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DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value added tax

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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 855

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**United Kingdom and Belgium**
REFERENCES:	**Articles 32, 33 and 34**
SUBJECT:	**Distance selling**

1. INTRODUCTION

The United Kingdom submitted a request to the VAT Committee regarding distance sales of goods and, in particular, regarding the place of supply of sales for which the cross-border transport of the goods to the consumer is ensured not directly by the supplier but by a third party.

In a separate request, Belgium also invited the VAT Committee to address the issues raised by the current application of the provisions on distance selling and, in particular, the interpretations of the terms 'goods dispatched or transported by or on behalf of the supplier' under Article 33 of the VAT Directive[1].

The questions and analyses submitted by the United Kingdom and Belgium are attached in annex. Since they relate to the same topic, they will be examined together in this Working paper.

2. SUBJECT

The distance selling arrangements are defined under Articles 33 and 34 of the VAT Directive, Article 33 introducing a derogation to the rule on supplies of goods with transport laid down in Article 32 of the VAT Directive.

Article 32 of the VAT Directive is based on the origin principle and provides that for goods supplied with transport, 'the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins'. The wording of the provision specifies that the goods can be dispatched or transported 'by the supplier, or by the customer, or by a third person'. Therefore, the rule applies regardless of whether the transport is carried out by one of the parties to the sale contract or by a third party. This rule has been in force since the adoption of the Sixth VAT Directive[2], but was combined until 1993 with the exemption upon exportation and taxation at importation also for supplies between EU Member States.

As from 1993, Council Directive 91/680/EEC[3] added provisions on distance selling, in order to address some issues linked with the creation of the Internal Market. In this context, Articles 33 and 34 of the VAT Directive together provide that, by way of derogation from Article 32 and under certain conditions, the place of supply of goods supplied with transport 'shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends', in other words – for supplies qualifying as distance sales for VAT purposes, the place of supply shall be deemed to be in the Member State of destination of the goods.

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1 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

2 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1).

3 Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ L 376, 31.12.1991, p. 1).

In order to avoid the administrative burden for the suppliers associated with the taxation of supplies of goods in the Member State of destination (VAT registration in that Member State and fulfilment of all obligations there), it was decided that it would only be obligatory to apply this rule once a fixed threshold is reached in the Member State of destination (EUR 35 000 or EUR 100 000, depending on the decision taken by that Member State[4]). However, the supplier was given the possibility to opt for taxation in the Member State of destination as from the first supply, recognising by this that VAT, being a consumption tax, should accrue to the Member State of destination.

Unlike Article 32 of the VAT Directive that covers goods transported by the supplier, by the customer or by a third person, it stems from the wording of Articles 33 and 34 that these provisions on distance selling apply only insofar as the goods are 'dispatched or transported by or on behalf of the supplier'.

As a result, depending on whether or not this and other conditions set out under Articles 33 and 34 of the VAT Directive are met, the Member State which has the taxing rights over a given supply of goods will be either the Member State where the transport ends (when all the conditions for distance selling are respected) or the Member State where the transport begins (when one or several of these conditions are not met).

The consequences of these rules are that depending on whether their sales fall under the scope of Article 32 or under the scope of Articles 33 and 34 of the VAT Directive, suppliers have to, first, declare and pay the VAT due on the supply either in the Member State of origin or in the Member State of destination and, second, they have to apply the corresponding VAT rate which can be different in the Member State of origin than in the Member State of destination.

The UK and Belgian tax administrations have thus noticed that some business arrangements have been put in place in view of splitting the supply of the goods from their transport and delivery with a view to avoid accounting and paying VAT in the Member State of destination of the goods.

By legally separating the supply and the transport, vendors consider that the transport of the goods is not made 'on behalf of the supplier' as required by Article 33 of the VAT Directive. In turn, they argue that the supply of goods does not fall under the scope of the distance selling provisions and should therefore be subject to VAT in the Member State of origin of the goods, at the respective VAT rate.

Based on their tax audits experience and observations, the UK and Belgian delegations invite the VAT Committee to take a position on the interpretation to be given to the terms 'dispatched or transported by or on behalf of the supplier' under Article 33 of the VAT Directive.

3. THE COMMISSION SERVICES' OPINION

In order to clarify the meaning of the terms 'dispatched or transported by or on behalf of the supplier' as provided for under Article 33 of the VAT Directive, it is necessary to

[4] A majority of Member States retain a threshold of EUR 35 000. See Distance selling of goods - European commission.

recall the background and the objectives of the provisions on distance selling included in the VAT Directive.

As already mentioned, the provisions on distance selling were introduced by Directive 91/680/EEC in 1993. At this time, the rules of the EU VAT system on the place of supply of goods were still based on the origin principle which is reflected in the rule laid down in (the current) Article 32 of the VAT Directive.

The provisions on distance selling were introduced as derogation to the rule of Article 32 of the VAT Directive with the objective of preventing distortions of competition created by the application of the origin principle on cross-border supplies subject to different VAT rates applicable in the Member States. While these risks of distortions of competition at the time were mainly associated with mail-order and limited in their extent, the current widespread use of the internet for distance selling and purchasing has significantly increased the amounts of VAT revenues that can be lost by the Member State of destination if the distance selling provisions are not applied.

In addition to the VAT losses supported by tax authorities, local businesses selling on domestic markets where higher VAT rates apply are penalised by the distortions of competition created by their competitors established in Member States applying lower VAT rates and selling goods to final consumers in other Member States without applying the distance selling rules.

In this context, the Commission services consider that Articles 33 and 34 of the VAT Directive could be read in two different ways.

A literal interpretation would lead to strictly consider that the transport must be taken in charge by the supplier or on his behalf in order for taxation at destination to apply. If, therefore, the contract with the transport company is concluded by the client himself and the client in case of problems with the transport can only take action vis-à-vis the transporter (and not against the supplier), Articles 33 and 34 of the VAT Directive could not apply because the supplier is not responsible to the client for the goods arriving in a good state. Under this interpretation, it would be considered that it is not because the supplier has recommended the transporter to his client that the transport can be considered as having been made on his behalf.

This option has the advantage of being very straightforward when looking strictly at the legal situation and at the contractual relationships but it also implies that it would be quite easy to circumvent taxation of the goods at the place of destination by arranging the contracts according to the desired result (taxation in the Member State of departure rather than in that of arrival of the goods).

Such arrangements could be dealt with in the light of the "abuse of law" test as established by the Court of Justice of the European Union (CJEU) in *Halifax*[5]. There are two elements in that test:

- whether the arrangements lead to a result against the purpose of the VAT Directive rules; and

[5] CJEU, judgment of 21 February 2006 in case C-255/02 *Halifax and Others.*

- whether the arrangements have as their main purpose to lead to that result, and any other "economic" reasons are non-existent or residual[6].

As approach, this implies an assessment on a case-by-case basis that will be subject to the view of the national judge in each case.

A broader interpretation could however be envisaged, implying that Articles 33 and 34 of the VAT Directive must be applied so as to achieve the objectives for which they were designed, namely to ensure that VAT receipts accrue directly to the Member State of consumption and to prevent distortions of competition between Member States[7]. It would imply that, for the application of the distance selling rules, not only the contractual arrangements between the supplier, the transporter and the customer have to be taken into account but also, and more importantly, the economic reality.

In this regard it should be noted that in a statement to the minutes agreed at the time of adoption of Directive 91/680/EEC, the Council and the Commission made clear that 'the special arrangements for distance selling will apply in all cases where the goods are dispatched or transported, either indirectly or directly, by the supplier or on his behalf'.

This declaration clarifies that goods can be seen as having been dispatched or transported 'on behalf of the supplier' not only in situations where the supplier directly intervenes in the transport or dispatch but also in situations where he is indirectly associated with the transport of the goods to the customer.

Also, it results from the comparative reading of Article 32 of the VAT Directive on the one hand and Articles 33 and 34 of the VAT Directive on the other, that while Article 32 explicitly lists and covers all sorts of transport irrespective of whether the dispatch or transport is carried out 'by the supplier, or by the customer, or by a third person', Article 33 concentrates on situations where the transport is carried out by or 'on behalf of the supplier' excluding from its scope only the situation where dispatch or transport is carried out by or on behalf of the customer.

This second approach implies that, for the application of the distance selling arrangements, regard must be had to the economic reality and not only the contractual arrangements between the supplier, the transporter and the customer. It would allow their application both where the supplier is directly involved in the transport or dispatch of the goods and where he is indirectly involved.

Indirect involvement in the transport or dispatch of the goods could be considered present in situations where the supplier is involved with the company providing the transport service (e.g. by actively promoting, suggesting or recommending the transport company to the customer), even though the supplier does not as such conclude a contract with the transport company for the transport nor bears the cost of transportation or assumes any responsibility for transporting the goods to the client. According to this broader interpretation, under those specific circumstances, the goods should still be considered to be delivered 'on behalf of the supplier', falling therefore in the scope of Articles 33 and 34 of the VAT Directive.

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6 CJEU, judgment of 21 February 2008 in case C-425/06, *Part Service.*

7 In this respect, particular attention should be made to recital 11 of the VAT Directive.

This question has far reaching implications for the good functioning of the Internal Market and the Commission services therefore consider that it is important to have an exchange of views in the VAT Committee on the distance selling rules with a view to reaching a common understanding on the scope to be given to those rules.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on the questions raised by the United Kingdom and Belgium, and on the observations made by the Commission services. They are in particular requested to give their opinion on the two approaches examined.

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ANNEX 1

Question from the United Kingdom

Subject: CROSS BORDER B2C SUPPLIES OF GOODS – DISTANCE SALES

Issue

The UK has found that some businesses have adopted arrangements to circumvent the distance sales provisions in the VAT Directive 2006/112/EC (the Directive) in order to account for tax at the rate due in the Member State in which the goods are dispatched rather than at the rate due in the Member States to which the goods are delivered.

Purpose

The UK seeks the views of the Commission and the Member States about these arrangements, in particular whether VAT should be accounted for in the Member State of dispatch or the Member State of delivery.

Law

The relevant legislation is set out in Articles 32, 33 & 34 of the Directive.

By virtue of Article 32 goods dispatched or transported – whether by the supplier, customer or a third party – are deemed to be supplied at the place where they are located at the time when their dispatch or transport to the customer begins. Accordingly, intra-EU retail supplies of goods to non-business customers are taxed in the Member State from which the goods are dispatched.

However, by way of derogation from that Article, Articles 33 and Article 34 together provide that where the value of such supplies exceeds the appropriate threshold (in Article 34) that has been adopted in the Member State in question, the place of supply shifts to the Member State to which the goods are delivered.

In particular, a requirement for a distance sale under Article 33 is that the goods are "dispatched or transported by or on behalf of the supplier" which has the effect of making the supplier responsible for the delivery.

Background

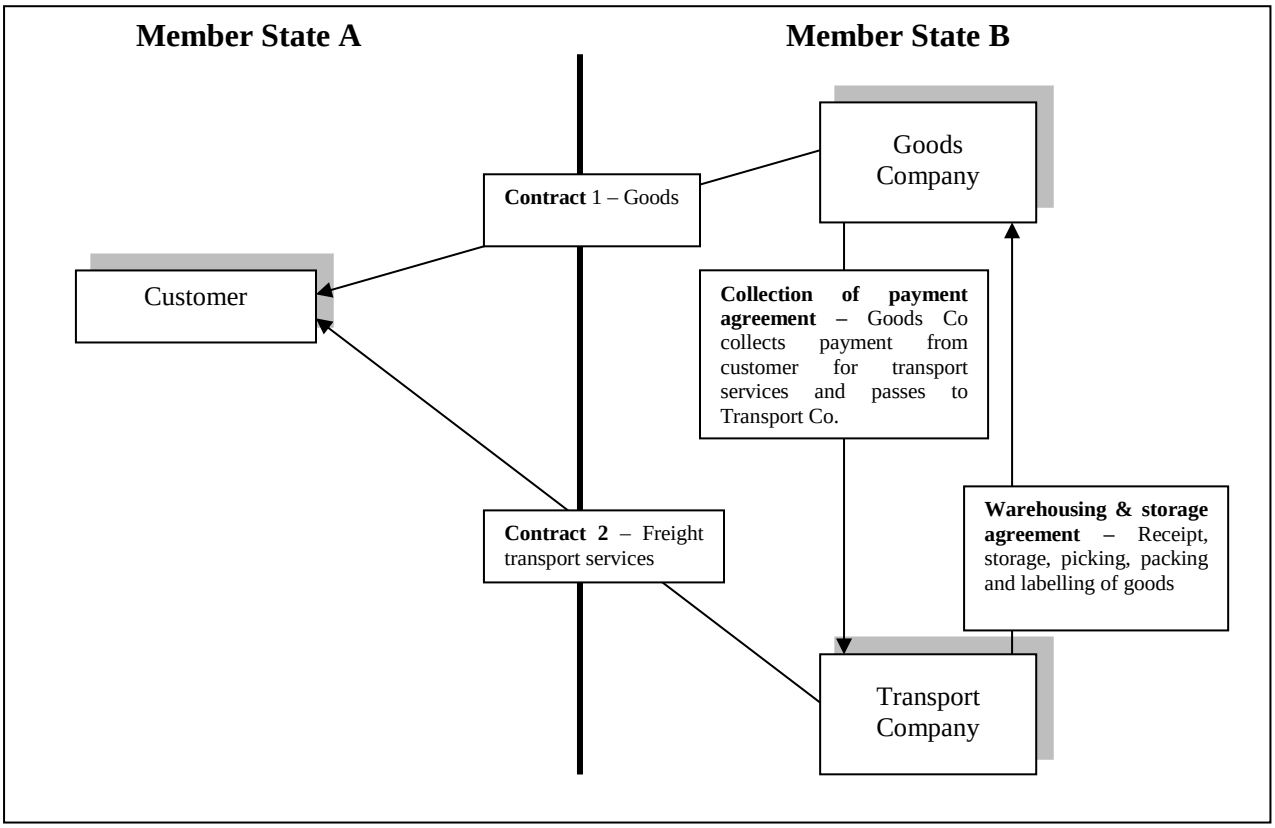
This regime for distance sales was aimed at preventing distortion of competition which would otherwise have been caused by mail-order and similar businesses establishing in Member States with low VAT rates in order to make sales to customers throughout the Community at those same low rates. The development of internet trading has seen a dramatic increase in this form of trade in recent years.

The arrangements

The UK is aware that some businesses have attempted to circumvent the above rules. Although the details vary slightly from case to case, the overall focus of the arrangements

is on splitting the supply of the goods from their subsequent delivery. Thus, one legal entity supplies the goods and another legal entity delivers them.

All of the cases investigated by the UK involve internet sales. When customers order goods from another Member State on the internet, they are given the options of collecting the goods in person; arranging delivery themselves or they can request on the supplier's website delivery by another legal entity (supposedly under a separate contract). Often, but not always, this transport company is associated with the supplier. In reality, the customer will always request delivery by the transport company. On this basis, the supplier maintains that his supplies are not subject to the distance sales provisions and that the normal rules apply. Accordingly VAT is due at the low rate of the Member State of dispatch and not at the UK standard rate of 20%.



UK's view

The UK considers that ultimately the customer is ordering goods from the supplier and wants those goods delivered to him. The arrangements put in place between the two legal entities are merely an alternative way in which the supplier has his goods delivered to the customer. The introduction of a third party for the purposes of delivering the goods does not prevent those goods from being "dispatched or transported by or on behalf of the supplier". Consequently, the UK considers that VAT is due in the Member State of delivery.

Although some businesses are benefitting from the differences between the standard rates of VAT, and from reduced or zero rates in the member state of dispatch, we believe that the main motivation for most businesses adopting these arrangements is to avoid the very significant burden of potentially having to register for VAT in multiple Member States.

To date, the UK is aware of a small number of businesses – both UK businesses selling to consumers in other Member States and businesses in other Member States selling to UK consumers – that have tried to argue that their supplies are outside the scope of the distance selling rules. This seems to suggest that the arrangements are at a relatively early stage of being adopted.

However, UK based sellers are already complaining that competition is being distorted as a result of these arrangements and the growth of cross-border internet trading means that more businesses are likely to be tempted to adopt the same approach including, perhaps, the bigger operators.

Finally, the UK observes that the report of the Commission Expert Group on Taxation of the Digital Economy considered the regime for distance sales, noted in particular the burdensome requirement for businesses to register for VAT in multiple Member States and made certain recommendations.

Question

Do the Commission and Member States agree that tax is due or should be due in the Member State to which the goods are delivered?

ANNEX 2

Question from Belgium

Subject: Cross border B2C supplies of goods – distance selling rules – transport by or on behalf of the supplier (Articles 32-34 Directive 2006/112/EC)

The Belgian VAT authorities would be grateful if the Commission and delegations of the VAT Committee would share their views on the following question on the application of the special place of supply rules in articles 32, 33 and 34 of the Directive 2006/112/EC.

I. THE ISSUE

A supplier established in Member State 1 supplies goods to private customers in other Member States, such as Belgium.

The supplier separates the supply of the goods from the transport of the goods to the private customer established in the other Member State and brings the customer into contact with a specific transport company.

Since the transport contract is formally concluded between the transport company and the private customer and the transport charges are formally paid by the private customer, the parties involved claim that the so-called "distance selling"-rules are not applicable to the supplies. As a result, the supplies of goods concerned are systematically taxable in the Member State of departure of the goods.

II. RELEVANT EU-LEGISLATION

The relevant legislation is set out in Articles 32-33-34 of directive 2006/112/EC.

- *Place of supply = the place where the dispatch or transport to the customer begins*

By virtue of Article 32 goods dispatched or transported – whether by the supplier, customer or a third party – are deemed to be supplied at the place where they are located at the time when their dispatch or transport to the customer starts. Accordingly, intra-EU supplies of goods to non-business customers are taxed in the Member State from which the goods are dispatched.

- *Derogation: the place of supply = the Member State to which the goods are delivered (distance selling-rule).*

However, derogating from that rule, the articles 33 and 34 together provide that where the value of such supplies exceeds the appropriate threshold (in Article 34) which is applicable in the Member State in question, the place of supply shifts to the Member State to which the goods are transported.

In particular, in order for Article 33 to apply, and apart from other requirements, the goods need to be "*dispatched or transported by or on behalf of the supplier*", triggering his responsibility for the delivery.

However, goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier are excluded from this special scheme (article 33, paragraph 1, (a) and article 34, paragraph 1 of the Directive.

III. LEGAL ANALYSIS

- Background and ratio of the distance selling rules

The distance selling rules provided in Article 33 and 34 of the directive 2006/112/EC aim at preventing distortion of competition between businesses established in Member States with low VAT rates and businesses established in other Member States. Without such a scheme the application of the rule laid down in article 32 of the Directive would allow mail-order and similar businesses to establish in Member States with low VAT rates in order to make sales to customers throughout the EU at those same low. The growth of internet trading over the recent years has increased the potential risk for circumventing the rules on distance selling.

- Commercial and legal arrangements put in place

Even though the transport contract is formally concluded between the transport company and the private customer and the transport charges are formally paid by the private customer, audits have revealed systematically one or more of the following elements in each of the cases of B2C-sales into Belgium:

– The transport company has a longstanding commercial relationship with the supplier and almost all (if not all) goods sold by the supplier concerned are transported to the customers by that transport company.

– The supplier suggests, recommends or proposes the transport company (either via the website or orally) to the private customer, who does not know the latter and concludes a contract with that specific transport company in almost all (if not all) cases;

– The supplier gives concrete information and indications with respect to the transport directly to the transport company(especially in cases where the nature of the goods is such that a specialized transport company needs to be involved);

– Commercial documents forwarded by the supplier to the customer explicitly stating that the transport costs are included in the contractual specifications but will be deducted once the order is received because they will be charged directly to the client by the transport company "*in order to be able to apply the VAT rate of the Member State of departure of the goods on the supply*".

In view of the number of cases encountered, and taking into account the factual characteristics of these cases, it is obvious that businesses have structured their legal and commercial relationships in such a way as to avoid the application of the distance selling rules. The parties involved claim that, as soon as the transport company is contracted by the private customer who bears the transportation costs, the transport is not carried out "by or on behalf of the supplier". As a result, one of the conditions of the distance selling arrangements is not fulfilled and the distance selling rules are not deemed to be applicable so that the supply will be taxable in the Member State of departure of the goods.

Consequently, these suppliers can not only avoid VAT obligations in the Member State of arrival of the goods, but they are also able to offer to their private customers the advantageous VAT rate in the Member State of departure of the goods instead of the disadvantageous VAT rate in the Member State of arrival of the goods (either because the normal VAT rate in the Member State of departure of the goods is lower or because the goods are not subject to the standard VAT rate there).

- Proposed approach

The Belgian VAT authorities consider that the condition, in the distance selling rules, that the transport has been carried out "on behalf of the supplier" should be interpreted as covering all situations where the supplier is in some way involved in the transport service (e.g. by actively promoting, suggesting, recommending,… the transport company to the customer), even though the supplier does not conclude the contract with the transporting company nor bears the transportation costs. Under those specific circumstances the goods should still be considered to be delivered "by or under the directions of the person who supplies them".

In this respect, the issue of proof is crucial. Indeed, as the contract is often concluded by the private customer who bears the transportation costs, it is not always straightforward to prove that the supplier explicitly recommended the transporter to the buyer and that the transport service should therefore be deemed to be carried out "on behalf of the supplier".

Even though specific rules such as the distance selling rules would normally warrant a strict interpretation of the eligibility conditions, it should be noted that such a strict interpretation would undoubtedly reinforce the existing tendency amongst operators to put arrangements in place to circumvent or abuse the existing distance selling rules, especially in a context of expanding mail order sales over the internet. As a result of the systemic circumvention of the distance selling rules, the purpose of these rules would be totally frustrated and entire trade flows would be shifted towards Member States with the lowest VAT rates for any particular product, creating undesirable and unacceptable distortions of competition. In other words, a strict interpretation of the distance selling rules would remove any kind of useful effect of these rules and in fact almost render them inoperative in practice.

IV. QUESTION

Do the Commission and Member States agree that the condition "by or on behalf of the supplier" for the application of the distance selling rules in articles 33 and 34 of the directive 2006/112/EC should be interpreted as covering any kind of involvement by the supplier in the transport, such as promoting, suggesting, recommending,… a transport company to the customer?