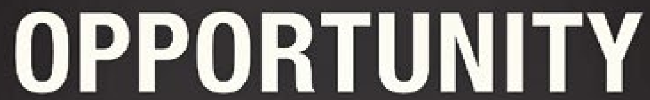
Indirect Taxes NEWS



Amnesty: US Multistate Tax Commission Offers Remote Sellers an Opportunity

and more current information

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Editorial

Dear Reader,

This is the third Indirect Taxes Practice Group (IDTPG) Newsletter in which I have been involved in. Since the last Newsletter (No. 04 | Spring 2017), there has been and will be a lot of IDTPG activity.

The IDTPG session at the GGI European Regional Conference in Brussels in May of this year was very well attended. We looked at how to successfully manage (or not) a multi-jurisdictional cross-border VAT compliance assignment. My thanks to Ionut Zeche for assisting Toon Hasselman (Global Vice-Chairperson of our PG) and I with a very engaging talk on a practical example involving 26 EU Member States. Sabina Mexis and Pablo Garciga (IDTPG Regional Chairperson and Vice-Chairperson respectively) ran their first PG meeting at the GGI North American Regional Conference in Vancouver in June. This covered Indirect Tax aspects of Canada/USA cross-border transactions. Not only did this attract a good number of attendees but the third party feedback I received was very positive; well done to both.

Following up on this topic, Toon Hasselman and I also presented an Indirect Tax topic at the GGI Nordic-Baltic Meeting in September.

We have already planned the next IDTPG session for the upcoming GGI World Conference in Vienna. Given the VAT gap was little under EUR 160 billion in 2014 (and bound to have increased since), with VAT fraud being widespread throughout the EU, measures for controlling VAT collection being implemented, e.g. taxpayers having to provide detailed recapitulative statements, extension of the Reverse-Charge for some goods and services (amongst others), we will be running a session looking at how we as VAT consultants deal with simple questions that may unknowingly have a fraudulent backdrop and lead to questions about ethics, negligence, etc. The session will be presented with "bar-stool" commentary and in an open forum. We are hoping you will all join us, not least because we wish to bribe (or is it "imbibe") you with drinks, nibbles and good company but also because, towards the end of the session, you will get a chance to mingle amongst the GGI Indirect Taxes community.

I am pleased to present this Newsletter – which again has 13 articles on Indirect Taxes drafted by PG members from each of the five GGI regions and is therefore truly global in reach.

In this edition, we continue with the 'VAT-in-brief' themed series on "Import VAT Issues" with an article from Belgium and we start a second series focusing on "Events, Exhibitions and Conferences" from the Netherlands. It appears that the Dutch are introducing a new VAT regime currently known as TAR, something that is known in the UK as TOMS (Tour Operators Margin Scheme). This is well worth bearing in mind.

I commend the articles to you and trust you will enjoy reading them!

Steve McCrindle
Global Chairperson of the
GGI Indirect Taxes Practice Group

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Amnesty: US Multistate Tax Commission Offers Remote Sellers an Opportunity

By Pablo Garciga

Owning property in a state generally establishes tax nexus. This is true even if a Treaty between the US and a foreign country creates the legal fiction that the limited activities of the foreign vendor are not deemed to create a Permanent Establishment in the US for federal income tax purposes. Since the number of online vendors have increased, the situation often arises whereby an out-of-state vendor owns inventory held by an online marketer (e.g. Amazon) at the marketer's warehouse. This situation has the potential of creating nexus for the out-of-state vendor in many states.

The Multistate Tax Commission (an intergovernmental state tax agency) is offering a very favourable Voluntary Disclosure Agreement ("VDA") programme for online marketplace sellers. The application period began on 17 August 2017 and runs through to 17 October 2017. Participating states include: Alabama, Arkansas, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Kentucky, Louisiana, Nebraska, New Jersey, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, and Wisconsin.

In order to be eligible for the programme, taxpayers must not be registered with the state, nor have filed returns or made payments to the state for the taxes for which the taxpayer is attempting to procure the VDA. This VDA is intended for taxpayers who have no connections to the participating state, other than inventory stored in a third party warehouse or at a fulfillment centre of the marketplace provider/facilitator.

This VDA programme has several unique and advantageous aspects. States' VDA agreements seldom abate interest (indeed, in many states, interest on underpayments is statutorily mandated). This VDA abates past tax liabilities and related interest and penalties. States' VDA programs generally contain lookback periods (states agree to limit the liability to a certain number of past years, e.g. the most recent three years) and abate whatever liabilities might exist for earlier years. This VDA does not generally contain a lookback period.

This VDA program applies to several taxes, including sales and use taxes, and a good faith estimate of back tax liability to the state for the prior four years is a required disclosure. Taxpayers are permitted to choose which states and which tax type for which to seek relief.

In consideration for the abatement of these liabilities and related interest and penalties, taxpayers are required to register by 1 December 2017 with the respective states and begin to collect and remit the appropriate sales tax on taxable transactions to customers in the state.

The 19 states participating in this VDA program have some flexibility on how to structure certain aspects of the programme (e.g. Wisconsin will require payment of back sales tax liability and interest for a lookback period of 1 January 2015 to present.)

Before choosing to participate, taxpayers must consider additional

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aspects of the program (e.g., possible sharing of taxpayer information among states). The participating states have agreed that they will not share taxpayer information regarding this VDA programme except as required by law, pursuant to court order, or in response to an inter-government exchange of information where the taxpayer's name and identification number are included in the request (i.e., blanket requests for information will not be honoured).

This special VDA programme does not cover sales taxes collected but not remitted to the states (taxpayers must remit the taxes collected and pay interest and penalties on these liabilities).

VAT Switzerland – Calculation of Security for Foreign Companies

By Marc Nideröst

As of 1 August 2017, the security for a taxable person not resident or domiciled in Switzerland are calculated differently.

If a taxable person not resident or domiciled in Switzerland is not entered in the commercial register, a security needs to be provided in order to complete the registration for VAT purposes. This said security is usually paid in cash or by setting up a bank guarantee with a bank domiciled in Switzerland. Previously, the security generally corresponded to the amount of the annual tax expected to be payable. It usually amounted to at least CHF 5,000 and at most CHF 250,000.

As of 1 August 2017, the security will usually be calculated as follows (special cases reserved):

3% of the expected taxable domestic turnover (excl. exports), at least CHF 2,000 or a maximum of CHF 250,000

The new calculation method cannot be applied retroactively.

According to the revised Swiss VAT act that will come into force on 1 January 2018, the turnover threshold under which a person is exempt from tax liability is not limited to the turnover generated in Switzerland any longer. Therefore, foreign companies will need to register for VAT purposes in Switzerland if their global turnover reaches CHF 100,000 p.a. and part of that turnover has been generated locally in Switzerland.

As of 1 January 2019, a company based abroad supplying low-value goods to Swiss customers will be liable for Swiss VAT, if the turnover generated with such supplies reaches CHF 100,000 p.a.

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Anti-VAT Fraud Measures Postponed (again)

By Richard Jahoda

At its meeting on 16 June, the Economic and Financial Affairs Council (ECOFIN) discussed the compromise proposal prepared by the Maltese Council Presidency on anti-VAT fraud measures, with the aim of reaching an agreement on this proposal in respect of the directive on a generalised VAT reverse charge mechanism. The discussion was concluded without an agreement, which requires unanimity in the Council. France and Slovenia opposed the proposal.

The EU Council has been working on a proposal for a Council directive which aims to allow the application of a generalised VAT reverse charge mechanism to domestic transactions between businesses involving services or goods with an invoice exceeding EUR 10,000 based on the application of the Czech Republic and Austria, which are prepared to start the pilot project.

The aim is to help some member states that are particularly affected by VAT fraud and do not have sufficient measures to combat it, which could be the case in instances of VAT fraud schemes such as the 'carousel' or 'missing trader' schemes.

According to the European Commission, the VAT gap in the EU has reached nearly EUR 160 billion, of which about EUR 50 billion is attributable to cross-border fraud (in 2013).

The possibility of applying the reverse charge mechanism exists in the current system; however, its application is limited to a certain list of sectors. Its application is also limited in time. It was introduced by EC directive 2013/43/EU.

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The German View on Cross-Border Tax Audits

By Brigitte Jakoby

Since the introduction of the Mini One Stop Shop ("MOSS") within the EU, cross-border tax audits have been an important, but still unresolved issue. EU Member States have not yet been able to agree on harmonised rules for conducting cross-border tax audits. A leaflet published by the German Ministry of Finance on cross-border tax audits now seeks to answer some of these issues/questions. The leaflet deals with the purpose of cross-border audits.

In theory, cross-border tax audits seek to provide amicable solutions for all EU Member States, but the various national tax authorities determine the legal consequences independently, based on their own national VAT law. Hence, despite a coordinated external audit the tax authorities may take a different legal evaluation. So, whereas coordinated tax audits would reduce the risk of double taxation, they do not rule it out altogether.

The German Ministry of Finance differentiates between simultaneous and joint tax audits. Simultaneous tax audits are carried out by the national tax authorities at the same time, but independently. Tax authorities then exchange the information between each other. Joint tax audits would see the authorities investigate the facts together. This would avoid different interpretations. Another advantage of joint tax audits would be that the authorities determine the key areas of the tax audit together. This reduces the potential for conflicts. In the case of cross-border tax audits, the official language would remain German but the participating tax authorities and taxable persons can agree on another language.

The leaflet of the German Ministry of Finance is a step in the right direction. It seeks to eliminate some of the legal uncertainties. The first tax audits concerning MOSS can be expected to occur in the not too distant future. Companies who participate in the MOSS should start preparing for such tax audits. The clock is ticking.

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Split Payments in Poland

By Artur Plutowski

Despite the introduction of measures combatting VAT fraud introduced over the first half of 2017 (SAF-T reporting, local reverse-charge in construction and changes to registration for VAT purposes procedure), the Polish government plans to implement a ´split-payment mechanism´ from 2018.

Generally the mechanism would be voluntary but it may become mandatory for VAT fraud-sensitive sectors (e.g. fuel, alcohol, tobacco, electronics), and would apply to B2B transactions.

According to draft information, buyers might choose to pay the VAT element of the price to a dedicated bank account of sellers (VAT account). If the mechanism is chosen, buyers would enjoy some benefits (listed below). However, this may in turn cause the split payment to be obligatory for sellers.

Generally, the VAT account would be used solely for the following settlements:

- output tax due to tax authorities,
- refunds of surplus of input tax by tax authorities, or
- paying VAT element to suppliers.

The benefits foreseen for the buyer choosing the mechanism are as follows (inter alia):

- no joint and several liability (standard for VAT fraud-sensitive goods, e.g. fuel or pipes),
- direct refund of input tax surplus within 25 days,
- reduction of VAT amount due (disclosed in VAT return), if paid before statutory deadline, and
- penalty in the form of additional obligation (30% and 100%) would not be applicable.

Introduction of the mechanism triggers several practical issues to be considered or reconsidered, for example:

- identifying purchasers choosing to apply the mechanism,
- finding new sources for financing their VAT liability,
- facing cash flow difficulties due to limited availability of cash accumulated on the VAT account, or
- reviewing of contractual payment conditions.

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Artur Plutowski gained his experience over 17 years of continuous support to a wide range of clients, from large multinational groups to family owned businesses and HNWI. The focus is on local and international structuring and restructuring, including VAT, M&A, litigation and transfer pricing.

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VAT in Brief – Imports in Belgium

By Filip Camps

Ostensibly, whenever a company is importing goods into Belgium, the goods will be subject to a Belgian import VAT charge at the point of entrance of the goods in Belgium (however, see ET 14.000 below).

Depending on the nature of the goods involved, a VAT rate of 0%, 1%, 6%, 12% or 21% will be due.

This import VAT can be claimed back

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on the condition that the entity that is claiming back the VAT is subject to VAT.

The claim back can occur either by using the VAT portal, or by the introduction of a VAT return in case the entity involved is subject to quarterly or monthly VAT returns.

ET 14.000

In case the entity involved is subject to monthly or quarterly VAT returns, they can introduce an application to acquire a so-called ET 14.000 license.

By obtaining the license, the entity involved can defer declaring the import VAT due via a 'postponed accounting' mechanism to their VAT returns. The result will be that there is no cash pre-financing involved.

Foreign Businesses

Businesses that do not have an entity or permanent establishment in Belgium can opt for a direct VAT registration in circumstances where the foreign business belongs in the EU.

Please note that, in cases where a foreign business invoices under a direct Belgian VAT registration to another Belgian VAT number (not being a direct VAT registration of a foreign business), the reverse charge mechanism needs to be used.

Non-EU businesses can have a General Fiscal Representative or a Simplified Fiscal Representative perform their Belgian VAT obligations.

Only the General Fiscal Representative can apply for and obtain the ET 14.000 license. Please also note that a General Fiscal Representative will need to pay a guarantee up to an amount equal to the expected VAT due during the following twelve months.

For a Simplified Fiscal Representative the guarantee will be limited to 10% of this amount.

Finally, we want to draw your attention to the fact that Belgium has incorporated an extensive reverse charge mechanism in its internal VAT law. So please check upfront if this mechanism can be applied to avoid direct VAT registrations or Fiscal Representatives in Belgium.

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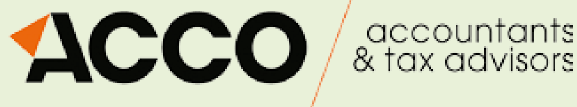

Non-Resident Taxable Person under GST

By Aditya Kumar

With the introduction of GST in India, it is important for foreign corporations to understand the concept of non-resident taxable person ('NRTP'). The concept introduced under the GST laws has led to raised eyebrows by the foreign companies doing, or intending to do, business with India.

Once a person falls within this definition there are compliance obligations for registration, payment of taxes and related compliance, including payment of tax in advance, which makes it important to determine if one is a NRTP or not. On a simple reading of the definition of NRTP, it appears that every transaction of import, of either goods or services or both, by an overseas supplier would fall under the mischief of the definition.

So the anomaly one faces is that at one end the supplier may be considered an NRTP and pay tax in advance, and at the same time, the recipient pays tax under reverse charge. A review of the definition of NRTP reveals that it concerns the nature of the transaction as being "casual" or "intermittent". Simply put, that which is not "regular" in nature.

Does this mean that a single once-off transaction or a transaction spread over less than six months involving supply of service would make the overseas supplier fall under the definition of NRTP and that multiple transactions or transactions spread over a period would not? Frankly, there are no answers to this question at present. The concept seems to have been picked up from that of a casual taxable person. But extrapolating the same to a non-resident gives birth to enormous confusion and complexity. Until such time that the Government issues clarification on the issue, in our opinion, entities should not yet register for GST, as in any case the question of jurisdiction of the Indian Government on NRTP will arise.

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Aditya Kumar is an FCA, LLB, MBA specialising in VAT/GST consulting in cross-border business and foreign in India and abroad. He thus has experience and a vast working knowledge of all aspects of service tax, trade law, VAT and the like. Serving clients from national and international companies and having worked in every existing kind of indirect tax branch, he offers pragmatic solutions on a cost-effective basis. He is also the author of one of the first books on GST published by the leading tax book publisher in India.

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South African VAT Consequences on Foreign Rebates

By Graeme Saggers and Simphiwe Mili

The VAT consequences on rebates received from international companies is an issue not often considered. Very little legislation and case law exists governing the treatment of rebates received from international entities. Currently only binding general rulings provide for the treatment of local rebates in the Fast Moving Consumable Goods and the Motor industries.

A recent matter required research into the VAT consequences on rebates received by a South African resident company from a foreign unrelated company. The South African company operates as a printer and ink products retailer. The company purchases goods for resale from a South African subsidiary of the aforementioned foreign company.

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The South African company in turn receives a volume-based rebate from the foreign company for the number of printers and ink products purchased from the South African subsidiary.

The contentious issue in this case was whether there was the existence of a supply as the rebate was provided by the foreign company directly to the South African resident company, whilst the exchange of the goods was between the South African resident company and the subsidiary. There was no direct transaction between the South African company and the foreign company. There were also no defined terms to the rebate and hence its existence did not provide any real incentive to sell more products.

The conclusion was that there was VAT payable on the rebates received. This was due to the fact that even though the rebate was received from the foreign company it subsequently (however indirectly) decreased the price of the printers and ink products purchased from the local supplier. This would then constitute a local supply for VAT purposes.

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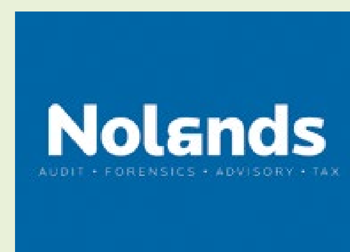

Reimbursements vs Disbursements – the Malaysian Experience

By Wen Tak Wong

The GST impact of recovery of expenses is a controversial subject in many countries, not least in Malaysia. The underlying principle is whether expenses are incurred by the principal (then a separate supply), i.e. a reimbursement, or if expenses are incurred by an agent acting on behalf of its client, i.e. a disbursement.

The Malaysian Customs has published guidelines stating all criteria below must be met for treatment as a disbursement:

(i) Incur expenses as an agent acting on behalf of the client,
(ii) Client is recipient of the supply

(invoice is in client's name),

(iii) Client is responsible for paying for the supply,

(iv) Payment is authorised by the client,

(v) Client knew the supply is made by a third party,

(vi) The exact amount is claimed from the client with no mark-up, and

(vii) The payment is clearly additional to the supply made to the client.

Such strict criteria can result in unreasonable outcomes. Reimbursements must be assessed separately against GST orders to determine the GST rate. Since zero rating and reliefs are often granted to specific persons, the principal may not qualify. For example, when lawyers incur land search fees or registration fees, government services are outside the scope of GST. However, when reimbursed, these become standard-rated. Similarly, recovery of medical fees or levy from employees, not subject to GST at source, may be standard-rated. Even transport charges reimbursed by exporters to overseas clients could be caught and standard-rated, since guidelines state only certain businesses qualify for zero-rating. Business should be mindful of the GST treatment on reimbursements and ensure proper GST clauses are built into agreements.

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PIS and COFINS Tax Credit Calculations

By Fernando Retzler Martins

It will not be surprising how many grey areas exist in the Brazilian tax legislation. Two of the taxes whose legislation allows for different interpretations are PIS and COFINS, indirect taxes levied on gross revenue and, in most cases, subject to a non-cumulative system that allows the appropriation of credits on 'inputs' applied in the production of goods and provision of services.

PIS and COFINS legislation was enacted many years ago, leaving room for different interpretations regarding the definition of credits to be discounted when assessing the taxes due. Pursuant to this legislation, companies may deduct credits calculated on inputs applied on the provision of services and on the manufacture of goods intended for sale, but our legislation has not clearly defined which inputs may be considered in the calculation of such credits.

As a result, the Brazilian Federal Revenue Service (RFB) issued some Normative Instructions defining, in a very restrictive and conservative way, which inputs are likely to generate credits: raw material, packaging material and, intermediate products and other goods that suffer transformation during the process and are not included among the fixed assets of the company. For service providers, inputs are the goods applied or consumed in the provision of services.

Consequential of this very restrictive interpretation adopted by the RFB, taxpayers have begun to question the concept of input for the purposes of PIS and COFINS credits in the administrative and judicial courts.

In the administrative courts, prevailing understanding was that credits could generally be appropriated on inputs considered as essential to the production or provision of services, when directly or indirectly applied in the process. More recently, however, the administrative courts´ stance has been that such inputs must be directly related to the production or provision of services. The judicial courts have been pacifying the broader understanding that inputs that generate PIS and COFINS credits are generally those essential to the activity of the company.

Therefore, both in the administrative and judicial courts, the concept of input for credit calculation of PIS and COFINS is not restricted to raw materials, intermediary products and packaging material, but rather all essential elements must be considered, i.e. those without which the production or manufacture of goods or provision of services would not be viable.

Considering these different interpretations, taxpayers who wish to calculate PIS and COFINS credits on inputs that are not clearly accepted by the RFB should discuss such possibility with their legal advisors, analyse the risks and, in certain cases, initiate judicial proceedings to preserve their right and avoid future tax assessments.

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VAT-in-brief: Events, Exhibitions and Conferences

By Toon Hasselman

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LIMES International B.V. is an independent international tax consultancy firm specialising in cross-border issues. It focuses exclusively on companies and expats that cross borders, providing them with a broad range of integrated solutions in tax and expat, legal, payroll, immigration and relocation, pension and insurance, HR, and VAT and customs services.

Toon Hasselman is an experienced, distinguished VAT and Customs specialist providing support to both national and international companies. He provides simple and practical solutions, and "out of the box" alternatives, and he promotes a no-nonsense approach with a conclusive solution at fair cost. Toon is Global Vice-Chairperson of the GGI Indirect Taxes Practice Group.

General

Admission to events that take place in the Netherlands are subject to Netherlands VAT (currently 21%).

Hosts

Hosts need to register for VAT in the Netherlands for admission, ancillary (e.g. use of cloakrooms and sanitary facilities) and catering services, provision of exhibit space and tickets to conference parties. An all-in fee (currently admission: 21%, catering: 6%, hotel and transportation: 6%) may have to be split between its elements.

Deduction of VAT

VAT on event costs is deductible, however, not on catering expenses unless this is first agreed with the Netherlands Tax Service.

Managers

Managers provide a wide range of services in relation to an event, from invoicing in its own name or the name of the host, to any and all support services. What the VAT consequences are depends on how the contract between the manager and the host is set up. Regardless, either the host or the manager will be required to register for VAT.

Travel Agency Regulation (TAR)

It may well be that a business makes supplies that fall under the TAR if such business buys and sells services such as hotel accommodation, passenger transport, or excursions to delegates in its own name. As TAR is a relatively new concept in the Netherlands the application of TAR in relation to event hosts and managers is not totally clear.

VAT Registration/ Ruling

When a foreign manager or host is obligated to register for VAT in the Netherlands, it is a well-established practice to discuss and agree the VAT treatment of an event with the Netherlands Tax Service.

Italian Split Payment Mechanism: An Increase of VAT Credit Positions

By Francesco Milano

From 1 July 2017 the Italian Split Payment Mechanism, whereby VAT charged on VAT invoices issued to a public administration is paid directly to the tax office by the public administration receiving the invoice, has been extended to other transactions.

In particular, the Split Payment Mechanism also applies to transactions involving the issuance of invoices in respect of:

- subsidiaries of the Presidency of the Council of Ministers and Ministries;
- subsidiaries of regions, provinces, metropolitan cities, municipalities or associations of municipalities;
- subsidiaries of previous companies;
- companies listed in the FTSE MIB index of the Italian Stock Exchange

The reason behind the adoption of the mechanism is to limit VAT fraud and abuse. The adoption of this mechanism is subject to a "special measure of derogation issued by the Council of the European Union" authorising Italy to adopt the new mechanism to discontinue payments from 1 July 2017 to 30 June 2020.

The main consequence of this intervention will be an increase in VAT receivables for those who are required to issue invoices with Split Payment Mechanism, which may result in cash-flow problems, considering in particular the difficulties and long timelines required in Italy for reimbursement of VAT. These problems may also be exacerbated because of new restrictions introduced to mix the compensation of a VAT credit with other tax debts.

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COMMA 10's cornerstone is the professional collaboration between chartered accountants and lawyers and offers its clients complete and inter-disciplinary services related to accounting, corporate and tax services, in the legal area and referring to business area, corporate restructuring and bankruptcy. COMMA 10 is based in Milan and provides integrated services to individuals, private and public companies as well as non-profit organisations.

Francesco Milano is a chartered accountant and has years of experience in VAT and international tax advising foreign companies with subsidiaries and branches Italy. He is also a member of the Study Commission for ICT in Business Administration of the Institute of Chartered Accountants of Milan.

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Indirect Taxes NEWS

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