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EU VAT FORUM

INTERIM REPORT OF THE SUB-GROUP ON CROSS-BORDER RULINGS (CBR)

DECISIONS OF THE EU VAT FORUM ON THE RECOMMENDATIONS OF THE CBR SUB-GROUP

1. INTRODUCTION

Within the framework of the EU VAT Forum, several EU Member States have agreed to participate in a test case for private VAT ruling requests relating to cross-border situations. The test case started on 1 June 2013 and is scheduled to last until the end of 2014.

The following Member States participate in this project:
- since the beginning: Belgium, Estonia, Spain, France, Cyprus, Lithuania, Latvia, Malta, Hungary, Netherlands, Portugal, Slovenia, and the United Kingdom;
- since 2014: Finland and Sweden.

A first evaluation meeting was held on 20 May 2014 (see annex 1). This meeting was divided in two sessions: a first session only for Member States' CBR contact person, and a second session including the EU VAT Forum business representatives. This meeting allowed to share the first experiences about this CBR pilot case.

2. CURRENT USE OF THE CBR FRAMEWORK

2.1. Number of CBR requests

a. It appears that some Member States did not yet receive any inquiries – no direct requests from taxable persons nor consultations from CBR contact points from other Member States – on CBR rulings (CY, LV, MT, SI, SE).

The other Member States received a few CBR requests. Most CBR requests were introduced in the United Kingdom (10 requests) and Belgium (8 requests).

b. All CBR contact points deplored the little use of their services. However, it was acknowledged that the CBR ruling initiative is only available since a few months. It was also observed that the purpose of this initiative is not to receive as many CBR requests as possible, as this procedure should only be used in case of doubts about the VAT regime to be applied to cross-border transactions. Moreover, the admissibility conditions imposed at the start of this test case were quite strict, in order to avoid an overload of requests. All participating CBR contact points agreed that the risk of receiving too much requests is not present at this stage, and that more visibility should be given to this initiative.

c. It was also observed that the reduced number of requests is linked to the fact that some large MS are not (yet) participating in this project. All participants (business and participating MS) expressed the wish that those MS join the CBR network.

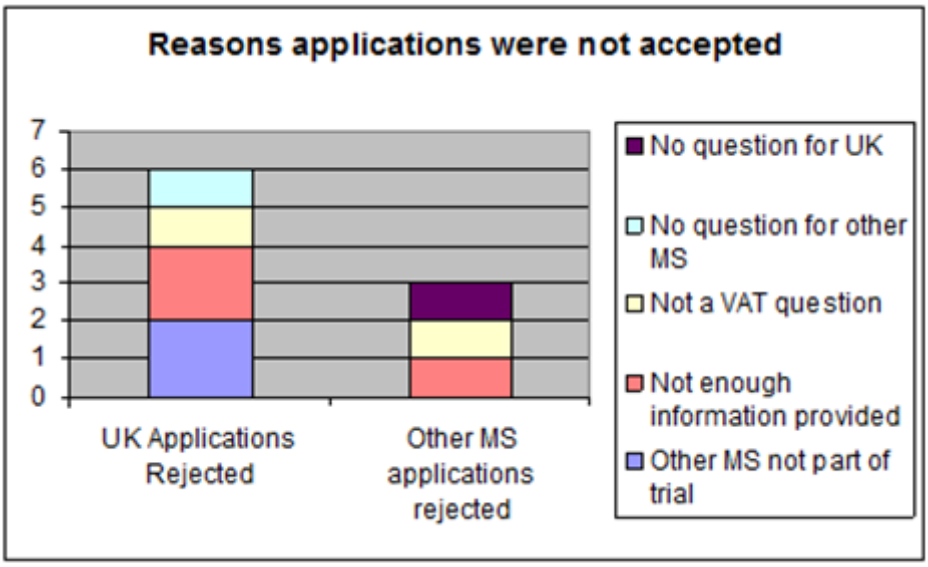
2.2. Admissibility of the requests

a. The information notice explaining how CBR requests have to be introduced, imposes the following eligibility conditions:

- a CBR can only be requested if the transaction(s) envisaged are complex and have a cross-border aspect in two or more MS participating in the test case;

- a CBR request can only be introduced in a participating MS, and this has to be done in the participating MS where a taxable person concerned is registered for VAT purposes;

b. Several CBR requests had to be rejected because one or more of the eligibility conditions were not fulfilled. E.g., in the UK, 6 of the 10 CBR requests introduced in that MS were refused, and 3 of the 5 CBR requests transmitted by other MS were also rejected, for the following reasons:



c. It should be clear that CBR requests cannot be used for general information requests. E.g., SE had to reject two general requests (for information about thresholds in other MS; and for information about invoicing requirements in another MS).

d. Moreover, a CBR request must be introduced in line with the conditions governing national VAT rulings in the MS where the request is introduced. This may also limit the number of requests introduced and accepted.

   E.g., in Belgium, several CBR ruling requests were rejected because of the national ruling condition that a request should not relate to situations or transactions identical to situations or transactions which already produced tax effects for the taxable person concerned. Following an exchange with the European Commission, the Belgian authorities decided to recall this condition, in order to extend the eligibility criteria (see press-release of 6 May 2014).[1]

e. It was agreed that no CBR should be given in case the company concerned is being audited.

3. CONCLUSIONS WITH REGARD TO THE PRESENT USE OF THE CBR FRAMEWORK

3.1. Conditions applying to the CBR requests

a. Questions were raised with regard to the need to make the scope clearer for the taxpayers. It appears that there are some doubts about the meaning of the word

[1] http://financien.belgium.be/nl/Actueel/140506_btw_schrapping_van_een_van_de_voorwaarden_voor_cross_border_rulings.jsp; http://finances.belgium.be/fr/Actualites/140506_btw_schrapping_van_een_van_de_voorwaarden_voor_cross_border_rulings.jsp

"complex" transactions. In this regard, it was agreed that MS should not adopt a (too) strict approach.

b. A participant indicated that it had received a request concerning future rules (adopted but not yet into force). It was agreed that such requests should not automatically be excluded from the scope.

c. It was agreed that the CBR request should not relate to purely hypothetical situations. However, this condition should not be applied too strictly, as the aim of the CBR is to provide certainty to the taxable person about transactions envisaged. Therefore, a CBR request should be allowed for activities that are in the planning phase, insofar as the transactions are genuinely contemplated.

   Accordingly, it was also agreed that the CBR should not be excluded for taxable persons not yet VAT registered but planning new, VAT liable business, in so far as their plans are precise enough to allow CBR decisions.

d. Taxable persons applying for a CBR should be asked to inform the Member State concerned about the same or similar requests introduced in other Member States.

e. It was observed that the taxable persons requesting a CBR decision should provide sufficient information about the transactions envisaged.

3.2. Communication between the CBR contact points and with the taxable persons

a. The use of national contact points, allowing fast contacts between tax authorities, in an informal way, was considered to be an advantage.

b. In some cases, these contacts allowed to have an exchange of views upfront, before decisions were taken. However, in some cases, some participants noted that there was a lack of feedback from the contact point initiating the consultation. If needed, a real dialogue should take place, as a better understanding may help to prevent situations of double taxation (or situations of a double non-taxation).

c. Some participants (business and CBR contact points) observed that the response time should be reduced. In some cases, it apparently took about 6 months before answers were communicated to the taxable persons. Even though this may be in line with national rulings conditions, this was considered to be a very long time.

   In this regard, it was noted:

   - that translations may cause an extra delay; but also

   - that the translation burden is (at least partially) shifted to the taxable person, introducing the CBR request (cf. language conditions applied to the requests).

d. Some business participants indicated that it would be useful to inform the taxable person concerned about the acceptance of a request and about the expected reply time needed.

3.3. Other points

a. One participant observed that this exercise requires qualified resources (technical knowledge, language expertise) and that it may cause administrative difficulties, since it runs in parallel with the normal circuit of requests for domestic rulings.

b. A next meeting of this sub-group should be organised at the end of the CBR test case (preferably in December 2014). It has been suggested to discuss then the following issues:
   - how to continue this project (assuming that it is continued);
   - the possibilities to involve other MS in the CBR project;
   - differences in MS' treatment of CBR requests, on the basis of national ruling conditions;
   - the timescale for the communication of requests and replies.

c. It was suggested to set up a database where the most interesting CBR could be viewed by the MS participating in the project. However, it appeared that it would also be useful for business to have access to CBR ruling decisions agreed. So it was concluded that a list of CBR rulings would be suggested for publication, on a voluntary basis, and providing that personal data protection rules are properly taken into account.

4. DECISIONS OF THE EU VAT FORUM, BASED ON SUGGESTIONS AND RECOMMENDATIONS FROM THE CBR SUB-GROUP

a. The cases for which an agreement could be obtained of all authorities concerned, can be published as "cross border rulings". This is done on a voluntary basis, without mentioning names of Member States involved in a CBR if they do not agree to have their name published. These cases are described in a neutral way, avoiding any reference to specific taxable persons (see annex 2).

b. Further reflections and consultations will be held with regard to the question how to deal with situations where the authorities of different Member States have dissenting opinions on the VAT treatment of a specific cross-border transaction.

c. This report shall be published, as it solves a number of questions on the use of the CBR framework and as it contributes to the visibility of the CBR test case.

Annex 1

List of participants (meeting 20 May 2014)

- Member States: BE, EE, ES, FR, LT, HU, MT, NL, PT, SI, FI, SE
- Business representatives: CBI, CFE, EuroCommerce, FEE, MEDEF, TEI, UEAPME
- Commission

Annex 2

Cross-border ruling decisions for publication (June 2013-May 2014)

2014/1. Organisation of "in house" training

(May 2014)[2]

Member States concerned: Belgium, the Netherlands

Facts: A company **A** of MS 1 organizes a training in MS 2, to be attended by employees of other group companies only (i.e. "in house" training). Company **A** issues invoices to the group companies for the training services, notably to a company **B** in MS 3.

Question: What is the place of supply of the services invoiced by company **A** to company **B**?

Is this in MS 2 (place of the event; in accordance with Art. 53 of dir. 2006/112) or MS 3 (MS of the recipient; in accordance with Art. 44 of dir. 2006/112)?

CBR: the place of supply is MS 3 (MS of the recipient).

2014/2. Organizing a symposium to present new products to clients

(May 2014)

Member States concerned: Belgium, United Kingdom

Facts: Company **A** of MS 1 organizes an event in MS 1, where some new products are presented to its clients. Some clients from MS 2 attend this event. These clients are taxable persons.

For the clients from MS 2, the following invoice flow is applied: company **A** charges a participation fee to its subsidiary **AA** in MS 2, which recharges this fee to the clients in MS 2. The amount invoiced to the clients includes the transportation and accommodation costs + a margin (cost plus).

Question: What is the place of supply of the services recharged by subsidiary **AA** in MS 2 to the clients in MS 2?

Is this place in MS 1 (place of the event; in accordance with Art. 53 of dir. 2006/112), MS 2 (MS of the clients; in accordance with Art. 44 of dir. 2006/112) or MS 2 (MS of the supplier; in accordance with Art. 307, 2nd para., relating to the special scheme for travel agencies).

[2] No agreement in a similar case concerning other Member States.

CBR: The place of the supply of services is in MS 2; in accordance with Art. 307, 2nd para., of dir. 2006/112.

2014/3. Renovation of buildings in another Member State

(May 2014)

Member States concerned: Spain and Portugal

Facts: Company **A** of MS 1 has a subsidiary **AA** in MS 2. Company **A** renovates buildings in MS 2 for entities in MS 2.

Company **A** subcontracts with other companies in MS 1 to perform the renovation work in the buildings in MS 2.

Subsidiary **AA** transfers workers to company **A** for the execution of the renovation services. With regard to these transfers of workers, **A** is responsible for the wages and the social security obligations. Subsidiary **AA** sends invoices to **A** for the materials, the rental of equipment, waste management services, and the transferred workers' transport costs.

Question: where do these supplies of goods and services take place?

CBR:

- the transfer of workers takes place in MS 1, where the recipient **A** is established (Art. 44 of dir. 2006/112). In this regard, account is taken of the work performed by the assigned staff. It appears that the work is limited to machinery leasing with staff and management of waste. In this case such services are not considered works of construction and therefore cannot be considered as related to immovable property.

  Nevertheless, it should be noted that if the service provider compromises to implement all or part of a work, taking responsibility for the outcome, the transaction should be qualified as works of construction of immovable property, the special rule of Article 47 of VAT Directive should be applied and the service should be located in MS 2.

- the debt expense (i.e. the wages and the social security obligations) is ancillary to the transfer of workers and is also located in MS 1.

- the supply of materials which are in MS 2, without leaving the territory of MS 2, is located in MS 2 (Art. 31 of dir. 2006/112).

- the supplies of the renovation services by the subcontractors from MS 1 regarding the properties located in MS 2 take place in MS 2, since there is a direct relationship between such services (works of construction) and these properties (Art. 47 of dir. 2006/112).

2014/4. Supply of SIM cards for mobile phones

(March 2014 + from 2015 on)

Member States concerned: Spain, Portugal, United Kingdom

Facts: Company **A** from MS 1 issues SIM cards with mobile phone numbers of MS 1. All its customers (consumers) are deemed to be established in MS 1.

Pay As You Go ("PAYG") top-up vouchers are distributed outside MS 1, in MS 2, through refills terminals operated by company **B**, a local business partner (retail outlet) of company **A**, or through cash points.

Question: Where does this service (topping up of the SIM cards) take place? (under the current provisions and under the legislation applying from 2015)

CBR: a) under the current legislation (2014):

- These products have to be included within the category of supply of services "not clearly identified" and art 65 of VAT Directive, payments made on account, is not applicable.
- The marketing of telephone refills by a chain establishment that is located in MS 2 is a transaction not subject to VAT, because what is really provided is a means of payment for specific services that can be consumed in different territories.

  The supply of telecom services by a MS 1 supplier to a MS1 final consumer is not deemed to be located in MS 2 (in accordance with Art. 45 of dir. 2006/112).
- Even if SIM cards allow for more than the supply of telecom services, it does not change the nature of these services.
- The fees charged by **B** to **A** for the intermediary service in the distribution of the refills must be accounted for VAT in MS 1, according to the B2B rules (in accordance with Art. 44 of dir. 2006/112).

b) From 2015 on:

- On the basis of a presumption, VAT regarding the top up will be located in MS 1 (Art. 24a(b) of Council Implementing Regulation nº 1042 of 7 October 2013)
- However, the Directive concerning VAT on vouchers, if adopted, may introduce new rules on this matter

2014/5. Separate sales of machinery and tyres assembled to the machinery

(May 2014)

Member States concerned: Estonia, Finland

Facts: Company **A** in MS 1 buys machinery from company **B** in MS 2. The machinery is shipped from MS 2 to MS 1. It is not disputed that this is an intra-community trade of goods.

Company **A** also buys a set of tyres from company **C** in MS 2. **C** directly transfers the property of the tyres to **A** (and **C** invoices **A** accordingly). However, the tyres are transported from **C**'s premises in MS 2 to **B**'s premises in MS 2.

In some cases, **B** assembles the tyres to the machinery. Once this assembly is done, the machinery is shipped from MS 2 to MS 1. In other cases, tyres are not assembled but they are also shipped to MS 1, together with the machines.

Question: What is the VAT treatment of the sales of the tyres?

Reply: The sales of tyres by **C** to **A**, assembled or to be assembled, can be considered as intra-community sales of goods, but **C** needs documents certifying the transport of the machinery (or the tyres if not assembled) and a contract with **A** or **B** where this use of tyres is clearly stipulated. If **C** does not have such documents, the sales by **C** are subject to VAT in MS 2, and **A** can ask for a refund of that VAT.