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INDIRECT TAX NEWS

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SWITZERLAND

FEDERAL COUNCIL MAKES CHANGES IMPACTING FOREIGN FIRMS DELIVERING GOODS IN SWITZERLAND

The Federal Council of Switzerland recently passed two major changes to the Swiss VAT decree, the first of which will affect foreign firms beginning 1 January 2015. This provision is an interim solution that will apply until the Swiss VAT law is amended (likely in the first half of 2015).

Currently, the delivery of certain types of goods within Switzerland is subject to the reverse charge mechanism. However, from 2015, this concession will be removed and foreign firms will be required to register for VAT purposes in Switzerland.

This change is expected to affect businesses in the construction and energy sectors and also those leasing/hiring goods or providing maintenance work in Switzerland. Foreign firms that generate at least CHF 100,000 in Switzerland are subject to Swiss VAT when they deliver certain types of goods within the Swiss territory, just as are local firms. This means the foreign firm must register as a regular VAT payer in Switzerland and must have a Swiss UID number.

For example, a French company which is not VAT registered in Switzerland, builds kitchens in Switzerland using materials purchased in Switzerland by the clients. The kitchen materials delivered by the Swiss supplier is a standard delivery of goods, subject to the 8% Swiss VAT to be charged by the supplier to the client. This will not change as from 1 January 2015.

However, the building of the kitchen is a specific delivery of goods, and not a service from a Swiss VAT perspective. Currently, this is subject to the reverse charge by the client (if various conditions are met) but from 1 January 2015, if such specific deliveries of goods in Switzerland by the French company are equal to or exceed CHF 100,000, the French company will have to register in Switzerland.

Once the VAT law is formally amended, all firms, regardless of their origin, will generally be subject to taxation in Switzerland if, in their global business, they generate total revenue of at least CHF 100,000.

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EDITOR'S LETTER

Dear Readers,

Welcome to the final edition of Indirect Tax News for 2014.

It's encouraging to see that there has been a significant upturn in the global economic climate since this time last year and that here in Ireland, after 6 years of a contracting economy we are witnessing an active construction sector, increases in real estate values, renewed consumer confidence, and significantly reduced unemployment levels.

The improved economic climate has resulted in a corresponding increase in demand for Indirect Tax related advisory services as VAT, GST, and Customs Duties all arise as a consequence of increased commercial activity.

In this regard, BDO's increased focus on ensuring enhanced cooperation both commercially and technically across the 151 Countries in which we operate has ensured that we are well placed to help our clients and contacts to prosper during the good times, so please reach out to your local contact if we can assist you in any way.

As always, Indirect Tax News is focussed on providing you with a useful snapshot of evolving indirect tax related developments in the different countries in which our contributors are based and if you feel any of the issues addressed are of specific interest to you and you require additional detail, please feel free to reach out either directly to the writer of the article or to your local BDO indirect tax advisor.

If you have any thoughts on making this publication more user friendly or would like to have an article published about any specific matter, please feel free to email me at ifeerick@bdo.ie

Finally, as this is the last Indirect Tax News for 2014 I would like to take the opportunity to wish you and your families a safe and happy Christmas break as well as good health and happiness in 2015.

Best wishes from Dublin!

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AUSTRALIA

AUSTRALIAN GST: INBOUND TOUR OPERATOR FAILS IN BID TO APPEAL TO HIGH COURT

A long-running dispute between ATS Pacific Pty Ltd (the Taxpayer) and the Commissioner of Taxation (the Commissioner) over the correct GST classification of supplies made by an Inbound Tour Operator (ITO) has finally been concluded.

At issue on appeal to the High Court was whether the contractual relationships entered into between the Taxpayer and non-resident travel agents (NRTA) resulted in the Taxpayer acting in the capacity of a principal or agent when arranging and invoicing the NRTA for various Australian tour components comprising an overall Australian tour package sold to non-resident tourists.

In dismissing the Taxpayer's appeal, the High Court noted that "this case turns on the characterisation, for GST purposes, of particular commercial arrangements. We are not persuaded that it raises any issue of general importance sufficient to warrant a grant of special leave to appeal."

Despite being victorious in the High Court, on 12 November 2014 the Commissioner issued an updated version of the *ATS Pacific Pty Ltd* Decision Impact Statement confirming that it is still possible for an ITO to be acting in the capacity as agent for NRTA thereby resulting in the overall arranging service or margin qualifying for GST-free treatment. In other words, the outcome will depend on the nature of the contractual relationship between the ITO and NRTA.

BDO Sydney currently acts for a number of affected ITOs and has also been engaged by the top inbound tourism association (ATEC) to assist its members in preparing a class ruling on the correct characterisation of supplies made by ITOs to provide certainty on a going forward basis.

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BELGIUM

ADVANCE INVOICES – FINAL REGIME AS FROM 1 JANUARY 2015

The transitional period (and its administrative tolerances) regarding advance invoices comes to an end on 1 January 2015. The Belgian VAT Authorities have published the new rules and amended tolerances in their Administrative decision ET.126.003 of 7 October 2014.

An advance invoice is the request for payment for a part or the full price of the transaction, prior to the taxable transaction or the payment.

From 1 January 2013, the issue of an advance invoice no longer generates a VAT taxable event, implying that no VAT could be deducted on the basis of an advance invoice.

Supplies of goods and services subject to Belgian VAT

For local supplies of goods and services that are subject to Belgian VAT, the supplier will have two options. On a transaction-by-transaction basis, the supplier can choose between the normal procedure, or apply the new administrative tolerance.

Normal procedure

The legally foreseen procedure implies that the supplier issues a "request for payment", which does not mention any VAT, the applicable VAT rate nor the reason for a VAT exemption. The VAT only becomes due at the moment the supply takes place or when the payment is received, and a proper invoice needs to be issued ultimately on the 15th day of the following month.

Administrative tolerance

However, the Belgian VAT authorities will allow the supplier to issue an advance invoice charging Belgian VAT, provided that this invoice mentions the presumed date of the taxable event (i.e. the payment date or delivery date), unless the invoice is issued within a time-frame of 7 days prior to the taxable event. Provided all other mandatory invoicing requirements are met, this invoice can then be considered as a proper VAT invoice and no other documents need to be issued.

The supplier has the option of reporting this invoice for VAT purposes in the period of issuing of the invoice or alternatively in the VAT return relating to the period during which the VAT becomes due.

The customer on the other hand is entitled to deduct the VAT from the moment the invoice is issued by the supplier. However, the client should take into account a so-called "window of three months". If after three months from the end of the month during which the invoice was issued, the taxable event has not taken place, the client is obliged to regularise the initially deducted input VAT.

Other transactions

The tolerance outlined above can also be applied to transactions subject to a local reverse charge mechanism. Consequently, the advance invoice can be used to account for the VAT due and also to deduct the VAT at the same time under certain conditions.

It is important to note though that the aforementioned tolerance is not applicable to intra-Community transactions (goods and services), as the Belgian VAT Authorities cannot allow a discrepancy in the framework of exchange of information between the different Member States.

Special cases

A number of special rules have also been foreseen in case of corrections, bankruptcy and VAT reimbursements.

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CHILE

VAT REFORM ON REAL ESTATE TRANSACTIONS

The tax reform introduced by Law N° 20.780 of 29 September 2014, along with modifications to the Income Tax Law, have brought changes to indirect taxes. Among the changes were the following with respect to VAT on the sale of Real Estate.

From 1 January 2016 the sale of real estate will be subject to VAT, whoever the seller is (the concept of seller implies a habitual seller as defined by law). However, the sale of land, the sale of houses with housing subsidies, and sales due to execution of mortgage guarantees are excluded.

The sale of real estate will also be exempt from VAT as long as the following two conditions are met:

1. The real estate building permission under the General Building and Planning Act was granted by 1 January 2016, and
2. The sale is carried out within a year from 1 January 2016.

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CZECH REPUBLIC

CHANGES TO THE VAT LAW

New Reduced VAT Rate

As of 1 January 2015 a new, second reduced VAT rate will be applicable on certain supplies. The standard VAT rate of 21% and the reduced VAT rate of 15% remain unchanged. The new 10% VAT rate will apply to the following supplies:

- Medicines and pharmaceuticals
- Printed books
- Essential child nutrition
- Special foods for allergic persons.

Given the rate change, businesses operating in the Czech Republic should review their contracts and product portfolios to determine whether their supplies will be subject to the new reduced rate and, if so, they should implement changes in their accounting systems.

Changes in the Domestic Reverse Charge

From 1 January 2015 the following items will be subject to the domestic reverse charge rules where the supply exceeds CZK 100,000:

- Mobile phones, tablets
- Integrated circuit devices (for example, central processing units, microprocessors)
- Grains, cereals
- Raw and semi-finished metals, including precious metals.

In addition, the domestic reverse charge is also applicable to the following items regardless of the value of their supply:

- Construction services
- Investment gold
- Certain types of waste or scrap
- Emission allowances
- Supplies of immovable property when the taxpayer decided to apply VAT.

A special VAT report also has to be submitted to the Czech Tax Authority in respect of these commodities.

Extension of Definition of Taxed Immovable Property

The sale of a building site in the Czech Republic has always been subject to VAT. The recently passed VAT legislation extends the definition of a building site. Beginning 1 January 2015, undeveloped plots of land are also considered a building site if any construction works were performed there (for example, addition of infrastructure, electricity connection) or if any administrative steps were taken with respect to planned construction works on the site (for example, if an application for construction works approval was submitted).

New VAT Summary Control Report

With effect from 1 January 2016, the Czech Ministry of Finance will introduce a new VAT summary control report that Czech VAT payers will have to submit electronically to the Tax Authority along with their VAT return. The VAT summary will have to include a list of all taxable supplies between Czech VAT payers, in other words, taxable supplies subject to Czech VAT or supplies that are subject to the local reverse charge mechanism. The VAT summary will have to include information such as the VAT registration number, invoice numbers, the dates of taxable supplies, the tax base, the applicable VAT rate, and the amount of VAT in CZK.

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EUROPEAN UNION

COURT OF JUSTICE OF THE EUROPEAN UNION - ROUND UP OF RECENT CASES ON CROSS BORDER TRADE

In recent months, the Court of Justice of the European Union (CJEU) has issued three judgments with potential to affect cross border traders throughout the European Union, and also those from outside who do business with EU Member States.

The practical effect of these decisions has yet to trickle down into the courts and official guidance in the individual Member States, but businesses that think they might be affected by the issues raised should ask a BDO VAT specialist for advice.

Skandia America – non EU companies with branches in EU VAT groups

The CJEU has ruled that services supplied from a head office to its overseas branch are subject to VAT when the branch is a member of a VAT group. Multinationals making exempt supplies face increased VAT costs and all multinationals may have higher VAT compliance costs.

Until now, charges between head offices and their overseas branches have been ignored for VAT purposes as the courts have consistently ruled that it is not possible to make a taxable supply within the same legal entity. Historically, this allowed partly exempt businesses to reduce their VAT costs by importing services via an overseas branch, although a number of EU Member States blocked this through anti-avoidance legislation.

The CJEU's judgment

In the case of *Skandia America Corporation (USA), filial Sverige* (C-7/13) (SAC) the CJEU decided that when an overseas branch is a member of a VAT group registration, it should be treated as if it were a separate entity for VAT purposes. As a consequence of this decision, the provision of services from a head office to its overseas branch, where it is part of a local VAT group, constitutes a supply that falls within the scope of VAT. As a result, the VAT group has a reverse charge VAT liability on costs recharged to the branch by its head office (see illustration).

The court found that SAC's Swedish branch did not operate independently or bear the economic risks from its business activity and so could not be regarded as a taxable person in its own right. However, once the branch was part of a VAT group with other members, it formed part of a single taxable person for VAT purposes and lost its own identity. The supplies made by the head office to the branch (in this case, IT services) could therefore no longer be disregarded as an intra-entity transaction and had to be treated as a supply made to the VAT group.

Impact of the decision

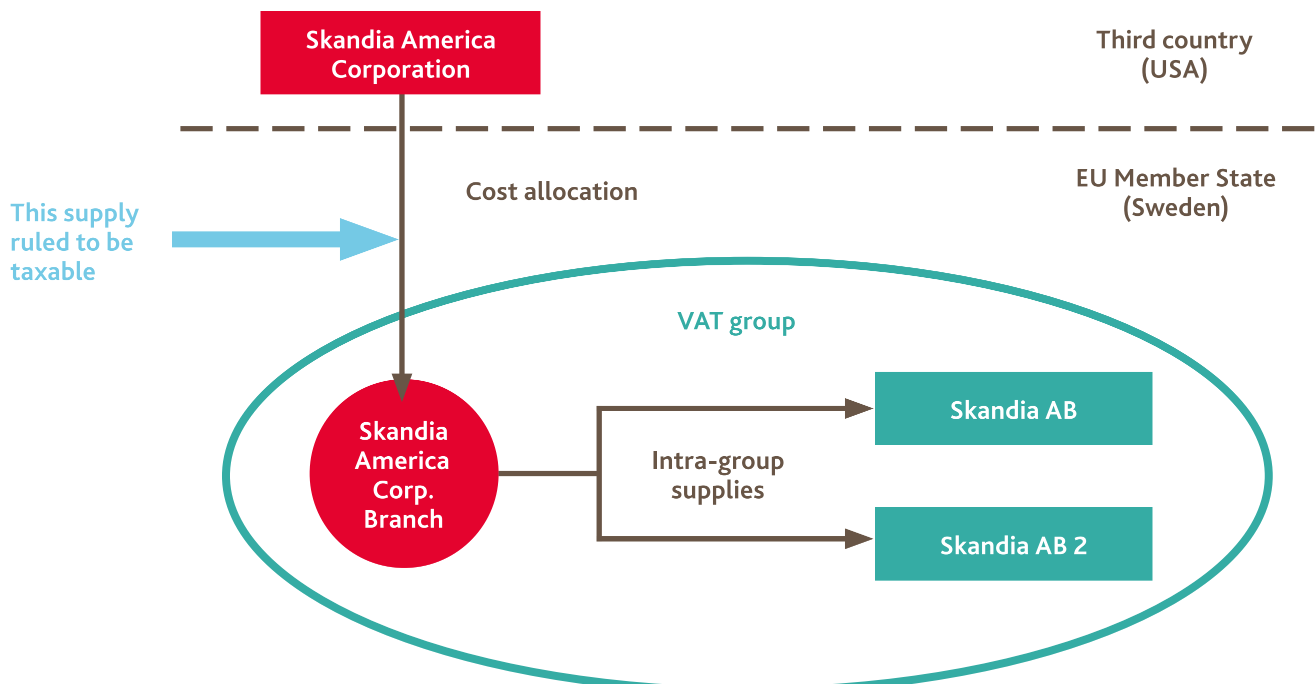
The most profound effect of the decision will be on partly exempt businesses where the head office or branch which is supplying or receiving the supply is VAT grouped. Any additional reverse charge VAT payable will increase VAT costs.

For a fully taxable business, any additional reverse charge VAT which arises should be recoverable as input tax but would create additional administrative burdens as a result of having to determine the correct VAT treatment of each internal charge.

However, the precise impact will vary between Member States. In some, such as the UK, anti-avoidance legislation is already in place to stop businesses using overseas branches to import services into a VAT group registration VAT free. Even so, it is possible that the *Skandia* decision may widen the scope of charges that are affected. In others without such measures in place, it will undoubtedly be necessary for business affected to completely reconsider their methods of importing services from the non EU parent company.

Although the specific facts of this case concern a business headquartered outside the EU, the judgment appears equally applicable to companies whose main business establishment is in the EU. As a result, cross border head office to branch transactions, where either the head office or the branch is in a VAT group, are likely to be seen as "third party" transactions (rather than intra-entity) and so will become liable to reverse charge VAT. Potentially, this could also affect cross border branch-to-branch transactions.

A few Member States have issued statements saying they will spend time considering the ramifications of the decision before changing national law. However, changes of some sort seem inevitable across the whole EU and any business that uses this structure to transfer services between its head office and a VAT grouped branch should take advice on the implications in the Member State where the VAT group is located.



Fonderie 2A – place of supply of goods subject to processing in another Member State

Questions were referred to the CJEU by France, asking for clarification of the place of supply of goods that are sent by a vendor in one Member State (MS1) for processing in another (MS2), then removed directly from the processor's premises to the customer (also in MS2).

In this case, *Fonderie 2A*, a metal working company based in Italy, sold metal parts to Atral, a company located in France. *Fonderie 2A* initially sent the goods to another French company, Saunier-Plumaz, to which it had subcontracted the painting of the metal parts. These were then sent on from the establishment of the Saunier-Plumaz (in France) to Atral.

The court has ruled that, in these circumstances, the supply of the goods by the vendor takes place in MS2. This is because the transportation and shipping to the buyer can only be started once the goods are in the condition specified in the contract (i.e. manufactured and painted). This means that the vendor has a liability to register for VAT in MS2 as well as in its own Member State.

This judgment is significant because this type of processing contract is widespread in the manufacturing and technology sectors and would seem to impose a 'finished goods' test to consider when determining the place of supply of the goods.

It should also be noted that the transactions in the Fonderie case took place in 2001, before the place of supply rules changed in 2010. At that time, work on goods was deemed to take place in the country where it was carried out, hence the subcontractor had to charge local VAT. The matter was drawn to the attention of the French authorities by Fonderie's attempt to recover that VAT via an EU VAT refund claim.

For supplies after 1 January 2010, however, the subcontractor's fee would be reverse charged, so the vendor would not incur overseas VAT. This means the liability to register for VAT in the other Member State is easily overlooked.

Welmory – can outsourcing create a fixed establishment in another Member State?

The CJEU has confirmed that use of third party services can, in certain circumstances, constitute a 'fixed establishment' for a business established in another country.

In the *Welmory* case, which involves a Cypriot company outsourcing the operation of its auction website to its Polish subsidiary, the CJEU ruled that a company must be regarded as having a fixed establishment in another Member State if that establishment "is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business".

It also decided that it is for the national, rather than European court, to ascertain whether those conditions are fulfilled in individual cases.

The *Welmory* decision had seemed on course to determine whether a company's use of its subsidiary's staff and technical resources in another Member State could create a fixed establishment of the company in that other Member State. Disappointingly though, the ruling simply reiterates what is already known from EU VAT legislation and case law, meaning that EU businesses remain at the mercy of the various national courts and tribunals to decide whether their outsourcing arrangements might create a fixed establishment in their particular circumstances.

Nevertheless, businesses should review the nature of their dealings with local providers to determine whether they are vulnerable to challenge from local tax authorities. While the risk of creating a fixed establishment in another Member State isn't new, the *Welmory* judgment might encourage Member States to attack outsourcing arrangements, especially where they secure a VAT advantage for the business. In some cases, it may be prudent to explore the commercial feasibility of alternative structures that carry less risk of creating a fixed establishment.

The *Welmory* judgment suggests that outsourcing arrangements will be subject to increased scrutiny in the coming months, so it is advisable to review the potential pitfalls and opportunities now.

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FRANCE

FOREIGN COMPANIES REGISTERED FOR FRENCH VAT PURPOSES: FILE OF ACCOUNTING ENTRIES (FEA)

Since 1 January 2014 companies established in France must maintain a File of Accounting Entry (FEA) if they maintain their accounting electronically.

The FEA must comply with the requirements set out in the French tax code and the French tax procedure code. If there is a tax audit, the FEA file must be provided to the French tax administration. Failure to comply with this requirement exposes the company to penalties from EUR 5,000 to 10% of any reassessment determined as a result of the audit.

Under an information note issued by the French tax administration, the FEA obligation is also applicable to foreign companies not established in France but registered for French VAT purposes.

The FEA maintained by foreign companies is not exactly the same as the FEA that must be maintained by French companies. Nevertheless, for example, the following information must be included in the FEA file of foreign companies:

- The split between the taxable and non-taxable operations;
- The VAT corresponding to each operation;
- The name and address of the suppliers and clients, and so on.

For the time being, the French foreign tax centre (at which foreign companies are registered for French VAT purposes) does not require foreign companies to provide an FEA file in the event of a tax audit. Nevertheless, it is highly recommended that foreign companies take steps to comply with the new requirement to maintain an FEA file.

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GERMANY

GERMAN FEDERAL COURT OF FINANCE COMMENTS ON DISCOUNTS TO FACTORING CLIENTS

In a ruling dated 3 July 2014 (V R 3/12) the German Federal Court of Finance (BFH) once again commented on discounts granted by a central regulator to factoring clients for the purchase of goods from certain suppliers. In its ruling, the BFH was of the view that these discounts do not reduce the basis of assessment for the services rendered by the central regulator (CR) to the suppliers. Moreover, these discounts do not result in the need for an adjustment of the input VAT deduction by the factoring client.

In this ruling the BFH abandoned its decision of 13 March 2008 (V R 70/06). The BFK now relies on recent case law of the European Court of Justice (ECJ) in its decision of 16 January 2014 (C-300/12) in *Ibero Tours*.

In the case before the BFH the central regulator (the plaintiff) concluded a so-called clearing agreement with its suppliers. Under that mechanism the plaintiff agreed to support the sales of its supplier and arrange for the central settlement of all supplies to factoring clients. Moreover, the plaintiff committed to taking over the delcredere liability for these supplies through an assumption of debt. The agreements for the supplies of goods were concluded exclusively and directly between the supplier and the factoring clients. Therefore, the CR was not involved in the supply chain between the supplier and the factoring clients. The CR received from the suppliers a commission for its services based on a particular percentage of the gross amount. This percentage was individually negotiated with the respective suppliers.

As additional remuneration, the CR passed on part of the commission payments received from the suppliers to the factoring clients. These payments were not dependent on the factoring clients' specific behavior (for example, compliance with payment deadlines). The CR and the factoring clients normally did not even conclude written agreements. The business relationships were based on a general practice that goes back to 1968. The factoring clients did not make payments to the CR. The CR's expenses were covered by the commission payments made by the suppliers.

The CR referred to the BFH judgment on central settlement of 13 March 2008 and argued to the German tax authorities that its passing on a part of its commission to the factoring clients entitles it to reductions of the tax base. Furthermore, the CR claimed that the correction right resulting from the reduction of the tax base is subject to VAT at the regular rate. The CR maintained that this right applies even when the goods delivered to the factoring clients are subject to a reduced VAT rate. By its letter of 31 March 2010 the plaintiff applied for an amendment of its preliminary VAT return for March 2010 in accordance with the plaintiff's position. The plaintiff's application was rejected by the tax authorities on 4 June 2010 and the plaintiff filed a lawsuit. The fiscal court granted the CR's application.

The BFH ruled that the reduction of the assessment basis is subject to the regular VAT rate in case of discounts granted by a central regulator to its factoring clients in addition to the cash discounts already granted by the supplier of the goods purchased. This additional discount is to be seen as a supplementary cash discount. The regular VAT rate applies to the services of the CR acting as intermediary.

With reference to the ECJ judgment in *Ibero Tours* (mentioned above), in the present case the BFH decided that the CR is not entitled to a reduction of the assessment basis under section 17(1) of the German VAT Act. The BFH justified its conclusion as follows: If the taxable amount of a taxable supply changes, the taxable person who carried out the transaction must correct the VAT due according to section 17(1), sentence 1 of the German VAT Act. The taxable amount must include everything that constitutes the consideration obtained or to be obtained by the supplier in return for the supply, whether from the customer or a third party, including subsidies directly linked to the price of the supply but excluding the VAT itself.

In cases where a purchasing cooperative acts as central regulator and grants supplementary price reductions to its members in addition to the cash discounts already granted by the supplier of the goods purchased, the BFH initially decided that the additional discounts reduce the tax base of the supplies rendered by the purchasing cooperative to the supplier of the goods (for example, the central settlement, the granting of guarantees, etc.). This conclusion was justified because the reduction of the taxable amount applies when the first entrepreneur in the supply chain grants the discount to the intermediary rather than to the final consumer.

In its judgment in *Ibero Tours* the ECJ concluded that its decision of 24 October 1996 (C-317/94, in *Elida Gibbs*), does not justify a reduction of the taxable amount in the following situation: Where a travel agency (as intermediary on behalf of the tour operator) granted its client (the final consumer) a discount on the price of the services rendered by the tour operator. In *Ibero Tours* the travel agency granted the reduction on its own initiative and at its own expense. Consequently, the discount had no impact on the travel agency's decision to use the tour operator's services. This conclusion is based on the fact that the travel agency does not grant a discount on its own services it provides to the tour operator within the scope of its procurement work.

The BFH, applying the principles of *Ibero Tours* to the present case, determined it should no longer adhere to the previous assumption that discounts granted by a CR to its factoring clients for the purchase of goods from certain suppliers results in a decrease in the taxable amount of the services rendered by the CR to the suppliers. In fact, the additional cash discount granted by the CR to the purchasers of the supplies has no impact on the taxable amount the CR provided to the supplier, since the CR does not grant a discount on its supplies (supply of goods), according to the ECJ decision in the *Ibero Tours* case.

Regarding the application of the principles of the ECJ decision in *Elida Gibbs*, the fact that the CR is a direct part of the supply chain between the supplier and the factoring clients was decisive. It is, therefore, essential that the CR does not provide an independent service separate from the actual supply chain. This is the case in the present matter where the plaintiff acted as CR and was not part of the supply chain between the supplier and the factoring client. The supplier delivered its goods directly to the factoring client. The CR provided independent procurement services relating to the supplier.

Moreover, price deductions granted by a CR to its factoring clients for the purchase of goods from certain suppliers do not decrease the assessment basis for the services rendered by the CR to the supplier. Therefore, this discount cannot be the basis for requiring a correction of the input VAT deduction on the part of the factoring client. Both transactions are inextricably linked in order to avoid an impairment of the principle of neutrality.

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HUNGARY

CHANGES TO THE VAT PROVISIONS

Hungary made a number of changes to its VAT provisions in 2014. Here is a summary of the most important ones:

New measures applicable to the transport of goods on roads

One of the most significant changes relates to the treatment of the transportation (by road) of goods by vehicle, including the transport of hazardous goods.

Taxpayers transporting goods on roads must register, in advance, under the Electronic Road Good Tariff Control System (*EKAER*) and they must declare the details of what they are transporting before they transport the goods.

The information they must provide includes: the EKAER number, information about the consigner and consignee, place of loading and unloading, the registration number of the vehicles that will be transporting the goods, and so on.

On the basis of the information provided, the system generates an EKAER number, which is valid for 15 days from the date the number is assigned.

The following activities can only be carried out by taxpayers with a valid EKAER number:

- Supply of goods from an EU Member State into Hungary,
- Supply of goods from Hungary to an EU Member State, and
- The taxable supply of goods for non-final users within the territory of Hungary.

The EKAER number must be given to the transportation service provider before the goods are loaded. This is an important condition and if it is not fulfilled, the products are considered unverified and can be subject to default penalty of up to 40% of the value of the goods.

The tax authority can seize the goods in the following situations:

- If the origin of the product cannot be authenticated by the appropriate documents, or
- If there is no EKAER number.

Frequency of VIES report

If the value of the EU supply of goods exceeds EUR 50,000 in the current quarter, a VAT Information Exchange System (VIES) report must be submitted monthly in Hungary, even if the VAT must only be remitted quarterly.

Under the new rule, the value of intra-community acquisitions must also be also monitored by the taxpayers and monthly VIES reports must be submitted if the value exceeds EUR 50,000.

Changes in the rules of periodic settlement

The VAT rules relating to on-going transactions with periodic settlement mechanisms will be changed. Previously, in the case of similar transactions, the payment deadline was considered the date of performance for VAT purposes. Under the new rules, the last day of the period in which the periodic settlement is made will be considered the date of performance for VAT purposes.

The changes will come into force in two stages:

- The new rule will be applied for accounting, audit, and tax advisory services beginning 1 July 2015 if the date of payment is after 30 June 2015;
- In the case of all other transactions subject to periodic settlement, the new rule will enter into force on 1 January 2016 for periodic payments that are due beginning in 2016.

Place of delivery in case of electronic services

Effective 1 January 2015, in the case of electronic, telecommunications, and audiovisual services the place of delivery of the services will be changed if the recipients of the services are EU individuals. Under a new rule, the place of delivery will be where the individual resides. So, for example, if a German company provides web hosting services for a Hungarian individual, the place of delivery will be Hungary and the invoice issued by the German company must include Hungarian VAT and the invoice must satisfy Hungary's VAT rules related to what information must be provided on invoices.

Taxpayers to whom this rule applies can fulfill their VAT obligation in one of two ways:

- By submitting an integrated VAT return according to the *Mini One Stop Shop* system, or
- By registration for VAT purposes in each EU Member States involved.

Frequency of VAT for new companies

Newly established companies are required to submit monthly VAT returns in their first two tax years effective 1 January 2015, rather than quarterly, which used to be the rule. This new requirement also applies to foreign companies that are subject to Hungarian VAT registration.

New threshold for domestic sales listing reports

Hungary has a separate reporting obligation for domestic transactions, which is part of the VAT declaration. In this report the taxpayer must provide the VAT ID number of the partner and details about incoming or outgoing invoices where the VAT due exceeds a particular threshold.

Beginning 1 January 2015 the threshold applicable to the reporting obligation will be decreased to 1 million HUF.

If the vendor has a fixed establishment in Hungary, then the Hungarian VAT Identification Number of the customer must be indicated on invoices where the VAT amount exceeds the new threshold. This invoicing requirement is not applicable for VAT registered foreign companies.

VAT on gasoline

Under the new provisions, input VAT on gasoline can be deducted if it is a direct material cost included in the tax base of the sale of other products.

Advance payments

Effective 1 January 2015 the Hungarian VAT law has been changed to expand the definition of advance payment. Under the changes, VAT will be due regardless of whether payment is made in money, by way of a cash-substitute payment instrument, or in some other way. The VAT is due when the advance is paid. This change will be relevant in swap transactions.

Domestic Reverse-charge taxation

Beginning 1 January 2015 the employee leasing and other staff outsourcing services related to construction work and real estate building projects, as well as the use of school cooperative society services, will fall within the scope of domestic reverse taxation, regardless of whether the services used are related to activities subject to a construction permit.

VAT treatment of portfolio management services

As a result of the interpretation of the European Court of Justice, the Hungarian VAT Act also stipulates that from 1 January 2015 portfolio management services are not eligible for VAT exemption. As a result, under the general VAT rules, the portfolio management services are subject to VAT.

Expansion of the 5% VAT to large animals

Changes to Hungary's VAT have expanded the products subject to the preferential 5% VAT rate to include the sale of the large animals, such as sheep and cattle, whether living or in processed form.

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IRELAND

IRELAND'S BUDGET 2015 AND CONSIDERATION OF *SKANDIA* CASE

On 14 October 2014 the Minister for Finance announced Ireland's 2015 Budget. From a VAT perspective there were very few changes. The most notable changes are as follows:

Second reduced VAT rate

A second reduced VAT rate of 9% was introduced on 1 July 2011 that was to last to 31 December 2013. This was extended indefinitely in Budget 2014 and the Finance Bill reconfirmed the retention of the 9% rate.

The 9% rate applies to certain goods and services previously subject to the 13.5% rate, including: restaurant and catering services; hotel and holiday accommodation; admissions to cinemas, theatres, certain musical performances, museums and art gallery exhibitions; fairgrounds or amusement park services; the use of sporting facilities; hairdressing services; and printed matter such as brochures, maps, programmes, leaflets, catalogues and newspapers.

Farmer's flat-rate addition

The farmer's flat-rate addition, which is a scheme that compensates unregistered farmers for VAT incurred on their farming inputs, has been increased from 5% to 5.2% with effect from 1 January 2015.

Recent decision in the *Skandia* Case (C-7/13)

The Court of Justice of the European Union (CJEU) recently ruled in the *Skandia* Case that supplies of services for consideration from a parent entity in a third country to its branch in a Member State constitute taxable transactions when the branch belongs to a single taxable person (VAT Group).As a result of the judgment, as the purchaser of those services, that single taxable person (the VAT Group) becomes liable for the VAT payable.

Although the *Skandia* case concerned services provided in Sweden, the Irish Revenue is currently examining the implications for Irish law. As part of that process, the Irish Revenue intends to consult with industry, tax advisors, and other interested parties.

The Irish Revenue has indicated that until the study of the CJEU judgement and the consultation process is completed and new guidance is published, providers of such services may continue to treat these services on the basis of the existing practice.

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LATVIA

GOVERNMENT ACTS TO COMBAT VAT FRAUD

The Latvian Cabinet of Ministers is considering proposals aimed at improving the detection of VAT fraudulent transaction schemes and at extending the scope of information publically available about the tax status of legal entities. The proposed changes would introduce new regulations that would reduce the risk of honest taxpayers being involved in transactions involving fictitious supplies.

The proposed amendments include the following provisions aimed at eliminating the main risks identified by the government with respect to VAT fraud:

- Publishing information on the home page of the State Revenue Service (SRS) of Latvia about the amount of taxes paid by every entity or persons carrying out business activities. This measure is modelled after a similar approach adopted in Lithuania that has been successful at stimulating tax payment and the declaration of income.
- Postponing registration of entities where the entity has indicated its registered address is a place that is not suitable for conducting business (for example, public asylums, homeless shelters) or where the registered address is the address of the residence of the entity's sole shareholder. This step will help combat VAT fraud because it prevents creation of fictitious enterprises that could be involved in fraudulent VAT schemes.
- Postponing registration of entities where a member of the board is a citizen and resident of a third state. The registration will be postponed until the member of the board arrives in Latvia and confirms his or her identity and physical presence in Latvia. Under the proposal, persons resident outside of Latvia may be members of the board of a legal entity registered in Latvia, but they must confirm their identity and physical presence in Latvia. This requirement will help combat VAT fraud because Latvian authorities have noticed that VAT fraud is often committed by legal entities founded by citizens from Tajikistan, Uzbekistan, Kazakhstan, Belarus, Moldova, and Russia.

With these proposals, the Latvian government hopes to make Latvia less attractive to those intent on committing VAT fraud. However, the proposals include provisions that will impact every taxpayer, since they will require additional action on the part of legal entities and third country nationals who are interested in becoming a board member of a legal entity registered in Latvia.

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LUXEMBOURG

CREATION OF THE LUXEMBOURG FREEPORT AND VAT RATE CHANGES

Creation of a favorable tax framework in relation to the opening of the Luxembourg Freeport

On 17 September 2014 Luxembourg officially inaugurated its Freeport, implementing the first practical application of the "VAT suspensive regime" related thereto.

To promote the activities of this state-of-the-art new facility and the art sector, the Luxembourg Ministry of Finance submitted a draft bill (Bill n° 6713) that makes considerable amendments to the Luxembourg VAT legislation with regard to public auctions and art related transactions. The changes enter into force on 1 January 2015.

In October 2011 Luxembourg introduced a VAT-free zone regime under Article 56sexies of the Luxembourg VAT Law and Circular 755 of 15 September 2011, or, more specifically, a VAT suspensive regime for specific supplies of goods.

To put Luxembourg in a key position in the field of the storage of high value goods such as art, the new bill provides for the following:

- Adoption of various optional measures from the VAT directive in relation with the taxation system applicable to the operations in the Freeport into Luxembourg's domestic law.
- Extension from 1 January 2015 of the reduced VAT rate (8%) to imports of antiques and collector's items (works of art were already subject to this reduced rate).
- Extension of the optional profit margin scheme, which is currently eligible on second hand goods, to the supply of works of art, collector's items, and antiques by the organizers of sales at public auctions.
- A VAT exemption for the supply of goods placed into the Freeport.

The Freeport is undoubtedly a great opportunity for Luxembourg to attract new investors and to diversify its economy by combining the financial services sector with high-value logistic services.

Increase in the Luxembourg VAT rates

From 1 January 2015 Luxembourg's reduced, intermediary, and standard VAT rate will increase by 2%, bringing the respective VAT rates to 8%, 14%, and 17%. The draft bill does not provide any transitional measures and the standard rules for the chargeability of VAT for supplies of goods and services, as well as advance payments, will apply.

The super reduced VAT rate of 3%, which is mainly applicable to essentials such as food products, pharmaceuticals, books, transport of persons, access to sporting facilities/cultural events, and renovation works (under certain conditions), remains basically unchanged. There are two noteworthy exceptions, however:

- In the housing sector, the benefit of the super-reduced rate will be reserved to housing affected to the primary residence of the owner, to the exclusion of those put at the disposal of tenants (with the exception of renovation works). As a transition measure, the 3% rate remains applicable to housing for rental purposes until 31 December 2016 to applications introduced before the 1 January 2015.
- Supplies of alcoholic beverages in restaurants. As from next year, on site supplies of alcoholic beverages will be subject to the new standard VAT rate of 17%.

Despite the announced increases, Luxembourg continues to have the lowest VAT rates in Europe.

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SPAIN

SPAIN ALLOWS DEDUCTION OF INPUT VAT EVEN AFTER DEREGISTRATION FROM TAXPAYER'S CENSUS

Spain´s Directorate General for Taxation (DGT) recently issued a binding ruling with regard to the ability of a taxpayer to deduct input VAT related to its activities after the taxpayer has been deregistered from the taxpayer´s registry.

In this regard, the DGT has followed the criteria mentioned by the EU Court in its judgment of 3 March 2005 in the Case C-32/03 *Fini H*. The facts that judgment is based on expressly refer to the continuation of the right of entrepreneurs and professionals to deduct input VAT after they have stopped supplying goods or rendering services.

As a result of the DGT's ruling, taxpayers do not automatically lose their ability to deduct input VAT merely because they cease their activity. However, the input VAT must have been incurred on expenses directly related to the exercise of activities of supplying of goods or rendering services and the other legal requirements set out in Spain's VAT law must be satisfied.

If the taxpayer has not effectively terminated its activities, the on-going obligation to submit the corresponding tax returns does not cease with deregistration. Following the criteria set out by the EU Court, the DGT concluded that the deduction of the input VAT incurred on future expenses incurred is allowed, though the taxpayer must be able to demonstrate that it has no intention of acting fraudulently or abusively.

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SWITZERLAND

SWISS SUPREME COURT SAYS VAT AUDIT RESULTS ARE NOT A FORMAL DECISION

As in every jurisdiction, the Swiss Federal Tax Administration performs regular VAT audits to check whether the VAT taxpayer has fully complied with the law and related regulations. The results of the audit, whether positive or negative, are reported to the VAT taxpayer in an assessment notice.

In a recent case before the Swiss Supreme Court the issue was whether an assessment notice is a formal decision that a VAT taxpayer has 30 days from which to appeal, which is the position the Federal Tax Administration has taken, or whether it is simply a document informing the VAT taxpayer about the claim of the Federal Tax Administration that can be challenged within the timeframe of the statute of limitation (basically 5 years). In other words, is a taxpayer's cause definitely lost if the taxpayer has not formally appealed against an assessment notice within 30 days?

The Swiss Supreme Court concluded (case 2C-805/2013 dated 21 March 2014) that an assessment notice issued as result of a VAT audit cannot be considered a formal decision from the Federal Tax Administration and therefor it can be challenged, even informally, by the taxpayer after more than 30 days. Should the taxpayer want a formal decision from the Federal Tax Administration, which is what is needed in order to bring the matter to court, the taxpayer must specifically request such a decision.

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UNITED STATES

SALES & USE TAX AND CLOUD COMPUTING

Cloud computing has raised many sales and use tax issues in the United States. Businesses who buy or sell these computing resources in the USA should be aware of the implications and watch out for further developments.

Sales & Use Tax

The United States does not have a value added tax at either the federal or the state level. Sales and use taxation in the United States is operated independently in 45 states plus the District of Columbia. The sales tax rates vary from 2.9% to over 10%. Sales tax is usually the responsibility of the trader to charge and remit to the state, and stated separately (or implicitly added at the time of sale) to consumers. Unlike a value added tax, a sales tax is imposed only once at the retail or consumer level. (For a more detailed explanation of US sales and use tax, see my earlier article in the July 2014 edition of Indirect Tax News.)

All states impose a sales tax on computer related tangible personal property and only a few states will impose a sales tax on computer related or online services.

What is cloud computing?

According to the National Institute of Standards and Technology (NIST), cloud computing "is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction."

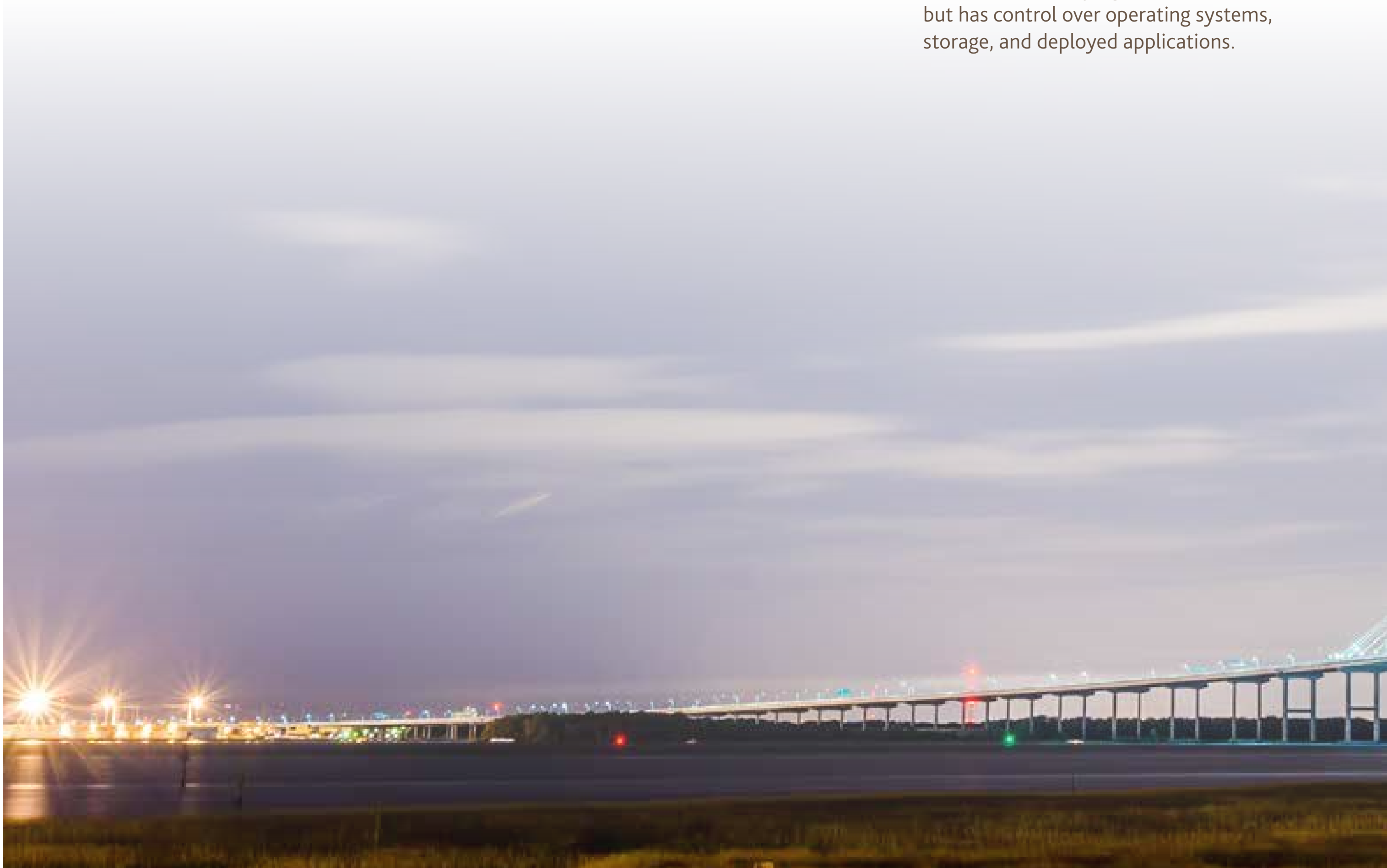
In the simplest terms, cloud computing will allow a user to gain online or remote access to computing power without maintaining and operating their own in-house technology. Rather than incurring the costs of purchasing hardware, software and IT professionals to operate and maintain their own computing infrastructure, companies have outsourced this function to third-party providers. By doing so, companies have significantly reduced their computing cost while at the same time obtained the latest equipment and technology without tying up a significant amount of capital investment. The real benefit to cloud computing is the on-demand flexibility and scalability of IT computing resources where a company only has to incur the cost for the amount of computing power they are currently in need of.

NIST states there are five "essential characteristics" of cloud computing: on-demand self-service; broad network access; resource pooling; rapid elasticity; and measured service. NIST also states there are three basic "models" of cloud computing:

1. The ***Software as a Service*** (SaaS) model allows a customer to access a provider's applications on a cloud infrastructure (i.e., the collection of hardware and software that enables the essential characteristics of cloud computing described above). Under the SaaS model, a customer does not manage or control the underlying cloud infrastructure, with limited exceptions.

1. The ***Platform as a Service*** (PaaS) model allows a customer to deploy its created or acquired applications on a cloud infrastructure using programming languages, libraries, services, or tools supported by the provider. As with the SaaS model, the customer does not manage or control the underlying cloud infrastructure. The customer does have control, however, over the deployed applications and, potentially, configuration settings for the application-hosting environment.

2. The ***Infrastructure as a Service*** (IaaS) model allows a customer access to processing, storage, networks, and other computing resources, where the customer can deploy and run software, including operating systems and applications. Under the IaaS model, the customer does not manage or control the underlying cloud infrastructure, but has control over operating systems, storage, and deployed applications.



The taxation of cloud computing

As identified above, NIST has defined cloud computing to encompass or incorporate many different types of online computing models such as data storage, software application, data processing, information service, web-hosting, and other networking services. These products and services can be purchased individually or they may be purchased in a variety of different combinations.

Since state sales and use tax laws relating to cloud computing are not specifically identified and in some cases maybe entirely absent in the tax rules, the taxation of cloud based solutions tends to raise more questions than answers. Therefore, to simplify our discussion in this article, we will be focusing only on the conventional Software as a Service (SaaS) business model.

A SaaS business model is where a customer is allowed remote access to a provider's prewritten software application hosted from the provider's cloud infrastructure. The taxability of a SaaS transaction for sales and use tax purposes is in principle no different from the taxability of any other transaction under the sales and use tax rules. Accordingly, the taxability of access to a software application in a given state will depend on whether the there is a sale of a taxable good or a taxable service. As a general rule, if software is characterized as tangible personal property it will be taxable, like all other tangible personal property. If the software is not characterized as tangible personal property, it will not be taxable unless the transaction can be characterized as a taxable service.

Sounds simple right? Not in the sales tax world. It took the courts in the United States almost three decades to determine if the traditional store purchased computer software was either intangible property, a service, or tangible personal property. Over time, all of the states have sinced passed laws that impose a sales tax on prewritten software that was purchased on tangible media. In the decades to follow, most software began to be delievered electronically to the consumer and the same taxability debate ensued in the courts: whether electronically delivered software was tangible personal property subject to sales tax. Today, most states have passed laws that impose a sales tax on electronically delivered software.

In the last decade, the states are now involved in a debate about whether remote access to prewritten software (SaaS) is tangible personal property. The states are also simultaneously struggling with the concept of whether remotely accessed software has really been physically received by the purchaser. Since most states have defined prewritten software as tangible personal property there is a general consensus that the software is subject to sales tax. However, one of the more pressing issues at hand is whether the end-user has truly received any tangible personal property since a SaaS solution does not provide for the delivery of the software in any form or manner.

Most states' sourcing rules for tangible personal property and taxable services have been in place for decades. Generally, states have very specific sourcing rules relating to the sale or lease of tangible personal property and typically will source the sale to the location (state) where "title to" and/or "possession of" the property was transferred. Conversely, most states' sourcing rules related to a taxable service will source them to where the benefit is received or the state were the user is located.

Currently, many states are imposing sales tax and sourcing SaaS solutions back to the location of the end-user - a sourcing methodology more related to a sale of a taxable service, and not typically how a sale of tangible personal property is sourced. Remember most states have identified that access to computer software is a taxable sale of tangible personal property, not an enumerated service. To address these sourcing rule inconsistencies, some states have arrived at some very creative conclusions to source the access to online software back to end-users in their states. Some states have concluded that such access has allowed "the end-user the right to use the software" or "the end-user has constructively received the software". Of course, most of these conclusions are expressed through recent rulings and not the enactment of any new sourcing laws.

Looking to the future

Cloud computing technology has helped many businesses increase computing performance while at the same time lowering their overall IT costs. However, the sales tax laws governing this area are creating an uncertainty for both the providers and users. Currently, the states have various inconsistencies of their characterization of accessed software (not delivered software) as tangible personal property and the application of their sourcing rules has created a host of problems for companies to comply with the sales tax laws. State taxing authorities must gain a better understanding of the cloud environment and bear the burden of providing consistent and uniform guidance to the public that will properly reflect their states' laws.

Cloud computing solutions are not new. Cloud computing is just old technology done better, In my opinion, many of the states have already ruled on similar transactions many years ago, but the need to identify additional revenues for their state budget shortfalls has prompted some creative thinking inside the states' taxing agencies. I believe the states should only construct taxability conclusions on the laws they have in place. If an online SaaS solution doesn't obviously fit within a tax rule, the solution should be considered exempt. If the state wishes to tax an online transaction, then the states' legislature should pass a new law to clearly identify the transaction as a taxable revenue stream.

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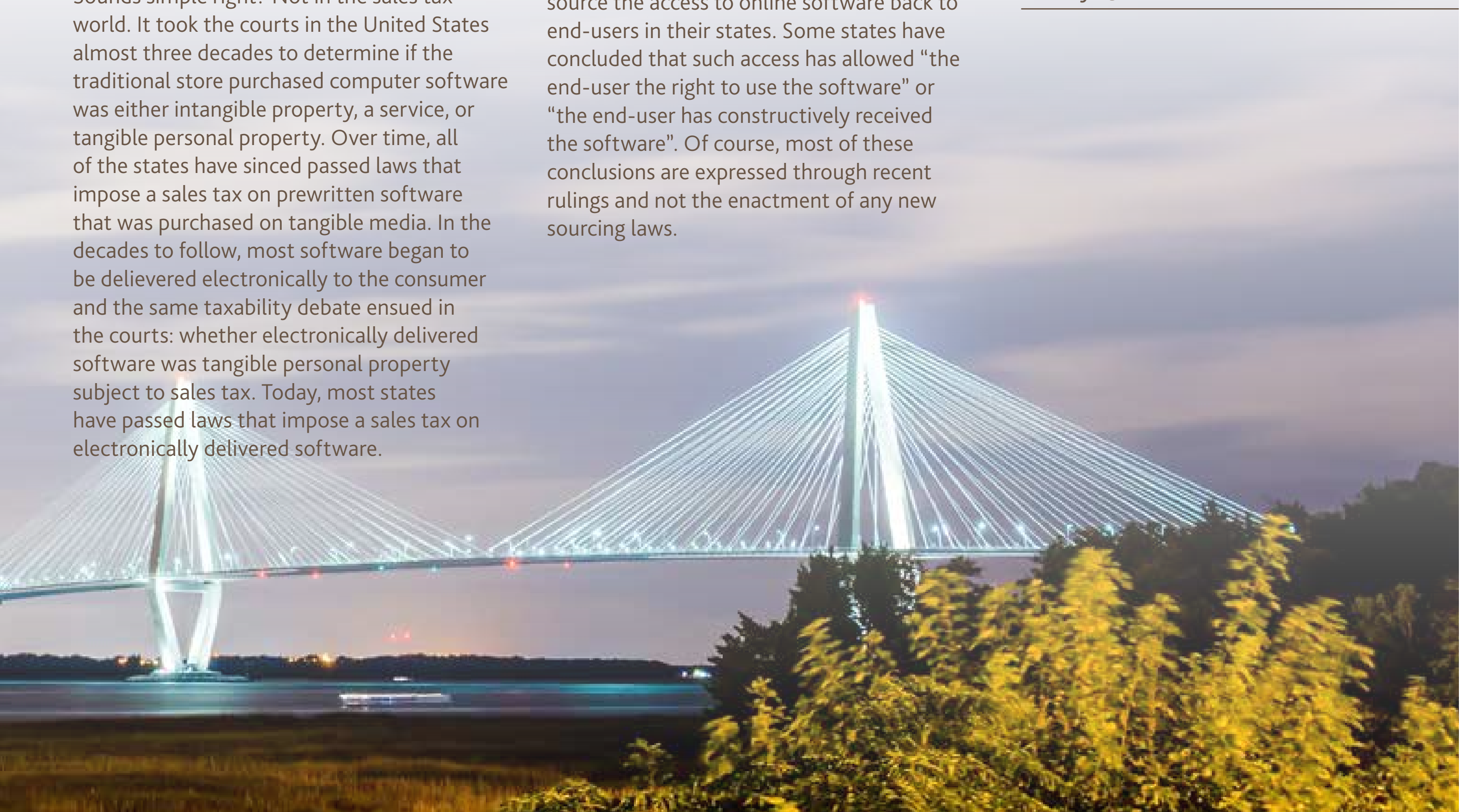

CURRENCY COMPARISON TABLE

The table below shows comparative exchange rates against the euro and the US dollar for the currencies mentioned in this issue, as at 17 December 2014.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
Czech Koruna (CZK)	0.03623	0.04524
Euro (EUR)	1.00000	1.24795
Hungarian Forint (HUF)	0.00321	0.00401
Swiss Franc (CHF)	0.83261	1.03911

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