Reglene for avgiftsberøring i EU har endret seg – det kan få betydning også for norske virksomheter

Når tjenester leveres mellom EU-statene, er hovedregelen nå at det er tjenestemottakeren som skal beregne og betale avgift av leveransen. Tidligere var det tjenesteleverandøren som skulle beregne og betale avgift.

Reglene i “the VAT Package” gjelder bare innenfor EU, men vil likevel kunne ha betydning for norske virksomheter som handler med EU.

De nye reglene betyr for eksempel at norske tjenesteleverandører i noen tilfeller ikke lenger trenger å registrere seg for mva i EU.

På den annen side vil norske leverandører som har fakturert kunder i EU uten mva, kunne oppleve at de mister et konkurransefortrinn i forhold til leverandører fra EU som har måttet kreve lokal avgift. Dette gjelder for eksempel innen bank- og finanssektoren, der mottaker av tjenesten ikke har krav på fradrag for ingående avgift.

Artikelen nedenfor er skrevet av tre avgiftsadvokater i DLA Piper – i tre ulike EU-stater – og gir en introduksjon til de nye reglene med flere relevante eksempler også for norske virksomheter.

Regelendringene i EU har virkning fra 1. januar i år.

Update on the EU wide VAT changes to the place of supply of services

Ready, steady...go:

On 12 February 2008 the European Council published a new package of measures (known as the VAT Package) setting out radical changes to the rules on the place of supply of cross-border services. The package becomes law and takes effect throughout the EU from 1 January 2010. It is designed to ensure that VAT on supplies of services is borne in the member state of consumption. The “basic rule” effective until 31 December 2009, that the place of supply of services is where the supplier belongs, arguably no longer allows the VAT system to uphold that principle; the globalisation of business and technology have allowed a greater ability for services to be supplied at a distance. A stated aim of the new legislation is to modernise and simplify VAT compliance across the EU, reduce opportunities for fraud, and to produce a more level playing field between service providers who currently, depending on the nature of their services, may be able to choose to locate outside the EU and not charge VAT, or locate in a member state with a low rate of VAT and charge VAT at that rate no matter where their customers are based.
All businesses which supply or receive cross-border services should have been assessing how the new rules impact on them. Businesses will need to ensure that they are in a position to comply with the new rules with regard to both charging VAT correctly and fulfilling new reporting requirements. This will necessitate changes to internal systems and training staff. In the UK, legislation has recently been introduced (with effect from April 2009) under which penalties for incorrect VAT returns are “behaviour-based”. This means that unpaid VAT resulting from a “failure to take reasonable care” which could include inadequate systems, could attract penalties of up to 30% of the VAT liability, although in the early months, HM Revenue & Customs have said they will operate with a light touch.

At the same time as adopting the new rules on place of supply, the European Council adopted new measures designed to speed up the input VAT refund process for traders established in other member states under the eighth directive (i.e. the process under which businesses established in one member state can reclaim VAT incurred in another member state).

In the UK, the new rules on the place of services were enacted as part of the Finance Act 2009. A new Notice 741A, Place of Supply of Services, has been published. These cover the changes which take effect between 1 January 2010 and 1 January 2013. In the Netherlands, bill no. 31.907 covering the implementation of the VAT package into the Dutch VAT Act 1968 passed the Senate on December 1st, 2009. In its commentary to the changes in the Dutch VAT Act, the Dutch State Secretary provides guidance on specific areas including the extension of the group of VAT taxable persons, the intervening fixed established, the time of supply and changes in the Dutch VAT returns.

On the EU level, further guidance is coming out from reported meetings of the EU VAT Committee and a proposed Regulation, to be effective from 1st January 2010, if implemented, will help to clarify certain practical issues and will be binding on Member States.

OVERVIEW OF VAT PACKAGE

- From 1 January 2010, the general rule for business to business (B2B) cross-border supplies is that the place of supply will be the place **where the customer is established** and the recipient of the service will be obliged to account for the VAT relating to the service in its jurisdiction (i.e. apply the reverse charge or “tax shift” procedure). The general rule for business to consumer (B2C) cross-border supplies will remain: that is, the place of supply will be **where the supplier is established**. In both cases, these rules are overridden in favour of the location of a fixed establishment if that is the actual recipient or provider of the services. (See further below.)

- There are however exceptions for services connected with land, supplies of passenger transport, supplies of services relating to cultural, artistic, sporting, scientific, educational, entertainment and other similar activities, restaurant and catering services and short-term leasing of means of transport. Generally, these supplies take place where they are physically carried out; supplies “relating to land” take place where the land is situated, as now, and the scope of this rule is extended. Supplies of hotel accommodation are now included. The EU Directive now includes “the grant of rights to use immovable property” as the land related services.

- In the case of B2C supplies, there are exceptions for supplies by intermediaries, supplies of transporting goods, ancillary transport activities, valuations of and work on moveable assets and supplies of intangible and electronic services. Supplies by intermediaries remain the place where the underlying transactions take place.

- From 1 January 2010, service providers have to file quarterly (in the UK) or monthly, EU Sales Lists. These are customer lists for B2B supplies giving the VAT registration number of their cross-border customers and the value of the supplies they have made which are subject to the reverse-charge rule (see further below).
From 1 January 2011, the rules applicable to events will change (i.e. from those put in place in 2010) and the B2B (not B2C) supply of organising events will be subject to the general rule i.e. VAT is accounted for at the place where the customer is established. This will not apply to the supply of admission to events.

From 1 January 2013, the rules applicable to leasing and hiring transport vehicles to non-business customers (other than short-term) will change (i.e. from those put in place in 2010), with the result that the place of supply shall be where the customer is established or resident.

From 1 January 2015, the rules applicable to digitised services supplied at a distance will change. Electronic, telecom and broadcasting services will be deemed to be supplied where the customer is established, has his usual address or is resident (whether the customer is a business or a consumer), and the same rules will apply alike to non-EU service providers and EU service providers. (Note that electronically supplied services cover services with internet content, not mere communication by email.) Non-EU service providers supplying telecoms, radio and television and broadcasting services to non-taxable persons resident in the EU can continue to register electronically in a single member state of their choice (a mini one-stop shop arrangement), and the VAT charged will be at the rate applicable to the member state of the customer. EU-based providers of electronically supplied services, telecoms, radio and television broadcasting services to consumers will also be able to fulfil all their VAT obligations in their member state but the VAT rate charged will again be that applicable to the member state of the customers.

Each member state has a wildcard enabling them to change the place of supply to the place of effective use and enjoyment to prevent double taxation, non-taxation or distortion of competition, and consistent and clear guidance is needed on how this power will be exercised EU wide. The UK HM

Revenue & Customs has limited the application of these provisions in the UK to where they are currently used (i.e. to supplies of letting on hire of goods, letting on hire of a means of transport, telecommunications and radio and television broadcasting services and B2B electronically supplied services) but will consider wider application if it deems it necessary to prevent avoidance. The Commission has asked other member states how they are intending to apply the use and enjoyment provisions and it is hoped that other member states will follow the limited stance the UK has taken to uphold the integrity of the basic rules.

KEY POINTS OF IMPACT OF 2010 CHANGES

The key areas of impact are likely to be:

- Increased administrative work due to the increased reporting requirements. For all business customers, it will be necessary to obtain the customer’s VAT registration number, check it where appropriate and where this is not available, obtain alternative evidence of their business status. Suppliers are expected to have carried out a reasonable level of verification.

- A need for all businesses to analyse the impact of the changes applicable to their particular circumstances and to put in place the necessary procedures and systems to comply with the new rules. Determining whether the reverse charge procedure applies may not always be straightforward given that the new place of supply rules will need to be implemented separately by each member state. Furthermore, determining the location of a customer’s “fixed establishment” or establishments (new article 44 of the VAT Directive) may involve a judgment about whether services are being supplied to one or more establishments of the customer in different member states and whether a supply can be split and delivered to two or more establishments. Different jurisdictions may take different approaches on whether a supply should be treated as being received in their jurisdiction. Those involved with cross-border
service contracts will need to review their arrangements. The proposed EU Regulation stipulates that where the customer has more than one establishment receiving the supplies, in the absence of abuse, the taxable person receiving the services will be responsible for determining where the services are supplied; and in a global contract scenario, where services are received by a customer in several places, unless the services are intended to be used by a particular fixed establishment of the customer, the services shall be treated as supplied at the main business establishment. In deciding whether services are used by a particular fixed establishment, the terms of the contract and the place where the costs are borne shall be taken into account and the notation of a fixed establishment’s VAT number on the VAT invoice issued by the supplier will be conclusive unless proved to the contrary. The interaction between VAT and transfer pricing has never been more significant.

In determining the place of “business establishment” and “fixed establishment”, the proposed EU Regulation establishes a substance over form criteria. The place of business establishment is where the business has its registered office, central administration, where the management meet and general policy is determined; a fixed establishment is an establishment of a minimum size with sufficient human and technical resources permanently present to receive and make use of services supplied and to provide the services. It seems now impossible for a company to have a business or fixed establishment for VAT purposes without it also constituting a permanent establishment for corporation tax purposes.

So far as the establishment of the supplier is concerned, a new Article 192A abolishes the “force of attraction” interpretation of the law, and makes it clear that where a supplier of a cross-border service has a branch in the member state where the customer is based and that branch “does not intervene in that supply” that branch is to be disregarded. In the UK, HMRC has said that intervening would require “an active, significant role in the making of the supply”. The proposed EU Regulation states that where the human and technical resources of the supplier’s fixed establishment in the customer’s member state are not used by the supplier for the fulfilment of the supply, then that fixed establishment should be ignored. Also it should be ignored if the fixed establishment only performs administrative support tasks, such as accounting, invoicing and collection of debt claims. But if the fixed establishment does intervene in the supply, before or during its fulfilment, or it is envisaged that it may intervene subsequently, via an after-sale service or application of guarantee clauses which does not constitute a separate supply for VAT purposes, then the supply will be treated as made from that fixed establishment. The draft EU Regulation also specifies that where the supplier issues an invoice quoting the VAT number of a fixed establishment, that fixed establishment shall be treated as having intervened in the supply.

Businesses receiving services from another member state will need to analyse, in the light of the new rules, whether they are now under an obligation to operate the reverse charge. The definition of a taxable person who must operate the reverse charge covers all those with a VAT registration number, as well as charities and government bodies. A business receiving a supply for private use (or private use of staff) shall be treated as a consumer. The proposed EU Regulation stipulates that where the type of services requires it, the supplier may need to obtain a self-declaration from the customer on the planned purpose of the acquired services, to ensure that the supply is not intended for private use of the customer or the staff of a taxable person. UK businesses must include reverse-charged services within their threshold for VAT registration, and may have to register for VAT for the first time. This could create a significant extra cost for some charities. Because of the extent of their non-business activities, much of the VAT on the reverse charge may be irrecoverable. From 1 January 2010, services are subject to the reverse charge, unless, possibly, according to the draft EU Regulation, they are received for purposes “other than those of the customer’s business”.

Other businesses that cannot recover all of their VAT may find that the new rules give rise to costs, in that services that they previously bought VAT free from providers outside the EU or at a low VAT rate from a provider established in Luxembourg or Malta, now carry a VAT cost because the reverse charge rule applies in their jurisdiction. Affected businesses
include banks and insurance companies that outsource back-office services to non-EU based providers. There is also a risk of double VAT, especially with more jurisdictions outside the EU introducing a form of VAT or goods and services tax (GST) which may not be wholly consistent with the EU VAT code. Double VAT in the EU should generally be avoided because of the mechanism in Article 398 of the EU Directive for a VAT Committee with delegates from each Member State to resolve difficulties, and in the UK, HMRC will not insist on VAT being charged at least in the early stages of the new rules, if another EU Member State has charged VAT under the old rules.

- For those whose services will, in the future, be subject to the reverse charge procedure, the resulting decrease in the need for eighth directive refund applications should reduce the cash-flow and administrative costs associated with the refund procedure. VAT is simply accounted for on the VAT return.

- Once the changes in 2010 are introduced, the distinction between management, bookkeeping and administrative services on the one hand (the place of supply of which is until 31 December 2009 where the supplier is established) and data processing, provision of information and consultancy services on the other (the place of supply of which is until 31 December 2009 where the customer belongs, if in business in the EU or if outside the EU) will cease to be of significant impact. With the reverse charge rules applying to far more services, the issues to look at on B2B transactions will be different ones; whether the service falls within any of the exceptions to the new basic rule that services are supplied where received. Businesses which currently have to register in a different member state from the one in which they are established because of the nature of the services they supply may find that this obligation has gone because the VAT in the "foreign" member state will be accounted for under the reverse charge procedure.

- The rules are changing on the time of supply of the reverse charge: instead of the payment date determining the time of supply, the time of supply will be the earlier of when the service is completed or when payment is made. In addition, in relation to continuous supplies of services, the time of supply will be linked to the payment periods: but if no payment is made or invoice issued within a 12 month period, there will be a deemed supply at the end of the calendar year. These rules will also apply for the purposes of determining in which recapitulative statement (or EC Sales list, ESL) the charge appears.

EU SALES LISTS (“RECAPITULATIVE STATEMENTS”)

As noted above, businesses will need to put in place systems to identify when a service is being supplied to a VAT registered EU business, to which the reverse charge procedure applies in the customer’s jurisdiction, then capture the required data in time to be filed under the EU sales lists. The requirement does not apply to exempt supplies such as financial transactions although because of the discrepancies in the financial services exemption across EU Member States, this is an area of difficulty. Suppliers will apply the law in their own jurisdiction rather than the customer’s where there is any doubt.

Businesses supplying IT services internationally and Financial services are likely to be the most affected. Where a customer is in business but does not have a VAT registration number the service must be omitted from the form. In the UK ESLs relating to services may be used quarterly in relation to calendar quarters, and the same form can be used for both services and goods. The list must be filed 14 days after the end of the relevant quarter, 21 days if submitted electronically, via a Government Gateway. Penalties will be imposed for delayed submission of forms or failure to deliver forms.

REFORM OF 8TH DIRECTIVE INPUT VAT RECLAIMS

Claims for VAT incurred in members states where the trader is not established will be made via an electronic portal to his member state of establishment, and the details will then be passed on to the member states of refund. Claims must be made by 30 September in the calendar year following the refund period and must be for more than three months, and less than a year.

Payment by the relevant member state must be made within four months of receipt and within 10 days of approval, and interest is due if payment is late, unless requested information fails to be supplied. The conditions for deduction (including blocked items) are
those applicable to the member state of refund, but partial exemption restrictions of the claimant’s own member state also apply.

**CONCLUSION**

The overall aim of the VAT Package is to ensure that supplies of services are taxed in the place of consumption, as has indeed always been the aim of the VAT system. The broader application of the reverse charge mechanism should have the effect of lowering cash-flow costs in B2B transactions although, overall, the radical and detailed changes of the VAT Package will trigger additional costs, in particular on changes to systems and training, and ensuring the ESLs are accurate. The changes to digital services in 2015 will introduce additional complexity.

Businesses should review their cross-border or global contracts to ensure that the impact of the new VAT regime is understood.

Partially exempt businesses and charities that have outsourced back-office services may have unexpected VAT costs after 1 January 2010.

Member States may interpret the new rules a little differently, for example, as to what constitutes a fixed establishment capable of making or receiving a specific supply of services. In addition, some Member States may legislate that the “effective use and enjoyment” rules apply to a wide range of services, introducing conflict with the basic rules. Clearly, the rules will work best if they are applied consistently across Member States, but only time will tell whether this will be the case and where the main points of conflict will lie.

Richard Woolich is a Partner in the London office of DLA Piper. His practice is focused on development of real estate practice nationally and internationally as well as VAT. He chairs the DLA Piper VAT practice. Jeroen Gobbin is a Partner with the Antwerp office of DLA Piper, where he practices in all the main fields of fiscal law, focusing especially on indirect taxes (including VAT and excise and customs taxes), real estate taxation and tax litigation/controversy. Daan Arends is a Senior Associate in the Netherlands office, specialising in VAT.