A quick enough fix?

Jeremy Woolf asks whether the four VAT 'quick fixes' for cross-border supplies of goods may not be simple to apply in practice

KEY POINTS

- **What is the issue?**

The EC has provided some guidance on the four VAT 'quick fixes' for cross-border supplies of goods that are due to come into force on 1 January 2020.

- **What does it mean to me?**

These changes are likely to be relevant to UK VAT practitioners because Brexit, if it occurs, is likely to take effect after their implementation. Also, the rules are likely to remain relevant during any transitional period.

- **What can I take away?**

The guidance is in draft and is not binding. However, there are potential traps and, if a strict approach is adopted, the fixes may not be easy to apply in practice.

As outlined in Rob Janering's article in July, four VAT 'quick fixes' for cross-border supplies of goods are due to come into force on 1 January 2020. That article helpfully provides the background to the proposed changes. Although not binding, the European Commission has provided some guidance on its views on these provisions in Working Paper 968 published on 15 May 2019 (bit.ly/2rDoqXH). Some draft Explanatory Notes were also discussed at the September meetings of the EC VAT Expert Group (being representatives from business) and the Group for the Future of VAT (being representatives of the member states) (bit.ly/2KeEC8g). Minutes of the meeting of the Group for the Future of VAT on 25 September have also been published (bit.ly/3703zxO). The proposals were discussed at the 113th meeting of the VAT Committee on 3 June 2019 (bit.ly/37gCbMh).

These changes are likely to be relevant to UK VAT practitioners because Brexit, if it occurs, is likely to take effect after their implementation. Also, the rules are likely to remain relevant during any transitional period. One point that arises from this guidance and related discussions is that these 'fixes' and, in particular, the provisions directed at chain transactions, may not be simple to apply in practice. The fixes also contain traps for the unwary.

Changes to the exemption in Article 138

One of the four quick fixes amends the exemption in Article 138 of the Principal VAT Directive for intra-Community supplies of goods. This is clearly not a 'fix' from a business perspective. It makes that exemption dependent on identifying the customer's VAT identification number and correctly recording the supply in the supplier's recapitulative statement unless the supplier can justify his failure.

Paragraph 4.3.6 of the draft Explanatory Notes provides some examples of cases where the trader should be considered to have justified his shortcomings. The failure to comply with these conditions does not impact on a customer's obligations to account for VAT on its acquisitions. It is therefore readily apparent that this change may potentially give rise to double taxation, since the loss of the exemption means that both the supplier (in the member state where he is established) and the customer (in the member state to which the goods are dispatched) will have to account for VAT.

Paragraph 3.3.1 of Working Paper 698 suggests that once it becomes clear that the supplier is not eligible to exempt his sale, it may be open to the customer to recover the VAT in the country where the supplier is established (because his supply is not exempt) and to recover the acquisition VAT that the customer has to pay in the member state to which the goods are dispatched. This may be a solution to the issue of double taxation when the customer is making taxable supplies, but it will not assist when the customer does not have a right of recovery. Is other corrective action possible? Hopefully, this will be an issue that is addressed in the final version of the Explanatory Notes.

If problems arise, conceivably the Court of Justice may be prepared to develop its jurisprudence in cases such as *Staatssecretaris van Financiën v Stadeco BV* (Case C-566/07). That case was concerned with the obligation, under what is now Principal VAT Directive Article 203, to account for VAT that is shown on an invoice. The court accepted that there was a right to recover any sums paid to the tax authority in error once it can be established that there is no danger of a loss of tax resulting from the error.

Unless satisfactory procedures are agreed, suppliers will clearly want to ensure that their terms and conditions give them a claim against their customers if they have a right to recover input tax because a supply fails to qualify for exemption under Article 138. Customers will no doubt want to ensure that this does not extend to cases where they are not at fault and any VAT charged in the state of sale cannot be recovered by them.

Call-off stock

The provisions directed at call-off stock, in new Article 17a of the Principal VAT Directive, clearly provide a welcome potential simplification for cases where:

- a sale occurs under the call-off stock arrangement to an identified VAT registered customer;
- the delivery to the customer occurs within 12 months of the shipment of the goods; and
- the supplier does not have a fixed establishment in the country to which the goods are dispatched.

Such sales can be treated as an intra-Community supply of goods from the supplier to the customer, provided the


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goods are delivered to the customer within 12 months. The provisions may avoid any need for the supplier to register in the country to which the goods are delivered.

The draft Explanatory Notes do not currently contain any guidance on what is a 'fixed establishment'. However, this issue was considered in Working Paper 968 and then discussed at the meeting of the VAT Committee on 3 June 2019. The Committee would appear to have agreed that a warehouse does not automatically result in a fixed establishment and suggested that a nuanced approach should be adopted in cases where the supplier owns the warehouse or it is let to the supplier. It was also accepted that there should be some tolerance for minor losses.

One anomaly that paragraph 3.1.3. of the Working Paper highlights is that the benefit of the Article 138 exemption for suppliers of call-off stock will be lost if the supplier sells the goods to a customer outside a call-off stock arrangement, unless the supplier has registered in the country to which the goods have been shipped prior to the sale. This is stated to be the position even if the customer would otherwise be liable to account for tax on that supply under a reverse charge. It is difficult to see any utility in requiring a supplier to register in such circumstances. More generally, the proposals may give rise to logistical problems in ensuring that the Article 138 exemption is not retrospectively lost because a VAT registration cannot be obtained before the supplier is treated as making a taxable supply in the member state to which the goods have been shipped (because the goods have been held there for more than a year or sold outside the call-off stock arrangements). It remains unclear what steps member states are prepared to adopt to prevent these problems.

Chain transactions

The third 'fix' is directed at the difficulties that previously arose in determining which supply transport should be ascribed to when there is a chain of supplies; and therefore which supply in the chain potentially qualifies for the exemption under Article 138 of the Principal Directive for intra-Community supplies of goods.

Under new Article 36a of the Principal VAT Directive, when a relevant chain exists the transport is to be ascribed to the supply to the 'intermediary operator' by the first supplier, unless the intermediate operator is established in the member state from which the goods are being dispatched, when the transport is to be ascribed to the supply by the intermediate operator to a customer established in a different member state. Unfortunately, the guidance suggests that this 'fix' may give rise to as many difficulties as it resolves. In particular:

1. The provisions only apply when an intermediary operator 'dispatches or transports the goods either himself or through a third party'. The provisions therefore provide no assistance when a 'first supplier' dispatches the goods, unless the customer can be said to be dispatching the goods through his supplier. Paragraph 3.6.6 of the draft Explanatory Notes accepts that it is possible for the first supplier to organise the transport on behalf of an intermediary supplier, so a relevant chain can exist. However, it suggests that the customer should only be considered to be acting through the supplier when 'the risks of the transport are borne' by the intermediary operator. The minutes of the 25 September meeting show that a number of member states did not consider this to be an appropriate test. Adopting a broader approach will obviously help to ensure that application of this 'fix' is not unduly limited.
2. Problems may arise in determining what supplies should be considered to form part of a relevant chain. This is particularly likely to be the position when different parties in the chain have organised different legs of the transport. The minutes of the 25 September meeting suggest that there were disagreements on these questions.
3. The minutes of the 25 September meeting also show that there were disagreements about how the new provisions interrelate with the triangulation provisions in Principal VAT Directive Article 141. This issue was also considered by the VAT Committee on 3 June 2019.
4. The minutes of the 25 September meeting show that there were disagreements about whether it might be open to an intermediate operator that is established in the country of dispatch and in another member state to subsequently alter which VAT number he relies upon. In turn, this may impact on which supply the transport is ascribed to.

These points suggest that this 'fix' may require suppliers to conduct detailed exercises in order to determine what transactions should be considered to form part of a relevant chain, and then to determine upon whose behalf the transport should be considered to be undertaken.

Proof of transport

The final fix is directed at the evidence required to prove an entitlement to exemption under Article 138. It creates a rebuttable presumption that a supply is exempt if the supplier has the requisite proof, if this can be obtained. In practice, this may not be easy, particularly if the parties are connected because of the more onerous requirements in such cases. However, it does not prevent the supplier from otherwise establishing the position.

Conclusions

The guidance referred to above is in draft and is not binding. However, there are potential traps and, if a strict approach is adopted, the fixes may not be easy to apply in practice. It will be interesting to see what changes appear in the final version of the Explanatory Notes, as well as what actions member states will be prepared to take to assist their effective implementation.

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