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5 June 2014

Ms. Maryse Volvert
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Via email: Maryse.Volvert@ec.europa.eu

**Subject: Explanatory Notes for Amendments to
Implementing Regulation (EU) No 282/2011 on
Services Connected with Immovable Property**

Dear Ms. Volvert,

In 2013, the European Council reached political agreement on amendments to Implementing Regulation (EU) No 282/2011 (the “Implementing Regulation”) clarifying existing rules for determining the place of supply of services for VAT purposes in the European Union. The provisions addressing services connected with immovable property located in the EU will take effect on 1 January 2017. To assist both businesses and tax administrations in developing a uniform application of these rules, the Commission plans to draft explanatory notes to the Implementing Regulation with input from relevant stakeholders including Member States and businesses (“Explanatory Notes”).

Tax Executives Institute (“TEI”) applauds the Commission for soliciting comments from business prior to drafting the Explanatory Notes and is pleased to actively support this initiative. Stakeholder involvement early in the process should allow the issuance of guidance well in advance of the 1 January 2017 effective date that will address key issues where further clarification is most needed. We agree with the statement in the Commission’s 1 April 2014 request for input from business that it is important to focus on the practical implications of the new rules and to set out clearly how they should be applied in practice.

TEI was founded in 1944 to serve the professional needs of in-house tax professionals. In 1999, TEI chartered a chapter in Europe,



which encompasses a cross-section of European and multinational companies. Today the organisation has 55 chapters throughout the world. As the preeminent international association of business tax professionals, TEI has a significant interest in promoting sound tax policy, as well as in the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 members represent over 3,000 of the largest companies in Europe, the United States, Canada, and Asia.

TEI members are accountants, lawyers and other corporate and business employees responsible for the tax affairs of their employers in an executive, administrative, or managerial capacity. The Institute espouses organisational values and goals that include integrity, effectiveness and efficiency, and dedication to improving the tax system for the benefit of taxpayers and tax administrators alike.

Background

Article 47 of VAT Directive 2006/112/EC (the “VAT Directive”) governs the place of supply for services connected with immovable property. Under that provision, the place of supply for those services is the Member State in which the property is located. However, the meaning of the terms “immovable property” and “services connected to immovable property” is vague and has resulted in many Member States applying domestic law definitions (based on their local civil codes) that differ from country to country. The lack of uniform treatment of these transactions at an EU level creates legal uncertainty and compliance challenges for businesses.

The transactions impacted in this context are generally business-to-business (“B2B”) services provided cross-border and generally between entities with full input tax recovery (*i.e.*, operations that should, in principle, be VAT neutral). Still, the varying interpretations of Article 47 across the Member States, and occasionally even within different departments of the same Member State’s revenue authority, create a number of practical issues, including:

- Double taxation or double non-taxation.
- The increased administrative burden of having to register for and charge VAT in another Member State. (This affects both businesses and tax authorities.)
- Compliance difficulties with setting up VAT accounting systems and recording and reporting transactions in multiple Member States. It is difficult for businesses to access the local VAT rules of all 28 Member States. The lack of a central location for accessing these rules in a common language impedes even the best efforts by businesses to comply. This is one reason why business generally, and TEI specifically, supports the creation of a centralised EU web portal housing this information.
- Confusion in the marketplace and possible distortions of competition that result from one supplier treating a particular service according to the general place of supply rule in Article 44 of the VAT Directive and another supplier treating the same service according to Article 47 of the VAT Directive.



- The expense of incurring foreign VAT and bearing the cash-flow cost of having to submit EU refund requests or, in some cases, bearing an absolute cost where a refund is not available (*i.e.*, where reciprocity rules preclude a claim).
- Exposure to penalty and interest assessments for applying an incorrect treatment when the application of the rules is not clear.

Suggested Areas of Focus for the Explanatory Notes

The Implementing Regulation clarifies the definition of immovable property and the connection necessary for a service to be sufficiently connected with immovable property for purposes of determining the VAT place of supply. While the Implementing Regulation is a welcome step forward compared to the somewhat imprecise text of Article 47 of the VAT Directive, there remains a need for further clarification of the rules to aid in their consistent implementation across all Member States. To be most effective, the rules must allow businesses to administer them in a robust, scalable, and repeatable way that will permit automation within enterprise resource planning (“ERP”) systems. If the rules cannot be easily explained in a business context, businesses will continue to face significant challenges in meeting their compliance obligations.

1. Article 13b of the Implementing Regulation – Definition of Immovable Property

Applying the VAT Directive to supplies of services connected with immovable property is a two-step process. First, it must be determined whether the underlying property is “immovable property.” Second, there must be a “sufficiently direct connection” between that immovable property and the services being rendered. The Implementing Regulation addresses each of these steps separately in Article 13b, and Articles 31a and 31b, respectively.

Article 13b describes the types of property treated as “immovable property” for purposes of the VAT Directive. While additional description is provided, a number of the words and concepts within Article 13b would benefit from further clarification.

A. Article 13b(b)

Article 13b(b) states that immovable property includes “any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved.” (Emphasis added.) The meaning of the term “construction” in this context is ambiguous and should be clarified. Construction generally refers to any major property development that does not qualify as a building (*e.g.*, civil engineering work, such as the construction of roads, bridges, airfields, harbours; installation of pipes for gas, water, sewerage; etc.). Conversely, “construction” does not commonly include items of equipment that are fixed to the ground for a temporary purpose or for the better use of the equipment itself (and not to make a lasting improvement to a building or construction). These clarifications would be welcome additions to the Explanatory Notes.



B. Article 13b(c)

Under Article 13b(c), immovable property includes “any item that has been installed and makes up an integral part of a building or construction without which the building or construction is incomplete.” (Emphasis added.) While this provision goes on to list examples of items that are integral to a building, crafting a more generally applicable framework for determining whether an item is “integral” would greatly assist businesses in applying this provision.

A suitable test for judging whether an item is “integral” is whether its installation helps complete the building or construction according to the structural features ordinarily associated with a building or construction. This is in contrast to items of equipment that fulfill a specific task or function independent of the building or construction, but happen to be located within a building or construction. Their purpose, even if physically attached to immovable property, is not for the better use or enjoyment of the immovable property. Instead, these items of equipment have their own purpose reflected often by the fact that, if removed, they can be used elsewhere and hence have a value distinct from the immovable property.

C. Article 13b(d)

If any item, equipment, or machine is permanently installed in a building or construction and it cannot be moved without destroying or altering the building or construction, this item, equipment, or machine is deemed to be immovable property for purposes of determining the place of supply. Understanding the meaning of “permanently” and “destroying or altering” will be critical to the application of this provision, as both conditions must be satisfied for this rule to apply.

Equipment and machinery generally have useful lives shorter than the buildings in which they are used. When those items are installed, they are often secured to prevent them from moving, to aid the performance of the plant or equipment, or for safety reasons. For example, a machine could be bolted to the floor of a factory to keep it from shifting during production. The mere fact that an item of equipment or machinery is located within immovable property and is physically attached to it, however, does not by itself mean that the item is immovable property since it serves a purpose distinct from the immovable property. The Implementing Regulation does not provide a bright-line test for identifying the level of attachment at which an item will be viewed as permanently installed. Additional guidance would be helpful for applying these concepts.

Even items permanently installed in a building or construction are not deemed part of the building or construction under Article 13b(d) unless their removal would destroy or alter the building or construction. The concepts of destruction and alteration differ substantially. While “destruction” is commonly understood to mean ruining something or causing it to no longer exist, alteration is a much less drastic change. Taken to the extreme, an alteration could include simply attaching or removing an item from a building or construction. The gap



between these two concepts must be bridged to provide meaningful guidance for practical and uniform application.

An objective test derived from normal business processes or information would be helpful for determining whether something is movable or immovable in this context. TEI would be happy to assist in crafting such a test.

2. Article 31a of the Implementing Regulation – Defining a “Sufficiently Direct Connection”

For supplies involving property that meets the definition of “immovable property” under Article 13b, the next step is to determine whether the services being provided have a “sufficiently direct connection” with that immovable property to trigger the application of Article 47 of the VAT Directive. Paragraph 1 of Article 31a of the Implementing Regulation provides two general guidelines for determining whether that connection exists:

- (a) where they are derived from an immovable property and that property makes up a constituent element of the service and is central to, and essential for, the services supplied;
- (b) where they are provided to, or directed towards, an immovable property, having as their object the legal or physical alteration of that property.

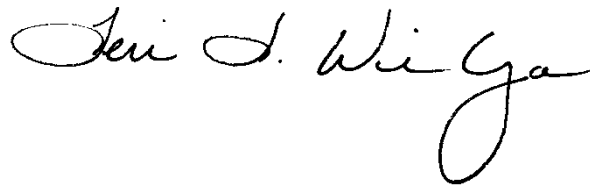
To better inform that analysis, paragraphs 2 and 3 of Article 31a list several examples of services falling within and without those two general guidelines. Those examples, however, do not specify the guideline in Article 31a,1 to which they relate. This lingering ambiguity makes it difficult to understand the scope and intended application of each general guideline. It would be helpful to confirm for each example in paragraph 2 whether it falls under Article 31a,1(a) or Article 31a,1(b). Without associating those examples, both businesses and tax administrations will struggle to develop a uniform application of these rules across all Member States.

Conclusion

TEI appreciates the opportunity to suggest issues to be addressed by the Commission in the Explanatory Notes to the Implementing Regulation. Including these points in that process will improve the application of the Implementing Regulation for businesses and Member States throughout the EU, making the common market more competitive and reducing the administrative complexity for VAT. The Institute looks forward to working with the Commission as it develops additional guidance and to participating in a workshop later this year to provide additional feedback.

TEI's comments on the Explanatory Notes were prepared by the Institute's European Indirect Tax Committee, whose chair is Jean-Francois Turgeon. If you have any questions about TEI's comments, please contact Mr. Turgeon at +41 228 494 342 Turgeon_Jean-Francois@cat.com, or Daniel B. De Jong of the Institute's legal staff at +1 202 638 5601 or ddejong@tei.org.

Respectfully submitted,
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