

European VAT for Cloud Computing, Software, Apps, and Other Digital Products and Services: Mastering 2015 Rules

TUESDAY, AUGUST 4, 2015, 1:00-2:50 pm Eastern

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European VAT for Cloud Computing, Software, Apps, and Other Digital Products and Services

Aug. 4, 2015

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“European VAT for Cloud Computing, Software, Apps, and Other Digital Products and Services”

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Aug 4, 2015**



Agenda

1. What is VAT and how does it work?
2. VAT on e-commerce, Products
3. VAT on Digital Services in the European Union
4. Summary of new rules under MOSS
5. Potential impact of 2015 changes on non-EU established suppliers



Value Added Tax

Consumption tax added to most goods and services in all levels of the production and distribution chain.

Implemented tax in most countries in the world except the U.S. and a few other countries.



Samples of VAT names and rates

Australia	GST	10%
Canada	GST	5%
China	VAT	17%
France	TVA/VAT	20%
Germany	MWST/VAT	19%
Hungary	AFA/VAT	27%
Netherlands	BTW/VAT	21%
UK	VAT	20%

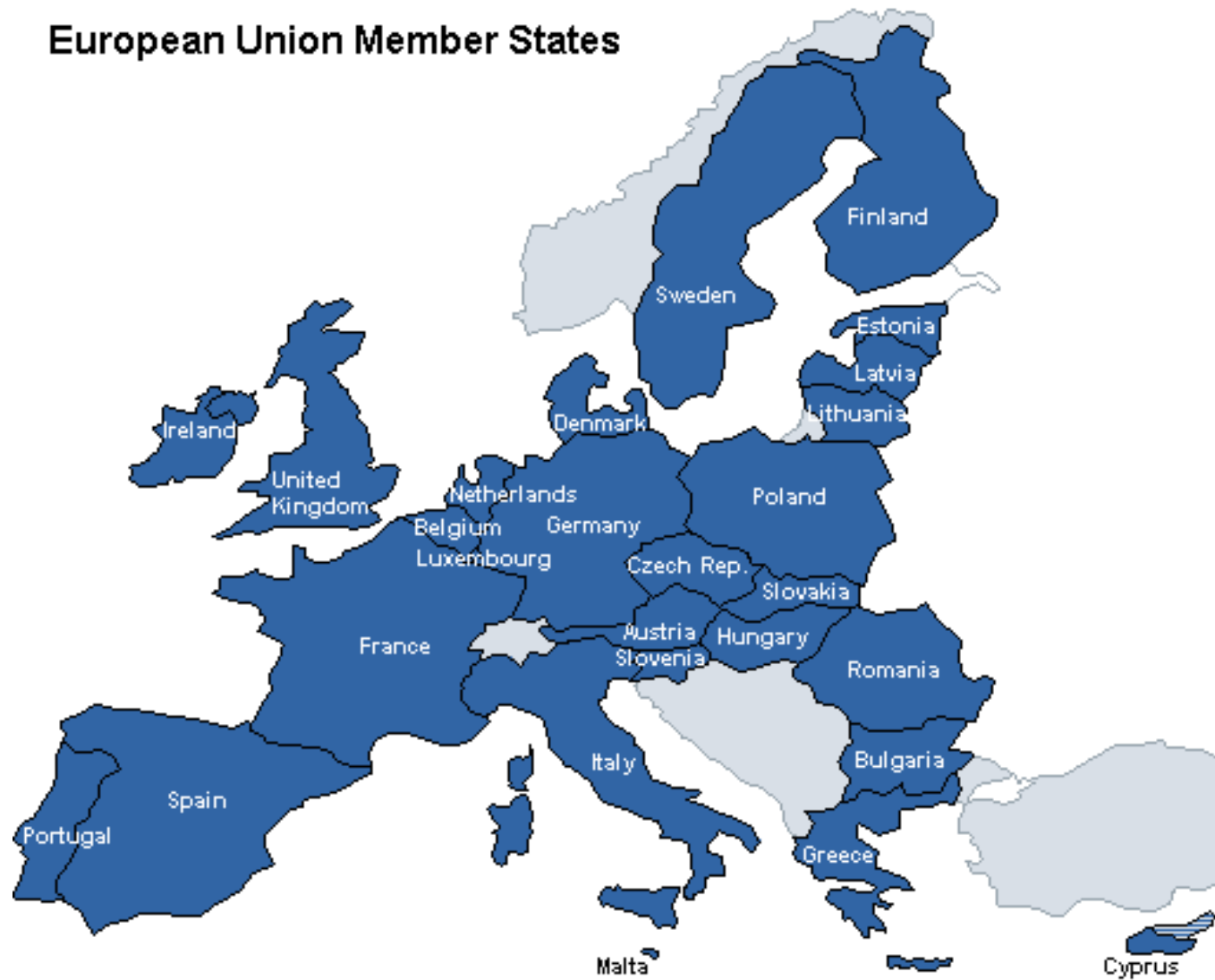


VAT in EU countries



- **Connected system within the 28 EU countries (member states)**
- **Usually one VAT registration can cover all trade**
- **Possible for the non-EU company to register for VAT only**
- **Always have to check on Permanent Establishment (PE) liabilities**
- **VAT is often refundable to the non-EU company**

European Union Member States



How VAT works

Most companies:

1. **Collect VAT on all sales**
2. **Pay VAT on all purchase invoices**
3. **Declare the difference to the VAT authorities**
4. **Pay VAT on the value that is added**



VAT is accounted for on a Balance Account, and is not a cost to the company usually. VAT is a cost to the private end customer.

VAT on Transactions: Sample the UK

Purchase from UK vendor	£ 50,000
<u>VAT 20%*</u>	<u>10,000</u>
Paid to UK vendor	£ 60,000
Sale to UK customer	£ 100,000
<u>VAT 20%*</u>	<u>20,000</u>
Total collected	£ 120,000

***VAT is not considered a cost for the company: accounted for on Balance Account. VAT is only a cost to the private person.**

VAT on imported products



Sample: U.S. product imported to the UK:

Commercial invoice:	10,000	(pay to U.S. vendor)
<u>Duty 3%:</u>	<u>300</u>	(pay to UK customs)
Landed cost	10,300	
VAT 20%*	2,060	(pay to UK customs)

*VAT is refundable to the VAT registered company

VAT Declaration to the Tax Authorities

Collected VAT	£ 20,000
Less VAT paid to UK vendors	-10,000
<u>Less VAT paid on Imports</u>	<u>-2,060</u>
VAT due the UK tax auth.	£ 7,940

VAT is not considered to be a cost for the company. Is a cost to the private person.

VAT on Services

- **B2B: Business to business**
 - **General rule**
 - VAT generally payable where the buyer of the service is based – usually reverse charge unless the supplier has a presence in the jurisdiction. No VAT should be charged B2B
 - Also applies to ESS
- **B2C: Business to consumer**
 - **General Rule**
 - VAT generally payable in the country of the service provider, except in certain cases.
 - VAT should be charged to the private customer
 - **ESS Rule**

ESS supply by a service provider outside the EU to an end private person within the EU – subject to VAT in the EU – service provider must register for VAT and charge VAT.

When VAT registration might be required for U.S. company

- Sales of “Digital Services” to private persons (on-line games, music, software, cloud, etc)
- Import and drop-shipments of goods within the EU (e-commerce such as Amazon Europe for example)
- Sales where installation is required
- Organizing of conference or tradeshow where fees are collected

VAT on e-commerce / goods

Goods and products are sold from website, shipped from a US warehouse to customers world-wide:

Customer has to pay duty and local VAT to customs (duty is a cost)

- VAT is refundable if the customer is a company
- VAT is not refundable if the customer is a private person

VAT on e-commerce / goods (Amazon)

Goods sold on website, shipped from a EU warehouse i.e. Amazon.uk.:

- **US company has to register for VAT in the UK**
- **US company has to import goods and pay duty and import VAT**
- **Must charge VAT to the customers per the EU laws**
- **VAT registration might be required in additional EU countries if sales are above threshold**

Common issues – Establishment

- Where a non-resident digital service provider does not have a corporate presence in a VAT jurisdiction, it may still be considered to have an establishment for VAT purposes
 - Servers
 - Physical services provided – e.g., maintenance
 - Use of an agent
- This can result in a liability to register for VAT and charge VAT on a supply that might otherwise be self assessed by the customer



E-Services and 2015 Summary of new rules under MOSS



Summary of new rules under MOSS – Overview

- As of January 1, 2015, B2C telecommunications, broadcasting, and electronically supplied services are taxed at the place where that person is established, has his permanent address or usually resides.
- This shift in the place of supply could impact on:
 - VAT rate charged
 - Application of VAT “use and enjoyment” provisions
 - VAT compliance obligations for the services supplied.
- A Mini One-Stop Shop (MOSS) also was implemented in the EU to simplify cross-border VAT compliance. There will be a “union scheme” for EU business and a “non-union scheme” for non-EU business.

Summary of new rules under MOSS – Definitions

Definitions under MOSS

Telecommunications services shall mean services relating to the transmission, emission or reception of signals, words, 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, with the inclusion of the provision of access to global information networks.

Broadcasting services shall include services consisting of audio and audio-visual content, such as radio or television programmes which are provided to the general public via communications networks by and under the editorial responsibility of a media service provider, for simultaneous listening or viewing, on the basis of a programme schedule.

Electronically supplied services as referred in Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.

Sample of services that are not covered

- Order goods on-line
- Professional advise on-line such as a lawyer
- Educational services
- On-line helpdesk
- Knitting pattern sold on-line

Difficult to determine what is included

Summary of new rules under MOSS – Place of Supply (Sales) Determination

Place of Supply Determination:

	Which services?	Evidence presumption
	Supplied at a location (e.g. Wi-Fi hot spot, internet cafe etc.) where the physical presence of the customer is required	Location of the service
	Supplied through a fixed line	Place of installation of the fixed line
	Supplied through mobile networks	Mobile country code of the SIM card used
	Supplied through a decoder or similar, or viewing card	Where the decoder or similar is located, or where the viewing card is sent
	All other circumstances	2 items of non-contradictory evidence

Summary of new rules under MOSS – Place of Supply Determination

Types of Evidence to Determine Place of Supply

Article 24f

- Billing address of the customer;
- Internet Protocol (IP) address of the device used by the customer or any method of geolocation;
- Bank details such as the location of the bank account used for payment or the billing address of the customer held by that bank;
- Mobile Country Code (MCC) of the International Mobile Subscriber Identity (IMSI) stored on the Subscriber Identity Module (SIM) card used by the customer;
- Location of the customer's fixed land line through which the service is supplied to him;
- Other commercially relevant information

Impact of 2015 changes on non-EU established sellers



Potential issues for non-EU established suppliers

Taxable Person

- **Article 9a:** Determines when a taxable person taking part in a supply through a network, interface or portal should be regarded as the principal.
- **Issues**
 - Has to determine if the sales it directly to a customer
 - May have to register for VAT in at least one EU country
 - Has to track if the sales is B2B or B2C

Taxation of digital services



- **Certain jurisdictions have specific rules/regimes for taxing cloud services**
 - EU – specific Electronically Supplied Services Regime
 - Iceland, Norway, Switzerland – similar to the EU
 - South Africa and Ghana implemented ESS legislation
 - Japan, Canada, Australia, and New Zealand are considering rules similar to the EU
 - Other jurisdictions treat cloud service as general services
- **For those jurisdictions without a specific regime provided the supplier does not have a presence in the jurisdiction in which the customer is located that is linked to the supply, the supplier will not be liable for VAT on the supply – liability may fall on the customer**
- **Focus on the EU as it is leading the field in the taxation of such services**

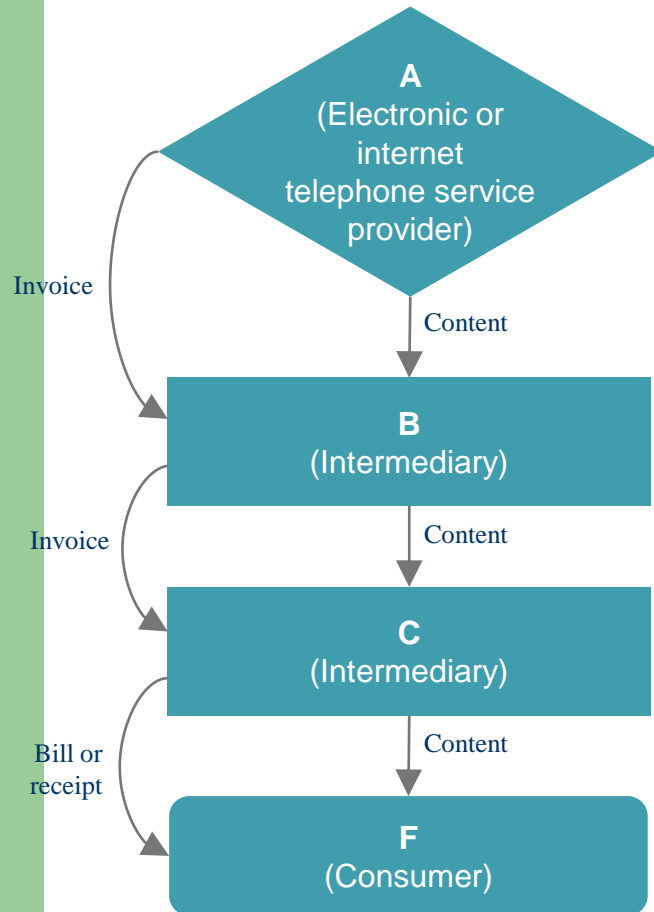
Sales to private persons in the EU

- Track if the order is from business or private person
- Register for VAT in on country i.e. the UK
- Charge local VAT to private persons i.e. 20% to UK, 25% to Sweden, 19% to Germany

Declare the VAT to the UK tax authorities

Potential issues for non-EU established suppliers – article 9a

BASIC CASE – ALL THE INTERMEDIARIES ARE CAUGHT BY THE PRESUMPTION



For each transaction in the supply chain, each intermediary is deemed to have received and onward supplied the electronic service.

Therefore each intermediary in the chain is required to account for VAT.



Potential issues for non-EU established suppliers – Article 9a

1. ***For the application of Article 28 of Directive 2006/112/EC, where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties***
 - In order to rebut the presumption at Article 9a:
 1. The invoice issued by each taxable person taking part in the supply of the e-services must identify those services and the supplier, and
 2. The bill or receipt issued or made available to the customer must identify the e-services and the supplier

Potential issues for non-EU established suppliers – B2B

Taxable Person

Article 18(2): Suppliers may regard a customer established within the European Union as a non-taxable person if they have not supplied their VAT identification number to the supplier, irrespective of information to the contrary.

Issues

- The word “may” appears to give the supplier a choice; if there is evidence to support the fact that the customer is a taxable person, even if the customer does not provide their VAT identification number, the supplier can choose to treat the customer as taxable or non-taxable.
- Commission’s introduction to the Implementing Regulation states that “the supplier should be able to determine the status of a customer solely based on whether the customer communicates his individual VAT identification number” and that “If no such communication is received, the supplier should remain liable for payment of the VAT.”
- This means the supplier has to rely on the VAT number of the company customer as
- Proof that the sales is B2B

Potential issues for non-EU established suppliers – B2C

Place of Supply

- **Article 24ga** – Enumerates evidence to confirm place of establishment, permanent address or usual residence. A supplier must obtain two pieces of non-contradictory evidence from this list in order to make a determination.
- **Issues**
 - What should a supplier do if they are unable to obtain two pieces of non-contradictory evidence?
 - Paragraph (7) of the Commission’s introduction to the Implementing Regulation states that “Where a non-taxable person is established in more than one country or has his permanent address in one country but usually resides in another, priority is to be given to the place that best ensures taxation at the place of actual consumption.”
 - This suggests that, where a supplier has conflicting evidence over their customer’s location the supplier should tax at the place of consumption.
 - Suggestion for explanatory notes to provide further guidance. For example:
 - Where two pieces of evidence are contradictory, continue to seek further evidence until two pieces are non-contradictory, then
 - Where no non-contradictory evidence can be located, tax in the place of consumption, then
 - Where the place of consumption cannot be identified, tax in the supplier’s Member State of Identification.

Potential issues for non-EU established suppliers – B2C

Place of Supply

Article 24ga – As part of the list at Article 24ga, 24ga (f) states that “other commercially relevant information” can serve as evidence for determining where a customer is established.

Issues

Other commercially relevant information” is a vague description. It would be helpful to have clarity over what this might typically include.

Suggested examples:

- Webpage country locator (e.g. if customer chooses to purchase through the UK page)
- Language (e.g. if customer chooses to view the webpage in Dutch).

Potential issues for non-EU established providers (continued)

Where a supplier has a VAT registration without an establishment in a Member State other than the Member State of Identification, and has registered for Mini-One-Stop-Shop (MOSS), should supplies to customers belonging in the Member State where the VAT registration is, be accounted for through that VAT registration or through MOSS?

- **Issues**

- This scenario may occur for registration obligations resulting from distance selling.
- It is understood that e-services should be reported through MOSS and all other supplies through the VAT registration.
- If the other registration is a DS registration, the supplier should be reporting goods through the DS registration and e-services through MOSS.
- This would create two VAT registrations, hence doubling the compliance effort, which would appear to be counter intuitive.
- Is it possible to have e-services and distances sales of good reported through the same registration?

Potential issues for non-EU established providers (continued)

- **Where a supplier has a domestic VAT registration and has registered for Mini-One-Stop-Shop (MOSS), how should input VAT be recovered?**
 - Should input tax incurred in that Member State to make those supplies be recovered via the Member State VAT registration or via the EU refund scheme?
- **What is the statute of limitation under MOSS?**
 - Supplies have taken place in the MS of consumption. Therefore rules for the MS of consumption should apply
- **What is the documentation retention requirements for the purpose of tax audits**
 - Supplies have taken place in the MS of consumption. Therefore rules for the MS of consumption should apply
 - Guidance on the audit of MOSS is expected to be released shortly
- **How will errors be managed?**
 - Supplies have taken place in the MS of consumption. Therefore rules for the MS of consumption should apply

Potential issues for non-EU established providers (continued)

What are the invoicing rules under MOSS?

- The member state where the customer belongs sets the invoicing rules.
- As a result supplier should be required to look to the local invoice rules implemented by each member state to determine the invoicing requirements.
- Our understanding is that most member states do not require a non EU supplier to issue invoices for B2B and B2C supplies.
- Member states which we are aware require non EU established businesses to issue invoices for B2B supplies are Italy and Greece.

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