

INDIRECT TAX NEWS

HUNGARY

Reclaiming VAT

[READ MORE 6](#)

ITALY

Disclosure of transactions

[READ MORE 7](#)

SWITZERLAND

New VAT law – new opportunity

[READ MORE 12](#)

LETTER FROM THE EDITORS

Dear Reader

Although VAT has been harmonised within the European Union, and different VAT/GST legislations have become widely assimilated from a general perspective, a huge number of detailed changes make it necessary to update one's knowledge on a regular basis.

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.

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

CONTENTS

- ▶ LETTER FROM THE EDITORS
- ▶ BELGIUM
The letting of immovable property and the provision of additional services
- ▶ CZECH REPUBLIC
Progress on implementation of EU directives
- ▶ DENMARK
VAT on travel agency services and real estate
- ▶ EUROPEAN UNION
Judgments of the European court of justice
- ▶ GERMANY
Assumption of obligations
- ▶ HUNGARY
Reclaiming VAT incurred in Hungary
- ▶ ITALY
Disclosure of transactions with 'black-listed' customers/suppliers - Update
- ▶ MALAYSIA
GST and recent indirect tax developments in Malaysia
- ▶ NAMIBIA
Changes to the VAT act
- ▶ THE NETHERLANDS
How to create a mismatch?
Margin scheme for tour operators
Input VAT recovery
- ▶ ROMANIA
Main features of the free trade zones in Romania
- ▶ SPAIN
Application of the new VAT rates in Spain
VAT penalisation of e-books
- ▶ SWITZERLAND
Switzerland: The ideal location for holding companies and acquisition vehicles



BELGIUM

THE LETTING OF IMMOVABLE PROPERTY AND THE PROVISION OF ADDITIONAL SERVICES

Does the letting of an immovable property, together with a number of additional services, give the service provider the right to deduct all input VAT in relation to the property?

This question has been put before the Belgian Supreme Court.

As a rule, the letting of immovable property (which is, based on several ECJ cases, defined as the mere passive making available of immovable property) is exempt from VAT. This implies that the lessor cannot deduct input VAT on costs in relation to this activity, because these are not used in making a supply that is subject to VAT. Where this passive letting is combined with a number of services that are subject to VAT, a breakdown is required of the price for the letting of the property and that of additional services. Apart from a few specific circumstances described in the VAT legislation, the letting of immovable property can only be subject to VAT when it does not consist of a mere 'passive letting'.

That is why the Belgian Ruling Commission (a tax authority service which helps taxpayers to obtain legal certainty on specific/complex tax issues) considers, for instance, that when a landlord actively participates in the lessee's activity that is carried on in the rented premises, the entire service no longer qualifies as a VAT exempt letting of immovable property. This requires, for example, that the landlord also participates in the activity carried on in the property and/or their charges are (partly) based on turnover, rather than a fixed periodic fee.

There are also services rendered by so-called business centres. In order for the letting of property together with additional services to be subject to VAT, the VAT authorities state that a package of inseparable services needs to be provided for a fixed price. In addition, the VAT Circular No. 39/2005 (ET 108.816 of 27 September 2005) states that a minimum number of pre determined services need to be provided: furniture, shared accommodation (e.g. meeting rooms, lavatories, elevators and halls), and shared facilities, such as office materials, telephone services and internet access.

In the present case, the service provider let an exhibition space to event organisers. Additional services were also provided, such as cleaning, insurance, technical staff, car parking, meeting rooms and telephone services. All services were invoiced with Belgian VAT.

The deduction of VAT which the landlord paid in respect of the additional services was not under discussion. However, the tax authorities refused an input VAT deduction in respect of costs in relation to the letting of the premises, claiming that VAT had been incorrectly charged on the letting of the exhibition space, as the aforementioned VAT exemption should have been applied.

The Belgian Supreme Court agreed with the tax authority's position that the extra services were merely of a subordinate nature and that the provision of these services did not necessarily change the nature of the main service (the VAT exempt letting of immovable property).

Even though the minimum service package as stated in VAT circular 39/2005 was almost entirely provided, it was not established that the services provided could qualify as those provided by a service centre, and thus qualify as a taxable supply for VAT purposes.

The bottom line of this decision is that the provision of services in addition to the letting of immovable property does not automatically make the entire service subject to VAT. More indications are required to determine whether the service qualifies as a taxable supply for VAT purposes (e.g. the landlord's participation in the lessee's activity that is carried on in the rented premises, or the provision of a global service at a fixed price).

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CZECH REPUBLIC

PROGRESS ON IMPLEMENTATION OF EU DIRECTIVES

The planned amendment of the VAT Act with effect from 2011, on which we reported in the previous edition, is now still in Parliament. The entry into force is thus postponed until 1 April 2011.

The amendment implements several mandatory provisions of the EU Directives, especially in respect of deductions. However, the amendment

primarily provides significant changes beyond the requirements of the EU legislation thus, according to the Ministry of Finance, combating VAT fraud and promoting the business sector.

The main changes are the implementation of a recipient's liability for the payment of VAT that the supplier does not pay to the tax authority (joint and several liability), the introduction of

a reverse charge scheme for certain domestic transactions (waste and emission allowances), and the possibility of claiming VAT refunds in case of non-payment by customers (bad debt relief).

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DENMARK

VAT ON TRAVEL AGENCY SERVICES

Until recently travel agencies have been exempt from VAT in Denmark, but as of 1 January 2011 travel agencies in Denmark must calculate VAT when they sell package tours. The new rule covers not only travel agencies, but also other companies that organise package tours. From 1 January 2011 VAT on package tours must be calculated according to a special margin scheme, i.e. the calculation of VAT should be based on the travel agent's profit.

The new rule only applies to travel within the EU. The sale of travel to destinations outside the EU will therefore still be exempt from VAT. There are special requirements when invoicing a customer:

- the VAT-inclusive price of the travel must be stated on the invoice. The VAT amount must therefore not be shown on the invoice
- the invoice must state that the special scheme for travel agents has been used. This can be done by using the following standard wording: "This invoice is issued without VAT according to the special scheme for travel agents."

VAT ON REAL ESTATE

As of 1 January 2011 sales of new buildings and building sites by companies and municipalities are taxable VAT supplies.

A new building is defined as:

- a building which has not been used (including a half-finished building)
- a building which is sold within five years after the building is finished (first time sale)
- a building which is sold within five years after the building is finished and which has not been used for a period of 2 years at the time of sale
- a building which has been rebuilt or renovated as a new building

The new rule only applies to assignments of new buildings and building sites which take place from 1 January 2011, i.e. if the assignment takes place in 2010 it is not a taxable VAT supply. In other words there is no requirement that the buyer has actually paid for the building or the building site in 2010.

Furthermore the sale of a building is not a taxable VAT supply if the base for the building was laid in 2010.

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EUROPEAN UNION

JUDGMENTS OF THE EUROPEAN COURT OF JUSTICE

Published in the period 1 April 2010 until 31 October 2010

There follows a short overview of the judgments of the ECJ relating to indirect taxation issues. Generally, we have concentrated on decisions made in relation to the VAT Directive.

1. *X Holding BV and Oracle Nederland BV* (Cases C-538/08 and C-33/09), judgment dated 15 April 2010

The former Article 17(6) of the Sixth VAT Directive (now Article 176 of the VAT Directive) does not preclude the legislation of a Member State from:

- excluding the deduction of VAT which relates to categories of expenditure concerning, on the one hand, the provision of 'private transport', 'food', 'drink', 'accommodation' and 'opportunities for recreation' to the members of staff of a taxable person and, on the other hand, the provision of 'business gifts' or 'other gifts'
- allowing the deduction of VAT on the acquisition of certain goods and services used partly for private purposes and partly for professional purposes, in proportion to their use for professional purposes, where the national legislation was enacted before the Sixth Directive entered into force
- amending, after the entry into force of the Sixth directive, an existing exclusion from the right of deduction, designed in principle to restrict the scope of that exclusion but in respect of which it cannot be ruled out that, in an individual case in a particular tax year, the scope of that exclusion might be extended by reason of the flat-rate nature of the amended scheme.

2. *X and fiscale eenheid Facet-Facet Trading* (Cases C-536/08 and C-539/08), judgment dated 3 June 2010

Former Articles 17(2) and (3) and 28b(A)(2) of the Sixth VAT Directive (now Article 41 of the VAT Directive) must be interpreted as meaning that a taxable person has no immediate right to deduct input VAT charged on an intra-Community acquisition, where the dispatch to the acquirer ended in a different Member State.

3. *Nathalie De Fruytier* (Case C-237/0), dated 3 June 2010

Former Article 13(A)(1)(d) of the Sixth VAT Directive (now Article 132 of the VAT Directive), which exempts 'supplies of human organs, blood and milk' from VAT, must be interpreted as not applying to the activity of transporting, in a self employed capacity, human organs and samples for hospitals and laboratories.

4. *Future Health Technologies Limited* (Case C-86/09), dated 10 June 2010
Article 132(1)(b) and (c) of the VAT Directive exempt 'hospital and medical care' and the 'the provision of medical care' from VAT. The Court held that where activities consisting in the dispatch of a kit for collecting blood from the umbilical cord of newborn children, and in the testing and processing of that blood and, where appropriate, in the storage of stem cells contained in it for possible future therapeutic use, are intended only to ensure that a particular resource will be *available for medical treatment in the uncertain event that treatment becomes necessary* but not, as such, to diagnose, treat or cure diseases or health disorders, such activities, whether taken together or separately, do not come within the concept of that Article. The analysis of umbilical cord blood would only come within it if such analysis were actually intended to enable a medical diagnosis to be made, which is for the referring court, if need be, to determine.

The concept of activities 'closely related' to 'hospital and medical care', within the meaning of Article 132(1)(b) of the VAT Directive, is to be interpreted as not covering activities, such as those in question in the main proceedings, consisting in the dispatch of a kit for collecting blood from the umbilical cord of newborn children and in the testing and processing of that blood and, where appropriate, in the storage of stem cells contained in it for possible future therapeutic use to which those activities are merely potentially related and which has not been performed, commenced or yet envisaged.

5. *Leo-Libera GmbH*

(Case C-58/09), dated 10 June 2010
Article 135(1)(i) of the VAT Directive must be interpreted as meaning that the exercise of the discretionary power of Member States to fix conditions and limitations on the exemption from VAT provided for by that provision allows those States to exempt from that tax only certain forms of gambling.

6. *CopyGene A/S*

(Case C-262/08), dated 10 June 2010
The concept of activities 'closely related' to 'hospital and medical care' within the meaning of Former Article 13A(1)(b) of the Sixth VAT Directive (now Article 132(1) (b) of the VAT Directive) is to be interpreted as meaning that it does not cover activities such as those at issue in the main proceedings consisting in the collection, transportation and analysis of umbilical cord blood and the storage of stem cells contained in it, where the medical care provided in a hospital environment to which those activities are merely potentially related has not been performed, commenced or yet envisaged.

If the services of stem cell banks such as those at issue in the main proceedings are performed by professional medical personnel, where such stem cell banks, although authorised by the competent health authorities of a Member State, within the framework of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells, to handle human tissue and cells, do not receive any support from the public social security scheme and where the payment for those services is not covered by that scheme, former Article 13A(1)(b) of the Sixth VAT Directive (now Article 132(1) (b) of the VAT Directive) does not preclude the national authorities from deciding that taxable persons such as CopyGene A/S are not 'other duly recognised establishments of a similar nature' to 'hospitals [and] centres for medical care or diagnosis' within the meaning of that Article. However, neither can that provision be interpreted as requiring, as such, the competent authorities to refuse to treat a private stem cell bank as an establishment 'duly recognised' for the purposes of the exemption in question. To the extent that it is necessary, it is for the referring court to determine whether the refusal of recognition for the purposes of the exemption provided for in that Article complies with European Union law and, in particular, with the principle of fiscal neutrality.

7. *French Republic,*

(Case C-492/08) dated 17 June 2010
The Court held that, in applying a reduced rate of VAT to the supply of services by *avocats*, *avocats au Conseil d'État et à la Cour de cassation* and *avoués*, for which they are paid in full or in part by the State under the legal aid scheme, the French Republic has failed to fulfil its obligations under Articles 96 and 98(2) of the VAT Directive.

8. *Pannon Gép Centrum Kft*

(Case C-368/09), dated 15 July 2010
Articles 167, 178(a), 220(1) and 226 of the VAT Directive must be interpreted as precluding national legislation or practice whereby the national authorities deny to a taxable person the right to deduct input VAT in respect of services supplied to him on the grounds that the initial invoice contained an incorrect completion date for the supply of services and the numbering of the subsequently corrected invoice and the credit note cancelling the initial invoice were not sequential, if the material conditions governing deduction are satisfied and, before the tax authority concerned has made a decision, the taxable person has submitted to the tax authority a corrected invoice stating the correct date on which

that supply of services was completed, even though the numbering of that invoice and the credit note cancelling the initial invoice are not sequential.

9. Astra Zeneca UK Ltd

(Case C-40/09), dated 29 July 2010

Former Article 2(1) of the Sixth VAT Directive (now Article 2(1) of the VAT Directive) must be interpreted as meaning that the provision of a retail voucher by a company, which acquired that voucher at a price including VAT, to its employees in exchange for their giving up part of their cash remuneration constitutes a supply of services for consideration.

10. EMI Group Ltd

(Case C-581/08), dated 30 September 2010

A 'sample', within the meaning of the second sentence of former Article 5(6) of the Sixth VAT Directive (now Article 16 of the VAT Directive) is a specimen of a product which is intended to promote the sales of that product and which allows the characteristics and qualities of that product to be assessed without resulting in final consumption, other than where final consumption is inherent in such promotional transactions. That term cannot be limited, in a general way, by national legislation to specimens presented in a form which is not available for sale or to the first of a series of identical specimens given by a taxable person to the same recipient, unless that legislation allows account to be taken of the nature of the product represented and of the specific business context of each transaction in which those specimens are distributed.

The concept of 'gifts of small value', within the meaning of the second sentence of former Article 5(6) of the Sixth VAT Directive (now Article 16 of the VAT Directive), must be interpreted as not precluding national legislation which fixes a monetary ceiling of the order of that established by the legislation at issue in the main proceedings, namely GBP 50 (EUR 58), for gifts made to the same person in the course of a 12 month period or forming part of a series or succession of gifts. The second sentence of former Article 5(6) of the Sixth VAT Directive (now Article 16 of the VAT Directive) precludes national legislation which establishes a presumption that goods constituting 'gifts of small value' within the meaning that provision, distributed by a taxable person to different individuals having the same employer, are to be treated as having been made to the same person.

The tax status of the recipient of samples has no bearing on the answers given to the other questions.

11. Oasis East sp. z o.o.

(Case C-395/09), dated 30 September 2010

Former Article 17(6) of the Sixth VAT Directive (now Article 176 of the VAT Directive) must be construed as not authorising the retention of national legislation, applicable when the Sixth VAT Directive 77/388 entered into force in the Member State concerned, which excludes in general the right to deduct input VAT paid at the time of the purchase of imported services, the price of which is directly or indirectly paid to a person established in a State or territory classified as a 'tax haven' by that national legislation.

12. Uszodaépítő kft

(Case C-392/09), dated 30 September 2010

Articles 167, 168 and 178 of the VAT Directive must be interpreted as precluding the retroactive application of national legislation which, in the context of a reverse charge regime, makes the deduction of VAT relating to construction works conditional upon the amendment of invoices for those services and the submission of a supplementary, amending tax declaration, while the tax authority concerned has all the information necessary to establish that the taxable person is, as the recipient of the supply of services at issue, liable to VAT, and to ascertain the amount of tax deductible.

13. Loyalty Management UK Ltd and Baxi Group Ltd

(Cases C-53/09 and 55/09), dated 7 October 2010

In relation to a customer loyalty rewards scheme, former Articles 5, 6, 11A(1)(a) and 17(2) of the Sixth VAT Directive must be interpreted as meaning that:

- payments made by the operator of the scheme concerned to redeemers who supply loyalty rewards to customers must be regarded, in Case C 53/09, as being the consideration, paid by a third party, for a supply of goods to those customers or, as the case may be, a supply of services to them. It is, however, for the referring court to determine whether those payments also include the consideration for a supply of services corresponding to a separate service
- payments made by the sponsor to the operator of the scheme concerned who supplies loyalty rewards to customers must be regarded, in Case C 55/09, as being, in part, the consideration, paid by a third party, for a supply of goods to those customers and, in part, the consideration for a supply of services made by the operator of that scheme for the benefit of that sponsor.

14. Kronospan Mielec sp. z o.o.

(Case C-222/09), dated 7 October 2010

Services consisting of research and development work relating to the environment and technology, carried out by engineers established in one Member State on a contract basis for the benefit of a recipient established in another Member State, must be classified as 'services of engineers' within the meaning of former Article 9(2)(e) of the Sixth VAT Directive.

15. Nidera Handelscompagnie BV

(Case C-385/09), dated 21 October 2010

The VAT Directive must be interpreted as precluding a taxable person for VAT purposes who meets the substantive conditions for the right of deduction, and who identifies himself as a taxable person for VAT purposes within a reasonable period following the completion of transactions giving rise to that right of deduction, from being denied the possibility of exercising that right by national legislation which prohibits the deduction of VAT paid on the purchase of goods if the taxpayer was not identified as a taxable person for VAT purposes before using those goods in his taxable activity.

16. Ingrid Schmelz

(Case C-97/09), dated 26 October 2010

Former Articles 24 and 24a of the Sixth VAT Directive, and Articles 284 to 287 of the VAT Directive must be interpreted as meaning that the term 'annual turnover' refers to the turnover generated by an undertaking in one year in the Member State in which it is established.

17. Republic of Poland

(Case C-49/09), dated 28 October 2010

The Court held that, by applying a reduced VAT rate of 7% to supplies, import and intra-Community acquisition of clothing and clothing accessories for babies and of children's footwear, the Republic of Poland has failed to fulfil its obligations under Article 98 of the VAT Directive.

18. AXA UK PLC

(Case C-175/09), dated 28 October 2010

Former Article 13B(d)(3) of the Sixth VAT Directive (now Article 135 of the VAT Directive) is to be interpreted as meaning that the exemption from VAT provided for by that provision does not cover a supply of services which consist, in essence, in requesting a third party's bank to transfer to the service supplier's account, via the direct debit system, a sum due from that party to the service supplier's client, in sending to the client a statement of the sums received, in making contact with the third parties from whom the service supplier has not received payment and, finally, in giving instructions to the service supplier's bank to transfer the payments received, less the service supplier's remuneration, to the client's bank account.

GERMANY

ASSUMPTION OF OBLIGATIONS

On 19 April 2007, in *Velvet & Steel Immobilien und Handels GmbH* (Case C-455/05) the ECJ answered the question referred for a preliminary ruling of the German Federal Finance Court, whether former Article 13B(d)(2) of the Sixth VAT Directive (now Article 135(1)(c) of the VAT Directive) has to be interpreted, with respect to the concept of assumption of obligations, as meaning that only pecuniary obligations are to be subsumed under that concept, or whether that provision also includes the assumption of other obligations, for example, service obligations (such as the obligation to renovate a property). The question arose because the expression of the concept of 'assumption of obligations' in the German language versions of former Article 13B(d)(2) of the Sixth VAT Directive has a general meaning, whereas in others, such as English and Spanish, it clearly refers to pecuniary obligations.

The ECJ clarified that in view of the linguistic differences, the scope of the phrase in question cannot be determined on the basis of an interpretation which is exclusively textual. In fact, that expression must be interpreted in the light of the context in which it is used and of the aims and scheme of the Sixth VAT Directive. Furthermore, the ECJ explained that the exemption provided for in former Article 13B(d)(2) of the Sixth VAT Directive concerns, in addition to the assumption of obligations, the negotiation and assumption of credit guarantees or any other security for money and the management of credit guarantees. It is common ground that all those transactions are, by their nature, financial services. The same

conclusion is also valid for the other transactions set out in subparagraphs 1 and 3 to 6 of former Article 13B(d) of that Directive.

Therefore, the assumption of an obligation to renovate a building is not, by its nature, a financial transaction within the meaning of former Article 13B(d) of the Sixth VAT Directive and therefore it does not come within the scope of that provision.

Consequently, the conclusion that it was the intention of the Community legislature to exempt from VAT the assumption of non-pecuniary obligations is not supported by the wording, context or purpose of former Article 13B(d)(2) of the Sixth VAT Directive. It follows that the assumption of such obligations is subject to VAT. Therefore, the reply to the question submitted must be that Article 13B(d)(2) of the Sixth Directive must be interpreted as meaning that the concept of assumption of obligations excludes from the scope of that provision obligations which are non-pecuniary.

Accordingly, the German Federal Finance Court decided in its judgment of 10 February 2010 (Case XI R 49/07) that the sale of a guarantee obligation of a car salesman under which they commit themselves to repair the car in case of defined damage is not subsumed under Article 135(1)(c) of the VAT Directive and therefore subject to VAT.

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HUNGARY

RECLAIMING VAT INCURRED IN HUNGARY

The name of the 8th VAT Directive, which dealt with the recovery of VAT inputs incurred in other Member States, was changed to Directive 2008/9/EC in its recodification in 2008, and it entered into force on 1st January 2010. Hungary has implemented the common rules into its VAT legislation.



Based on our experiences of the past few months we would like to draw your attention to the following:

1. Claims can generally be submitted in English, but further communications are in the official language of the particular state. So in Hungary the authority issues notifications and decisions only in Hungarian.
2. The Hungarian authority considers its official electronic letters as delivered on the fifth day after sending, irrespective of whether the addressee received and actually opened them.
3. Appeals can also be submitted electronically, but the exact rules are not well-defined. We suggest submitting paper appeals directly to the authority's customer services.

4. In the official notification regarding the provision of additional information, the Hungarian authority automatically requires a certified translation of documents that are available only in a foreign language. However, depending on the particular case, it can be a translation by the OFFI (National Office for Translation and Attestation) or it can be a 'normal' translation.
5. Occasionally the formal one month (not extendable) deadline for providing additional information is not enough (e.g. for a certified translation). However, in some cases a deadline extension may be applicable.

We release newsletters right after official announcements of changes. See our website: www.bdo.hu

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ITALY

DISCLOSURE OF TRANSACTIONS WITH 'BLACK LISTED' CUSTOMERS/SUPPLIERS – UPDATE

On 21 October 2010 the Italian Tax Authority issued some clarifications on the disclosure of transactions carried out with 'black listed' customers and suppliers, the first deadline of which was postponed to 2 November 2010.

1. 'Black listed' countries

VAT taxable persons in Italy are required to file a communication on transactions carried out with all persons having their seat, domicile or residence in black listed countries. By way of a Ministerial Decree, Italy has now removed Cyprus, Malta and South Korea from its list of Tax Havens. VAT taxable persons are therefore no longer under any obligation to communicate information on transactions carried out with persons whose legal seat, residence or domicile is in these three countries.

The updated list of countries that are considered to be Tax Havens, transactions with which must be reported in the communication, is as follows:

2. Non-residents

Non-residents registered for VAT purposes in Italy, either through direct registration or through the appointment of a VAT agent, are required to file the communication with regard to transactions carried out with black listed countries and relevant for VAT purposes in Italy.

3. Transactions to report

The following transactions must be reported:

- intra-community sales and acquisitions to/from customers/suppliers having their seat, residence or domicile in the EU countries listed in the *black list* (Isle of Man, Luxembourg and Monaco)
- exports and imports where the customer/supplier has their seat, residence or domicile in a *black list* jurisdiction
- supplies of services (both made and received) where the customer/supplier has their seat, residence or domicile in a *black list* jurisdiction

Furthermore, it is necessary to report transactions carried out with the VAT agent or the permanent establishment of persons having their seat, residence or domicile in a *black list* jurisdiction even if the VAT agent or the permanent establishment is in a non-black list country (even in Italy).

4. Penalties

Should the communication be omitted, incomplete or inaccurate, voluntary repentance is applicable.

Furthermore, the Tax Authority will not apply penalties in respect of communications for the third quarter of 2010, July, August, September, October and November 2010 provided the taxpayers amend their mistake by filing a new communication by 31 January 2011.

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Table 1

List of Countries included in DM 4.5.1999 (changed by Decree 27.7.2010) and DM 21.11.2001(changed by Decree 27.7.2010)		
Alderney (Channel Islands)	Guatemala	Panama
Andorra	Guernsey (Channel Islands)	Puerto Rico
Angola	Herm (Channel Islands)	Philippines
Anguilla	Hong Kong	Saint Kitts and Nevis
Antigua	Isle of Man	Saint Lucia
Aruba	Jersey (Channel Islands)	Saint Vincent and Grenadine
Bahamas	Kenya	Solomon
Bahrain	Kiribati – the former Gilbert Islands	Samoa
Barbados	Lebanon	San Marino
Barbuda	Liberia	Saint Helena
Belize	Liechtenstein	Sark (Channel Islands)
Bermuda	Luxembourg	Seychelles
British Virgin Islands	Macao	Singapore
Brunei	Malaysia	Switzerland
Cayman Islands	Maldives	Taiwan
Cook Islands	Marshall Islands	Tonga
Costarica	Mauritius	Turks and Caicos Islands
Dominica	Monaco	Tuvalu
Ecuador	Montserrat	United Arab Emirates
French Polynesia	Nauru	United States Virgin Islands
Gibraltar	Netherlands Antilles	Uruguay
Jamaica	Niue	Vanuatu
Gibuti	New Caledonia	
Grenada	Oman	

MALAYSIA

GST AND RECENT INDIRECT TAX DEVELOPMENTS IN MALAYSIA

Subsequent to the deferment of the second reading of the draft GST bill in March 2010, the Malaysian Government officially announced the postponement of the implementation of the Goods and Services Tax (GST) in a press statement dated 13 Oct 2010. Notwithstanding the postponement, the Government recognises the importance of GST in ensuring a strong and sustainable fiscal position to support long term economic growth.

In addition, the 2011 Malaysian Budget was tabled in Parliament on 15 October 2010 by the Prime Minister and Minister of Finance. The following are the major changes to indirect taxes:

- current rate of service tax on all taxable services increased from 5% to 6% (effective from 1 January 2011)

- import duty abolished on 300 tourist products including handbags, wallets, suitcases, briefcases, apparel, footwear, hats, toys, jewellery and daily used products including talcum powder, face powder, shampoo, bedspreads, blankets, curtains and table cloths (effective from 15 October 2010)
- sales tax exemption given on mobile phones (effective from 15 October 2010)

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NAMIBIA

CHANGES TO THE VAT ACT

On 1 May 2010 a long-awaited change to the Value Added Tax Act came into effect, zero-rating some medical supplies and services. This change resulted in doctors and hospitals now being able to claim input VAT on allowable expenditure in relation to the newly zero-rated services. This leaves doctors with more cash in their pockets, and the optimists among us believe that this will flow through to the consumer in the form of a reduction in doctors' consultation fees.

This change, however, imposed an administrative burden on doctors and hospitals, as some of them will now be VAT registered for the first time and will have to comply with the VAT legislation. All VAT returns with refunds larger than NAD 15 000 (EUR 1,515) lead to a VAT audit, which is a time consuming process and, as we all well know, time is money.

On the same day a few more basic foodstuffs were also zero-rated - good news for the man on the street.

The provisions dealing with the tax deductibility of mining rehabilitation expenses were deleted on the same day, causing quite a stir in mining circles.

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THE NETHERLANDS

HOW TO CREATE A MISMATCH?



From 1 January 2010 new place of supply rules for VAT purposes are applicable in the European Union. The main rule for supplies of services between businesses is that the place of supply for VAT purposes is where the recipient is established. The VAT due is shifted to the recipient of the service.

The supplier has to report such supplies in its domestic VAT return, and also has to list these supplies in its EC Sales list. The recipient of the services has to report the acquired supplies of intracommunity services in its own domestic VAT return, and must also account for the VAT due. The Netherlands has an extended reverse charge mechanism under which the reverse charge also applies to services which are not covered by the main rule.

For example, an Italian entrepreneur provides services to real estate situated in the Netherlands. The Dutch tax authorities require that these 'reverse charge' transactions are reported in the same box in the VAT return as for the 'main rule reverse charge' transactions. The Italian supplier will not list these transactions in its EC Sales List (not required, as it is not covered by the main rule for the place of supply). This will lead to a mismatch between the EC Sales systems of the EU tax authorities, as the Dutch recipient reports an acquisition but the supplier does not list a supply. The Dutch tax authorities admit that this problem arises, but are not changing their system.

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MARGIN SCHEME FOR TOUR OPERATORS

In Issue 2 of the Indirect Tax Newsletter we announced that the Dutch Ministry of Finance was planning to introduce a margin scheme for tour operators, possibly from April 2011. Draft legislation based on Articles 306-310 of the VAT Directive has now been published.

It is the intention of the Ministry of Finance to implement the new legislation from 1 April 2012. The margin can be calculated per trip but – contrary to the VAT Directive – also per period (globalisation). Approval has been requested from the European Commission for the latter calculation method.

The introduction of a margin scheme based on European VAT rules will mean the end of the current favourable Dutch VAT rules for the travel industry. Currently, Netherlands based tour operators, as well as travel agencies acting as an intermediary, usually don't have to charge VAT on their supplies, or can apply a reduced rate of 6% or 0%. Also, it will no longer be possible to reclaim Dutch VAT on the purchase of elements of a tour.

INPUT VAT RECOVERY

Based on Dutch VAT legislation, the right to deduct VAT arises in the period in which the taxable person receives a correct invoice from the supplier – even when the supplier issues the invoice too late. However, in practice it often happens that the VAT incurred is not reclaimed in the proper period, e.g. because of time-consuming internal approval procedures, insufficient staff to process invoices etc. Based on Article 167 of the VAT Directive, a right of deduction (of VAT incurred) arises at the time the deductible tax becomes chargeable. Based on the VAT Directive, a taxable person should therefore immediately reclaim the VAT, i.e. in the period in which the VAT became chargeable. This means that strictly the recipient cannot reclaim the VAT if the supplier does not issue an invoice in time, or if the customer does not reclaim the VAT in the period in which the VAT became chargeable. However, based on Article 180 of the VAT Directive, a Member State may facilitate late refund claims.

The Dutch Supreme Court recently decided that VAT incurred in a certain period cannot be reclaimed through the VAT return in a later period. Although guidelines from the Ministry of Finance state that additional VAT refund claims can be submitted up to 5 years in arrears, it is up to the tax inspector to accept or reject such a request. If a late claim is not accepted it is not possible to appeal against the tax inspector's decision. It is therefore important that taxable persons have strong and efficient internal administrative procedures to minimise the risk of non-recoverable VAT.

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ROMANIA

MAIN FEATURES OF THE FREE TRADE ZONES IN ROMANIA

Free trade zones (*zonă liberă*) are parts of the Romanian territory which have been created based on the model of special economic areas in China in the early 90's (Law no. 84/1992). They have historically benefited from tax incentives which have been repealed since the EU accession date. However, these free zones still qualify as customs destinations for merchandise, according to Article 166 of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.

Background

Free trade zones are created by Government decisions, at the proposal of the central or local administration authorities, and with the approval of the customs authority. They are precisely defined and enclosed by fencing or by the existence of natural limits, such as waterways. The ships in ports associated to free zones are deemed to be in the territory of the free zone.

There are seven free zones in Romania:

- a) 'Zona Liberă Sulina' - port;
- b) 'Zona Liberă Constanța-Sud și Zona Liberă Basarabi' - port, railway, road;
- c) 'Zona Liberă Galați' - port, railway, road;
- d) 'Zona Liberă Brăila' - port, railway, road;
- e) 'Zona Liberă Giurgiu' - port, railway, road;
- f) 'Zona Liberă Curtici-Arad' - railway, road.

Activities carried out

Activities within the free zones are carried out only by operators who have been granted licenses issued by the free zone administrations, observing the principles of free competition. Any activity carried out in a free zone has to be previously notified to the customs control authority by the operator. Notification is done using the application mentioned at Article 804 of the Council Regulation (EEC) No. 2454/93 establishing provisions for applying the Community Customs Code.

In a free zone area some activities may be limited or prohibited by the customs authority, taking into consideration the following criteria:

- a) the type of goods
- b) necessary control measures which bear a disproportional administrative cost compared with the economic advantages resulting from carrying out a particular activity within the free zone.

In view of the provisions mentioned above, the customs authority might prohibit the retailing of community goods by private individuals within a free zone.

Tax facilities

Goods from a free zone may be transported to another free zone without payment of duties. These goods can pass through the customs territory of Romania, in accordance with legal provisions (transit customs procedure). Also,

these goods can be brought into the country according to the conditions and formalities for the import or, where appropriate, temporary admission.

Generally, activities carried on in the free trade zones fall outside the scope of VAT or they are exempt from VAT as long as the goods in question are under customs procedures.

Financial provisions

All financial operations related to the activities carried out within free zones are carried out in foreign hard currency. By exception, financial operations related to the erection of buildings inside free zones, and those related to commercial activities carried out by the administrations of the free zones (outside the perimeters of the free zones), as well as commercial operations, including the provision of services between residents, and public catering through canteens and restaurants, may use Romanian currency.

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SPAIN

APPLICATION OF THE NEW VAT RATES IN SPAIN

Spain has implemented new VAT rates with effect from 1 July 2010. The standard rate has increased from 16% to 18%, and the reduced rate has increased from 7% to 8%. There was no change in the 'super reduced' rate, which remains at 4%.

This has involved a certain degree of complexity in practical terms, as the increased cost of products for end consumers has required changes in billing procedures. Only time will tell whether this measure will achieve its goal in the current critical economic climate.

The Spanish tax authorities have set out the correct procedure in particular cases where taxpayers may be in doubt:

- where credit notes are issued (e.g. when merchandise is returned, or discounts are applied once goods have been delivered), the tax rate which must be applied is the rate in force at the time of the original supply
- where payments are made in advance, the tax rate which must be applied is the rate in force at the time the payments effectively take place
- with regard to leasing contracts, the VAT accrues when the company has agreed the payment of each instalment under the contract. The tax rate which must be applied is therefore the rate in force at the time each instalment accrues

- when a company gives an estimated price, and the acceptance and provision of services take place when the tax rate has already changed, the tax rate which must be applied is the rate in force when the services are actually rendered.

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VAT PENALISATION OF E-BOOKS

Spain is interested in implementing reduced VAT rates for electronic books in the EU.

Under the provisions of the Spanish General Directorate of Taxation, the reduced rate of 4% that applies to physical books in Spain is only applicable to electronic books if they are delivered in CD ROM or USB memory format. This currently means that the same product is penalised if it is delivered using new technologies. This does not seem very logical in today's world, where this new format is becoming more and more popular.

Spanish parliamentary groups have unanimously requested that the Government supports an initiative within the EU, by seeking a reduction in the VAT rate applicable to

e-books with no physical support.

However, this will require the modification of Article 98(2) of the VAT Directive, which expressly specifies that reduced VAT rates are not applicable to electronically supplied services.

The current situation makes an odd and unfair distinction between traditional paper books and the newer e-book format, the reasons for which are not clear to the publishing sector, which sees a higher VAT rate as an obstacle to the development of a potentially very promising product.

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SWITZERLAND

THE IDEAL LOCATION FOR HOLDING COMPANIES AND ACQUISITION VEHICLES

On 1 January 2010, the new Swiss VAT regime came into force. It makes Switzerland an even more attractive location, particularly for holding companies and acquisition vehicles.

For many years now, European VAT professionals have been discussing whether holding shares qualifies as an entrepreneurial activity for VAT purposes. Input VAT incurred when selling shareholdings for reorganisation purposes might not be deductible within the EU, or might only be deductible under strict conditions. VAT on legal, consultancy and other fees in this respect would thus constitute an irrecoverable cost to EU holding and acquisition vehicles.

Under the new Swiss VAT legislation there are a few fundamental changes regarding input tax recovery for holding companies. First, the right to recover input VAT on expenses and investments is no longer conditional on the provision of taxable supplies. Instead, the

business activity itself is the condition for VAT recovery. The Swiss VAT legislation makes it clear that the buying, holding and selling of shares is itself a business activity, and that there is a right to recover input VAT incurred on expenses related to the purchase, holding and sale of shareholdings of at least 10% of the share capital.

Furthermore, all flows of funds that do not qualify as consideration for business supplies, such as capital contributions, interest-free loans, recapitalisation payments, forgiveness of debt, dividends and other profit shares, do not restrict input tax deduction.

Debt financing functions of holding companies remain exempt under the new VAT legislation, without entitlement to input tax recovery. Since the maximum VAT rate in Switzerland is only 8%, the irrecoverable cost is still very low, compared with other jurisdictions.

New VAT law – new opportunity

The new VAT law makes Switzerland even more attractive as a location for holding and acquisition vehicles. The opportunities arising from the new rules are significant. Holding and acquisition vehicles located in Switzerland will have the possibility of fully deducting input VAT incurred on expenses relating to the buying, holding and selling of shares.

Insofar as holding and acquisition vehicles incur VAT exempt interest and other debt financing income on which input tax recovery is not available, the irrecoverable tax is still very low, thanks to a modest maximum VAT rate of only 8%.

Therefore Switzerland must be considered when it comes to establishing a holding company or an acquisition vehicle.

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