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ELECTRONIC COMMERCE AND VAT BURDENS

PATRICK WILLE*

Introduction

Increasingly, services are supplied via the Internet to individuals as well as to businesses. The supply of these services is in principle subject to value-added tax (VAT). This raises the questions: In which country is the VAT due and who has to pay for it?

To get an answer to these questions, one has to verify what kind of service is provided and where the service provider and the recipient of the service are established.¹

Besides services which are provided via the Internet, common goods are nowadays also frequently ordered via the Internet as are services which are not provided via the Internet. In this case no fundamental changes occur. However, as a consequence of the Internet more and more orders are received from abroad and placed with suppliers established abroad.

The supply will not only take place in the country of the supplier.

It should be taken into account that, when setting prices, goods have to be transported to customers and that VAT rates differ from country to country. Moreover, the existing complex VAT legislation is in general a burden for electronic commerce.

Supply of goods vs. supply of services

For a correct application of VAT it is of utmost importance to differentiate clearly between the supply of goods and the supply of services since the rules to determine where the supply takes place are totally different in the two cases.

“Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.² Electric current, gas, heat, refrigeration and the like shall be considered tangible property.

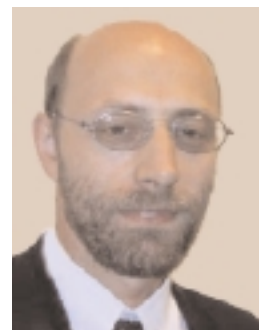
“Supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5 of the Sixth VAT Directive.³ The sale of software is basically a supply of services. However, the sale of standard software (e.g. on CD-ROM) is usually considered a supply of goods.

Services provided via the Internet

Several different kinds of services may be distinguished:

1. Standard software

Standard software, as opposed to tailor-made software, is a product which is produced on a large scale, available for everyone. Moreover, everybody can use it after a simple installation procedure and a small training effort to carry out certain applications and functions. Mostly, standard products consist of a package of programmes, including an installation service, training and maintenance. Application software for personal computers and game software fall basically within the category of standard products. Standard software which is completed by the supplier with security measures is also considered a standard product.



How to levy VAT on internet services depends on the kind of service provided

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¹ The Dutch tax authorities have published their point of view in the Decision of 14 August 1998, no. VB 98/1785 regarding services provided by means of the Internet. This decision is based on the results of the 38th of the Committee of Value Added Tax within the EC. One may conclude that these results are valid in all Member States.

² Article 10, § 1 Belgian VAT Code; Article 5 (1) Sixth VAT Directive.

³ Article 18, § 1 of the Belgian VAT Code; Article 6 (1) Sixth VAT Directive.

The transfer of standard software is not considered a supply of goods but a supply of a service when

- there is no transfer of the right to dispose of property as owner;
- the goods are not tangible because of there is no data carrier or when there is only a transfer of a copyright (license).

2. Tailor-made software

Tailor-made software is software which is developed for an individual customer. For the purpose of VAT, standard software which is transferred other than by means of a data carrier, is also considered tailor-made software.

When tailor-made software is imported on a data carrier, the import of a data carrier (without content) should be distinguished from the supply of a service (transfer of software/data).

When the customer is a taxable person, the transfer of the data carrier is considered inferior to the transfer of the software and will be taxed as one single supply of a service in the Member State of the customer. To avoid double taxation, the import of the data carrier is VAT exempted.

3. Downloading of files, virtual goods

The difference between standard software and tailor-made software has been raised above in the context of importing these products. Standard software is considered a good, and when importing it, VAT is due on the purchase price. When downloading such software via the Internet, no import VAT can be levied when the software comes from outside the EC.

4. Consulting files on the Internet

If files are available on a website but not downloaded and if these files can be consulted or viewed on payment (without considering the possibility of downloading an individual page as “still image”), one can make the following distinctions:

- They are regarded a service of entertainment if
 - according to objective rules – viewing or using these files may be considered entertainment e.g. looking, whether interactive or non-interactive, at (erotic) pictures or live-shows and participating in (multi-player) games.

- They are regarded an educational service if the customer is taking a course via the Internet. Activities which, whatever the medium, are comparable with correspondence courses, fall within the scope of educational services. There should be interaction between lecturer and student.
- They are a service of supplying information if the Internet is used for gathering information. The same is applicable to the provision of tailor-made information (consultancy) via the Internet.

5. Telecommunication services

Telecommunication services shall be deemed to be services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception. Telecommunication services within the meaning of this provision shall also include provision of access to global information networks.⁴

The place of service depends on the kind of service provided

1. Entertainment and educational services

The place of the supply of services relating to entertainment and education shall be the place where those services are physically carried out, i.e. the place where the customer buys the service is considered the place where the service is provided.

Viewing files or pictures via the Internet for consideration is mainly concentrated within the pornographic industry. These services are considered entertainment services.

When supplier and customer do not meet physically in one spot or in one country, as is the case of services via the Internet, the place of supply of the entertainment services is, according to Dutch court cases (Court Den Haag, 23 June 1993, confirmed by the High Court), the place where the service is bought.

If somebody in France is viewing Internet pictures or is taking a course via the Internet or is playing

⁴ Directive 1999/59/EC of 17 June 1999 amending Article 9 (2) (e) of the Sixth VAT Directive.

The place of service also depends on the kind of service provided

games via the Internet, then in principle, French VAT is due.

2. Information

Downloading games, magazines, music, movies and other files via the Internet is a service of supplying information.

The place of service when performed for customers established outside the EC or for taxable persons established in the EC but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides.

For EC-individuals and non-taxable persons established in the EC this rule has the following consequence. When buying software or information (via the Internet) in another Member State, it is not taxed in the Member State of the customer, but in the Member State of the supplier, e.g. a Belgian individual who buys software via the Internet from a French supplier will, in principle, be charged 19.6% French VAT.

The supply from outside the EC of tailor-made software to individuals can be treated as a service where the effective use and enjoyment takes place within the territory of a country and therefore will be taxed in that country.⁵ This rule applies e.g. in the Netherlands. Consequently, when a Dutch individual buys software via the Internet from a supplier outside the EC, Dutch VAT will be due at the rate of 17.5%.

Belgium has adopted this rule. A Belgian individual or public body who buys software via the Internet from a non-EC supplier, pays no VAT.

Companies established in Belgium which provide services via the Internet to individuals or public bodies established in Belgium or in other Member States have to charge these customers Belgian VAT. Individuals or non-taxable legal persons from outside the EC will receive an invoice without VAT.

3. Telecommunication services

The place of service is where the recipient of the service is established when the supplier is estab-

lished in another country than the country of the recipient (cf. the supply of information).

As regards individuals or non-taxable persons established within the EC, the place of service depends on the establishment of the supplier. When the supplier is established within the EC, VAT is due in the Member State of establishment of the supplier.

When the supplier is established outside the EC, VAT is due in the Member State of effective use and enjoyment of the telecommunication services.

Charging VAT

When individuals, established in another Member State, buy entertainment or educational services, then in principle, the supplier is liable to pay the VAT due in that Member State. Consequently, such a supplier should be registered for VAT purposes in all Member States where those services are supplied to individuals via the Internet.

Some Member States, e.g. the Netherlands, also demand a registration for VAT purposes for the non-EC supplier who supplies information to individuals.

Belgian VAT legislation states that, except for counter-evidence, the place of the supply of a service is deemed to be in Belgium as far as one of the contracting parties is established in Belgium (economic activity, fixed establishment, permanent address, usual residence).

As regards the counter-evidence, no general rules exist. Methods of providing counter-evidence depend on the way the service has been provided en payment has been settled. Also the technical possibilities to register website visitors have to be taken into account. In this respect, the Dutch tax authorities suggest:

- address of the customer;
- e-mail address of the customer;
- bank or credit card company used for settlement of the payment (using data from the bank of the supplier);
- registering the Internet provider (ISP) used by the customer (to minimise telecommunication costs, customers will call locally).

VAT on foreign suppliers demands registration

⁵ Article 9 (3) of the Sixth VAT Directive.

Payment of the VAT

VATable persons receiving services via the Internet from suppliers established outside Belgium have to charge for Belgian VAT in their VAT return via the reverse charge mechanism. To exercise the right to deduct, the recipient must have a regular invoice at his disposal. For invoices boxes 82 (taxable amount), 87 (taxable amount), 56 (VAT due) and 59 (deductible VAT) of the VAT return are used. For credit notes boxes 82, 87, 84, 61 and 62 of the VAT return are used.

Also VATable persons without a right to deduct have to pay the VAT due, e.g. doctors, lawyers, hospitals, schools, insurance companies. When receiving such a service for the first time, they have to inform their local VAT inspector. If they fail to do so, in the case of Belgium a fine of 20,000 BEF will be imposed. The VAT due must be paid by means of a special VAT return to be filed quarterly in case those services have been provided to them. This special VAT return is also used for paying the VAT due on intra-Community acquisitions. The VAT due on Internet services bought is mentioned in box 80 of the special VAT return. The taxable amount in box 74.

Individuals have to pay the VAT due by putting tax stamps on the invoice received for Internet services received from suppliers abroad which have not appointed a tax representative in Belgium. The tax stamp has to bear the date and signature of the customer.⁶

The question immediately arises of how many individuals may be aware of these regulations. Moreover, a payment with tax stamps is not adapted to survive the 21st century.

The Dutch Minister of Finance declared on 27 March 2000 that the tax authorities are forced to forego levying VAT on digital products sold via the Internet. In his opinion, an effective taxation of music, videos or texts that customers download via their computers from the Internet is not feasible.⁷

The supply of goods

The Internet makes it possible to provide goods and services at low cost to a large number of poten-

tial customers. Still, it is difficult to decide on the geographic area in which one wants to offer one's goods or services to potential customers.

When setting the price, transport costs and taxes need to be taken into account.

When selling in the local market, regulation is usually no problem. As soon as cross-border supplies take place, however, then in most cases one also has to know the regulation of the country of destination.

Place of the supply of goods sent from one EC Member State to another

In principle, when goods are supplied to a taxable person with the right to deduct VAT in another Member State, no VAT will be charged when goods are sent or transported from one Member State to another. The VAT related to the intra-Community purchase will be paid by the buyer in the Member State of destination. The product catalogues will contain prices exclusive of VAT.

If the purchaser is a private person, a taxable person without right to deduct VAT of a non-taxable legal person, then it is less evident how to fulfil VAT obligations.

As soon as the goods are transported from one Member State to another by the supplier or on his account, then it is possible that this is a distance sale. This implies that the VAT should be charged which is applicable in the Member State where the goods arrive. Moreover, in case of distance sales an invoice must be issued.

Certain rules must be obeyed concerning the particular VAT that is due:

No VAT will be due on an invoice if the purchaser is a taxable person without right to deduct. Or a non-taxable legal person which has a VAT identification number attributed in another Member State than where the goods are shipped from.

VAT will be due in the Member State of departure if the supplier does not exceed the threshold for distance sales and does not opt and the purchaser does not provide a VAT identification number attributed in another Member state.

Regulations abound regarding VAT payment. Is effective taxation feasible?

⁶ Royal Decree no. 31, Article 5, § 3.

⁷ "BTW bulletin", April 2000, no. 4, p. 15.

VAT of the Member State of destination shall be charged if the supplier exceeds the threshold for distance sales or opts, and if the purchasers are a private person or a taxable person without the right to deduct or a non-taxable legal person, or persons who do not exceed the threshold for intra-Community acquisitions and have not opted to charge all their acquisitions with VAT of their Member State.

Moreover, new means of transport are excluded from this regulation. Specific rules exist for excise goods.

Distance sales

In case goods are sent to another Member State by the supplier or on his account, to a person who is not liable to pay VAT on intra-Community acquisitions in that Member State (e.g. individuals), the place of the supply is determined as the place where the goods arrive. This implies that the supplier will have to charge the VAT of the Member State of the customer.

This derogation has been introduced to avoid that private persons and taxable persons who can not deduct VAT, as non-taxable legal persons (e.g. public bodies) can order goods which are sent departing from a Member State with a low VAT rate by specialised companies (mail order houses).

1. Thresholds

Taxable persons who cannot deduct VAT and non-taxable legal persons can only purchase in other Member States with the application of the local VAT rate for an amount of, in principle, 10,000 EUR.⁸ As soon as they purchase more than the threshold amount during the current or previous calendar year, they are obliged to pay VAT in the Member State where the goods arrive and they have to perform an intra-Community acquisition.

As long as the thresholds of 100,000 EUR⁹ or 35,000 EUR¹⁰ are not exceeded, the supplier can apply the common rules regarding the place of supply.

⁸ Germany, Austria, Ireland and the United Kingdom allow higher amounts.

⁹ Germany, France, Luxembourg, The Netherlands, Austria and the United Kingdom.

¹⁰ Belgium, Denmark, Finland, Greece, Ireland, Italy, Portugal, Spain, Sweden.

2. Option

Both the supplier and purchaser, except for private persons, can opt to apply the VAT of the Member State where the goods arrive.

This choice needs to be made by the supplier in the Member State from which the goods are sent or transported by the latter.

A Belgian supplier who effects distance sales to Luxembourg and intends to apply Luxembourg VAT to these distance sales as from the first distance sale to Luxembourg, will need to opt therefore with the appropriate Belgian tax authorities. In this case opting can be advantageous as the standard VAT rate in Luxembourg amounts to 15% instead of Belgium's 21%.

The choice of the purchaser is made in the Member State where the goods arrive.

A Belgian taxable person without right to deduct VAT who receives goods sent from another Member State will have to inform the appropriate Belgian tax authorities in case he wants to buy these goods with the application of Belgian VAT.

Opting can be advantageous if the VAT rate is higher in the Member State where the goods are sent from than in the country of destination, e.g. in Denmark where the VAT rate amounts to 25%.

For distance sales across borders, VAT is normally charged in the country of destination

3. Shipment or transport to Belgium, for example

When goods are sent to Belgium by the supplier or on his account from another Member State, the place of supply is deemed to be in Belgium when the following conditions are fulfilled in a cumulative way¹¹:

If the supply of goods is made to:

- 1a. – a taxable person, subject to the common flat-rate scheme for farmers;
- a taxable person subject to the special scheme for small undertakings;
- a taxable person who only supplies goods or renders services for which he does not have the right to deduct;
- a non-taxable legal person.

¹¹ Article 15, § 4 of the Belgian VAT Code.

1b. a private person.

If the goods are

2a. no new means of transport;

2b. not assembled or installed by or for the account of the supplier;

If

3a. the persons as mentioned under 1a. may not have purchased for more than 450,000 BEF (11,155.21 EUR) during the current or previous calendar year in another Member State, and may not have opted to have their intra-Community acquisitions taxed in Belgium;

3b. the supplies of the foreign supplier under the conditions mentioned above amount more than 1,500,000 BEF (37,184.03 EUR) during the current or previous calendar year;

3c. as far as for such supplies the amount of 1,500,000 BEF (37,184.03 EUR) has not been exceeded, the foreign supplier should, in his own Member State, have chosen for Belgium as the place of supply.

In case the supplied goods are excise goods, the place of supply will always be Belgium, whether the threshold of 1,500,000 BEF (37,184.03 EUR) has been exceeded or not, regardless of the choice of the supplier.

Examples

a. A Dutch company “A” sells a portable computer to a Belgian hospital “B”, which has ordered this computer via the Internet, for an amount of 8,000 EUR. “A” requests “V”, a Dutch transporter, to ship the computer from Amsterdam (The Netherlands) to “B” in Ghent (Belgium). The Dutch company “A” has already sold goods for more than 500,000 EUR under the form of distance sales in Belgium. The hospital “B” has not yet purchased anything in another Member State during the current and previous calendar year. Nor has the hospital “B” opted to have all its intra-Community acquisitions taxed in Belgium. In this situation, the place of supply of goods from “A” to “B” will be deemed to be in Belgium.

b. Consider the same situation, but the computer costs 12,500 EUR. In this case “B” is obliged to

pay the VAT related to the intra-Community acquisition in Belgium, which is due because the threshold of 10,000 EUR¹² was exceeded. The place of the supply from “A” to “B” will be in the Netherlands. In case “B” does not provide a VAT identification number to “A”, then “A” will have to charge Dutch VAT.

c. Consider the same situation as under a. But now “B” asks a Dutch transport company “V” to collect the goods on her account in Amsterdam. In this case there is no distance sale because the transport has not been effected by or on account of the supplier. This supply will take place in the Netherlands. “B” will not have to acquire the goods in Belgium and will pay Dutch VAT.

4. Shipment or transport departing from Belgium

When goods are shipped by or on account of a supplier from Belgium to another Member State, the place of supply is the place where the goods arrive, when the following conditions are fulfilled¹³:

1. The supply must be effectuated for either

- a. – a taxable person, subject to the common flat-rate scheme for farmers;
- a taxable person subject to the special scheme for small undertakings;
- a taxable person who only does supplies of goods or renders services for which he does not have right to deduct;
- a non-taxable legal person

on condition that:

these persons did not opt to pay VAT of their Member State for their intra-Community acquisitions at that moment;

or

at that moment, the amount of their intra-Community acquisitions in the current calendar year does not yet exceed the threshold under which these acquisitions are not subject to VAT in their own Member State;

or

¹² Belgium has translated this amount into 450,000 BEF.

¹³ Article 15, § 5 of the Belgian VAT Code.

Under certain conditions when goods are sent from another Member State the place of supply is deemed to be the country of destination

at that moment, the threshold had been exceeded in the previous calendar year;

and

- the goods are no new means of transport;
- the goods are not assembled or installed by or on account of the supplier;
- the goods are no excise goods;

or

b. a private person;

and

- the goods are no new means of transport;
- the goods are not assembled or installed by or on account of the supplier.

2. The amount of the supplies effectuated by the supplier to this Member State, at the moment of supply, exceeds the threshold or was exceeded during the previous calendar year, as determined by this Member State (100,000 EUR or 35,000 EUR).

This condition regarding the threshold does not apply

- to sales of excise goods to private persons;
- when the supplier has opted that the place of his supplies is in the Member State where the goods arrive.

This option is valid for a period of at least two calendar years.

Examples

A Belgian company “A” sells books to a school “B” in Luxembourg for 50,000 EUR. “A” sends the goods by train to Luxembourg. “A” did not effectuate any distance sales in Luxembourg. During the current calendar year the distance sales of “A” in Luxembourg already amount to 60,000 EUR. Neither “A” nor “B” have opted and for “B” this is the first purchase from another Member State. The place of supply will be Luxembourg, as due to this supply the threshold of 100,000 EUR will be exceeded.

Or consider the same situation as above, but the goods are transported to a bookshop in Luxem-

bourg. The place of supply is Belgium because the purchaser is a taxable person with a right to deduct.

5. Goods sent from a third country (i.e. a non-EC Member State)

When, in case of distance sales, the supplied goods, transported or dispatched from outside the EC and imported by the supplier into a Member State other than the Member State where the goods arrived, the goods are deemed to be sent from the Member State where the goods have been imported.¹⁴

Example

A French company “A” performs distance sales in Belgium. “A” itself purchased the goods in Switzerland and imports them to Germany. These goods sold by “A” to its Belgian customer will be deemed to be sent from Germany.

Conclusion

There are still many uncertainties regarding the interpretation of the current VAT legislation in the fifteen EC Member States and outside the EC in view of the increased use of new technologies such as the Internet. As always, legislation is way behind the technological evolution. Yet, the gap is becoming bigger and bigger because of the exponentially growing developments in today’s society.

The proposal of a directive on e-commerce and VAT, which was approved by the European Commission on 7 June 2000 will hopefully clarify the issue. It is of utmost importance that the VAT-taxable person has legal security, that there is simplicity for both companies and tax authorities and that there is tax-neutrality.

Legislation is urgently needed to simplify VAT rules for e-commerce

¹⁴ Art. 15, § 6 Belgian VATCode.