DIRECTIVE: NEW COMMENTS FROM THE BELGIAN ADMINISTRATION

The Belgian administration recently issued a circular letter (No. AAF 5/2011 of 27 June 2011) containing new comments on the Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 that provides clarification of the new VAT rules applicable to the place of supply of services. The new comments address different notions, including how to determine the status of the recipient of the services as well as the concept of "fixed establishment" for the purpose of determining the person liable to pay the VAT. Our below analysis highlights some of these new administrative comments.

Status of the recipient of the services

Regarding the status of the recipient of the services, the implementing Regulation provides certain steps to be followed by the service provider in order to determine whether his customer qualifies as a taxable person (Article 18). In this respect, the new administrative comments stipulate that the service provider will be released from its liability to determine the status of a customer established within the EU, where the customer has communicated its VAT identification number to the provider and the latter has checked the validity of this number, as well as the related name and address, such as referred to in article 31 of Regulation (EC) No. 904/2010.

Unfortunately, this does not imply that a simple consultation of the European "VIES" website – for customers established within the EU – would be sufficient to release the provider from his liability. This is because for most of the EU Member States, it is not always possible to perform all of the relevant checks (especially in respect to name and address) on the above mentioned website. In this respect, the new administrative comments – as well as the implementing Regulation – refer to the Council Regulation (EC) No. 904/2010 which foresees that the Member States must make available a certain amount of relevant information. Hence, the implementation

of this Regulation will most likely resolve the issue. However, the new administrative comments do not state which data must be checked, and more importantly how, prior to the entry into force of this Regulation on 1 January 2012.

Person liable to pay the VAT and concept of "fixed establishment"

If the service provider is not established in the country of the customer, the latter – who qualifies as a taxable person for VAT purposes – is liable to pay the VAT unless this provider has a fixed establishment in the country of the customer which intervenes in the supply. According to Article 53(1) of the implementing Regulation, a fixed establishment must be taken into account when it is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to make the supply of services in which it intervenes.

In its new comments, the Belgian VAT administration considers that a literal reading of the above mentioned article 53(1) could lead to the conclusion that, in order to be taken into account, the fixed establishment must have the ability to perform (all) the service supplies in which it intervenes. However, the administration rejects this interpretation. Indeed, it considers that the fixed establishment must be at least able to carry out transactions necessary for the fulfillment of the services supplied. These transactions can be performed before or during the fulfillment of the supply of services.

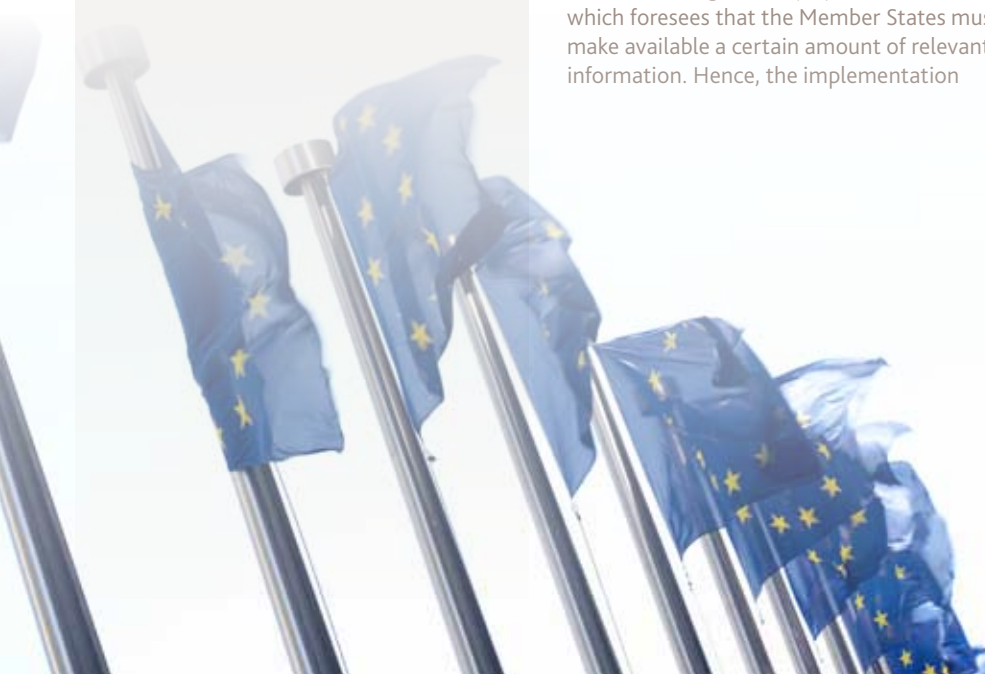
If the fixed establishment only performs transactions which occur after the supply of the main services (e.g. treatment of guarantees, after-sales service), it must be considered as not having intervened in the initial supply itself. According to the administration, the Article 53(1), together with Article 192bis of Directive 2006/112/EC, prevents the parties avoiding the application of the reverse charge mechanism for fraudulent purposes by using a fixed establishment only for potential and future transactions.

Other

The new circular contains also a few more comments notably on the VAT rules applicable to short-term hiring of means of transport and to the supply of restaurant and catering services on board a means of transport.

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EGYPT

SALES TAX INCREASE

In June 2011, the sales tax on cigarettes was increased from a 40% ad valorem rate on the retail price plus EGP 1.25 per pack of 20, to a 50% ad valorem rate on the retail price plus EGP 1.25 per pack of 20.

This increase was part of the 2011/12 Budget plans to reduce the fiscal deficit.

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NAMIBIA

PROPOSED CHANGES TO THE VAT ACT, ANNOUNCED 21 JULY 2011

Medical services, which were zero-rated as of 1 April 2010, will become exempt once again. The Minister of Finance announced this as part of the many proposed changes in her speech on 21 July 2011. One wonders about the rationale behind this, as 14 months is a very short timeframe in which to judge whether the decision to zero-rate these services was an effective one:

In addition to this proposed change, the Minister announced that the threshold for VAT registration will increase from NAD 200,000 to NAD 500,000 and that voluntary registration will be abolished. She also announced that the sale of livestock will no longer be zero-rated, but will be treated the in the same way as game, thus subject to VAT at 15%. This will probably result in food prices increasing, as farmers will now have to pay 15% more on the acquisition of livestock which will influence their ultimate selling price, and the consumer might be left out of pocket.

A further proposed change is the abolition of VAT refunds to tourists and non-residents on the purchase of raw minerals, unprocessed fish, livestock, game, crude oil or gas in Namibia and the exporting of these from Namibia. These will now be subject to VAT at 15%. This will also apply to the local supply and export of these goods from Namibia.

These changes have not yet been enacted and there is no clarity as to when they will be. It is speculated that they may come into effect early next year.

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PANAMA

VAT TREATMENT OF CONTRACTS WITH NON-RESIDENT LESSORS

VAT (ITBMS) of 7% is levied on the transfer of movable goods and on most services which take place in the Republic of Panama by sale, barter, cession, or any other acts, contracts or conventions which result or which serve to transfer the property of movable goods or grant their use, for example, equipment leases.

How is jurisdiction determined for VAT purposes in such cases? It is determined by the place where the equipment is located. There would only be no liability to Panamanian VAT when the equipment is located outside Panama.

The leasing regulations establish a general VAT exemption, indicating that lease contracts are exempt because these are considered a financial transaction. But the Leasing Law was enacted in 1990, and since that date the VAT regulations have been modified and the exemption for financial transactions has the following rules today:

- Exemption is granted on transactions with entities legally authorised to render financial or banking services. The term "legally authorised", in our opinion, could not include a foreign entity not registered to conduct financial or banking activities in Panama.
- Exemption is limited to interests derived from financial and banking services. Commissions are specifically not included in this exemption.

Therefore, under current VAT regulations, the exemption would not apply to a lease contract between a Panamanian company and a non-resident lessor. In these cases VAT must be withheld, at a rate of 0.065420%, that will be assessed on the gross payment. This is in addition to withholding income implications.

If you need additional information, or if you have any questions please contact us at the Panama office:

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PHILIPPINES

RECENT DEVELOPMENTS

Change or cessation of status as a VAT-registered person

The Philippine VAT Law was recently changed, with effect from 1 July 2011, by Revenue Regulations (RR) No. 10-2011, which amends the Consolidated Value Added Tax Regulations of 2005.

RR No. 10-2011 states that there is no supply for VAT purposes of goods or properties originally intended for sale or for use in the ordinary course of business in consequence of any of the following events:

1. A change of control of a corporation by the acquisition of the controlling interest in it by another stockholder, whether individual or corporate, or a group of stockholders. The goods or properties used in a business, including those held for lease, or those comprising the stock in trade of a corporation having a change in corporate control, will not be considered sold, bartered, or exchanged despite the change in the ownership interest in the corporation. However, the exchange of goods or properties (including real estate properties used in a business or held for sale or for lease by the transferor) for shares, whether resulting in corporate control or not, is subject to VAT.
2. A change in the trade or corporate name of a business.
3. A merger or consolidation of corporations. In this case, the unused input tax of the dissolved corporation, as of the date of merger or consolidation, will be absorbed by the surviving new corporation.

Toll fees are not exempt from 12% VAT

The Philippine Supreme Court decided on 19 July 2011 that the Bureau of Internal Revenue (BIR) can impose VAT on the collections of toll road operators.

The High Court earlier ruled that the BIR is not illegally widening the coverage of VAT by imposing the tax on toll fees, because Section 108 of the Philippine Tax Code imposes VAT on "*all kinds of services*" rendered in the Philippines for a fee, unless specifically excluded by the law. The Court also stated that toll road operators collecting fees from motorists who use their facilities are no different from the service providers mentioned under Section 108.

Moreover, the Supreme Court stated that the relevant law explicitly includes franchise grantees as subject to VAT. Since the activities of toll road operators have public consequences, a special grant of authority from the State is required, thus making them franchise grantees by reason of the nature and purpose of their business. It does not matter whether it is Congress or the Toll Regulatory Board which grants the franchise to toll road operators, because the Philippine Tax Code does not distinguish between legislative franchises and those conferred by other government agencies.

In addition, the High Court noted that the imposition of VAT on toll fees cannot be considered as a "tax on tax", because toll fees are not taxes. Toll fees collected by private operators are not assessed and collected by the BIR - they are simply a reimbursement for expenses incurred by the operators in the construction, maintenance, and operation of toll roads. The Court likewise stated that even if they are charged for the use of public facilities, toll fees are not government levies that can be treated as a tax. Further, the Court declared that although toll fees were regarded as a "user's tax," the VAT on toll fees cannot be deemed a "tax on tax" by reason of the nature of VAT as an indirect tax.

As providers of services, toll road operators are the ones directly liable for the VAT which is assessed on their gross receipts and not on the toll fees. The Court also clarified that even if such operators shifted the payment of VAT to toll road users, the former would not make the latter directly liable for the VAT because the VAT passed on to the users simply becomes part of the toll fees.

The above Decision of the Supreme Court covered the South Luzon Expressway (SLEX), Skyway, North Luzon Expressway (NLEX), Subic-Clark-Tarlac Expressway (SCTEX), Southern Tagalog Arterial Road (STAR), and Manila-Cavite Expressway.

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SWITZERLAND

PLACE OF TAXABLE TRANSACTIONS

Switzerland is not an EU Member State; therefore Swiss VAT law is not affected by VAT Directives for Member States of the European Union.

There are a few differences between Swiss VAT law and VAT Directives for EU Member States in defining the place of taxable transactions. In some cases it could also result in double taxation (EU Tax and Swiss Tax) or – much better – double non-taxation.

First of all, as in the EU, it is essential to distinguish taxable transactions between supplies of goods and supplies of services. The definitions for supplies of goods and supplies of services under Swiss VAT law vary from those contained in VAT Directives for EU Member States.

Supply of goods

In accordance with article 7 of the Swiss VAT law, the place of supply of goods is where the goods are located at the time of transfer of the power to dispose commercially of them, of their delivery, or of their being made available for use or exploitation. Furthermore, the place of supply of goods is where the transport or dispatch of the goods to the customer or to a third party on his instructions begins.

The place of supply of electricity and natural gas in pipes or cables is deemed to be the place at which the recipients of the supply have their place of business, or a permanent establishment for which the supply is made. In the absence of such a place of business or such a permanent establishment, the place of supply is deemed to be the place at which their domicile or the place from which they work.

Supply of services

In accordance with article 8 of the Swiss VAT law, generally, the place of supply of a service is deemed to be the place at which the recipient of the service has its place of business, or a permanent establishment for which the service is provided. In the absence of such a place of business or such a permanent establishment, the domicile or the place of the normal abode is deemed to be the place of supply. In Switzerland there is no difference between B2B or B2C.

The place of supply of services that are typically supplied directly in the physical presence of individuals, even if exceptionally they are supplied at a distance, is where the person supplying the service has his place of business or a permanent establishment. In the absence of such a place of business or such a permanent establishment, the domicile or the place from which the person works is deemed to be the place of supply. Such services are in particular: healing treatments, therapies, nursing, personal hygiene, marriage, family and life counseling, social services and social welfare services and child and youth care.

The place of supply for services by travel agencies and event organisers is where the person supplying the service has his place of business or a permanent establishment. In the absence of such a place of business or permanent establishment, the domicile or the place from which the person works is deemed to be the place of supply.

The place of supply of services in the area of culture, the arts, sport, the science, scholarship, entertainment or similar services, including services of event organisers and related services, if applicable, is where these activities are actually performed.

The place of restaurant supplies is where the supply is actually made.

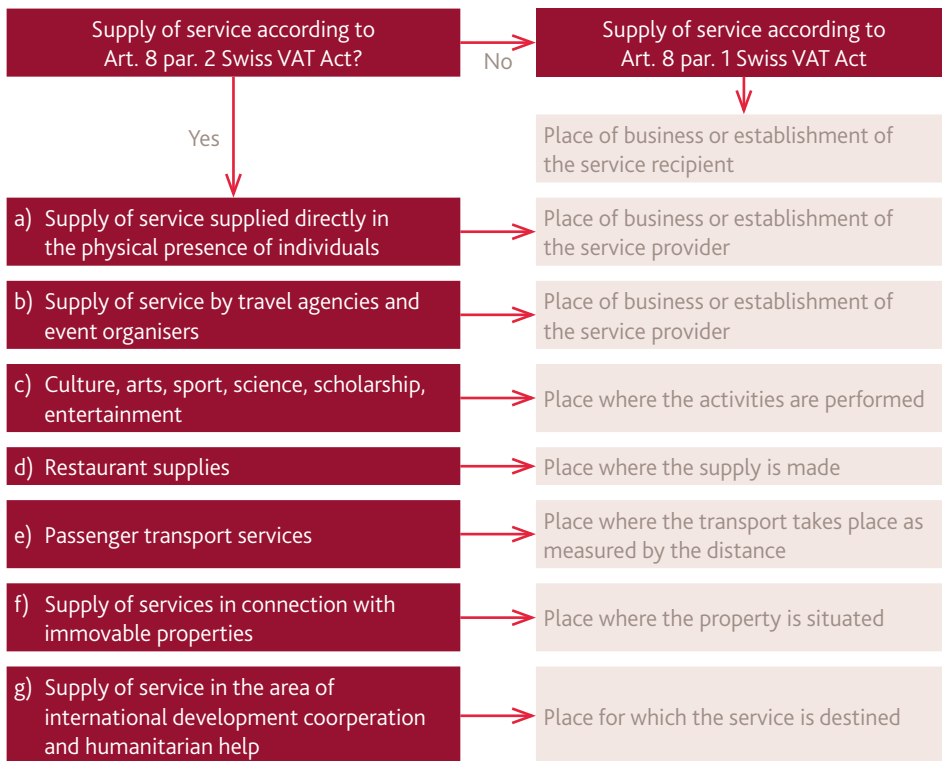
The place for passenger transport services is the place where transport actually takes place, as measured by the distance travelled; in the case of cross-border transport, the Federal Council may order that short internal distances may count as foreign, and short distances abroad as internal distances.

The place of supply of services in connection with immovable properties is where the property is situated. Such services are in particular: brokerage, management, survey and valuation of the property, services in connection with the purchase or creation of rights in rem, services in connection with the preparation or the coordination of construction services, such as architectural, engineering and construction supervision services, surveillance of properties and buildings and accommodation services.

For services in the area of international development, cooperation and humanitarian help, the place of supply is that for which the service is destined.

These rules are summarised in the following flowchart:





Acquisition tax

The acquisition tax system in Switzerland is similar to the reverse charge procedure in the EU.

Businesses with their place of business abroad that are not entered in the Register of Taxable Persons are subject to the acquisition tax if the place of supply is situated on Swiss territory.

This regulation is applicable for services for which the place of supply is the place at which the recipient of the service has its place of business or a permanent establishment for which the service is provided. In the absence of such a place of business or permanent establishment, its domicile or the place of its normal abode is the place of supply.

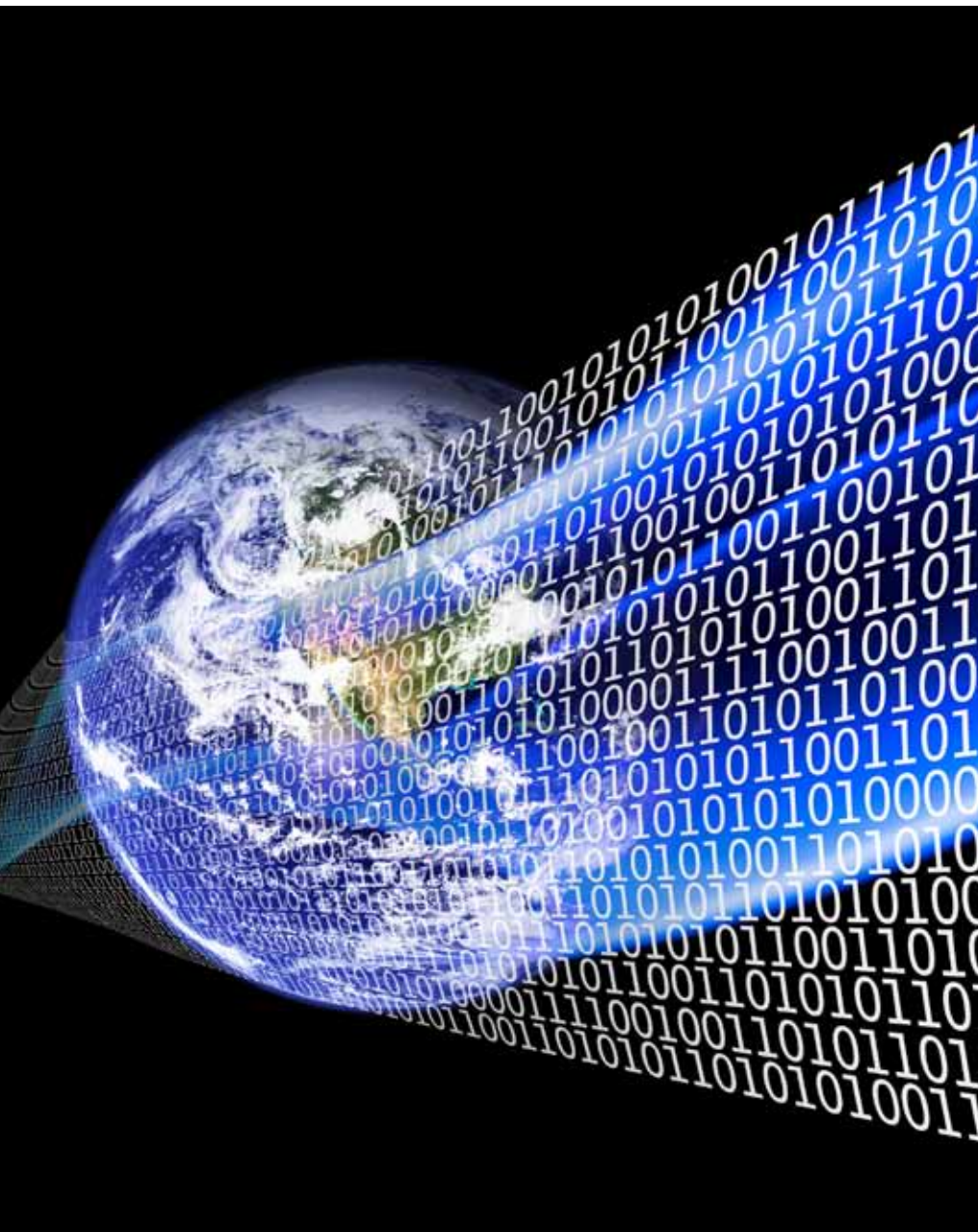
Furthermore, the acquisition tax is applicable to the import of data storage media without market value with the services and rights included therein. In addition, the acquisition tax applies to supplies of goods on Swiss territory by businesses with their place of business abroad that are not entered in the Register of Taxable Persons, if these supplies of goods are not subject to the import tax.

The recipient on Swiss territory of supplies mentioned above is liable to the tax on condition that they are a taxable person or - in the other case - they procure such supplies for more than CHF 10,000 per calendar year. In the case of supplies of goods on Swiss territory by businesses with their place of business abroad the recipient (only if it is a non taxable person) is liable to the tax if the competent authority has informed the recipient about the liability for acquisition tax in advance.

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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 31 October 2011.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
Egyptian Pound (EGP)	0.11784	0.16677
Namibian Dollar (NAD)	0.09050	0.12807
Swiss Franc (CHF)	0.81855	1.15757

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