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MECHANISMS FOR TAXATION BY VAT OF TRANSACTIONS ON CROSS-BORDER SUPPLY OF SERVICES IN ELECTRONIC COMMERCE: INTERNATIONAL CONTEXT AND UKRAINE

Abstract. The article is devoted to the analysis of the mechanisms for taxation by VAT of transactions on the supply of services in case the supplier and consumer are residents of different states (jurisdictions). The research shows that for B2B supplies the most viable mechanism is reverse-charge, while for B2C supplies such appropriate mechanism would be the registration of non-resident as VAT payer in jurisdiction of the consumer. It was established that Ukrainian legislation implements both these mechanisms. However, the registration of non-residents as VAT payers model should apply in Ukraine as of 1 January 2022, therefore it was emphasized that it is important to properly control the implementation of this mechanism in order to ensure prompt and effective response to problems which may arise in this respect.

Keywords: *taxation, VAT, cross-border e-commerce, OECD, non-resident*

Relevance of the study. The development of tax law at the international level is quite intensive now. This is caused by the need to respond to new challenges in the world, in particular to changes in business processes due to the significant expansion of Internet and digitalization of most areas of public and private relations, rapid growth of e-commerce role. One of the directions for developing such changes is the revision of the concept and mechanism of taxation by value added tax (hereinafter – VAT) of cross-border supply of electronic services and intangible assets by residents of one state (jurisdiction) to consumers from other states (jurisdictions).

Recent publications review. Issues related to the taxation of transactions on remote supply of services in e-commerce were studied by N. Boreyko, I. Belik, K. Solodan, T. Zatonatska, O. Melnichuk and others. At the same time, the issue of mechanisms for collection of VAT on cross-border supply of services by residents of one state (jurisdiction) to consumers from other states (jurisdictions) requires further scientific development.

The article's objective. The purpose of the article is to identify the internationally recognized mechanisms for taxation by VAT of transactions on the supply of services by residents of one country (jurisdiction) to consumers from other countries and to assess status of the Ukrainian legislation in the context of such mechanisms.

Discussion. The issue of suitable mechanisms for charging VAT on transactions on the supply of services by residents of one state (jurisdiction) to consumers from other states (jurisdictions) has been relevant for a long time. One of the main platforms on the basis of which it has been discussed is the Organization for Economic Cooperation and Development (hereinafter – the OECD).

In particular, on OECD platform in 1998 the Committee on Fiscal Affairs issued a report "Electronic Commerce: Taxation Framework Conditions" (hereinafter – the 1998 Report). In the 1998 Report it was stated that rules for the consumption taxation of cross-border trade should result in taxation in the jurisdiction where consumption takes place and an international consensus should be sought on the circumstances under which supplies are held to

be consumed in a jurisdiction. It was also noted that for the purpose of consumption taxes, the supply of digitised products should not be treated as a supply of goods. Where business and other organisations within a country acquire services and intangible property from suppliers outside the country, countries should examine the use of reverse charge, self-assessment or other equivalent mechanisms where this would give immediate protection of their revenue base and of the competitiveness of domestic suppliers [1, p. 5].

Subsequently, in the Report by the Consumption Tax Technical Advisory Group (TAG) issued on OECD platform in December 2000 (hereinafter – the Consumption Tax TAG Report), taking into account previous work, it was stated that the most practical solution to identify the place of consumption is to look at the customer's usual place of residence [2, p. 4].

In addition, the Consumption Tax TAG Report outlined developments on possible tax collection mechanisms. The expediency of applying a particular mechanism was considered based the consumer status – business representatives (business-to-business transaction) (hereinafter – B2B transactions) or end consumers (business-to-consumer transaction) (hereinafter – B2C transactions). The Consumption Tax TAG Report states that it was agreed as common ground that a "self-assessment" or "reverse charge" mechanism is a logical way for tax B2B transactions. In turn, for B2C transactions "consumer self-assessment", "registration of non-resident suppliers", "tax at source and transfer" and "withholding by third parties" were considered as potentially relevant mechanisms [2, p. 5]. At the same time, the possibility of implementing a simplified interim approach was considered as an intermediate step towards the transition to one of these or a newly developed mechanisms. This approach provided creation of a tax system, which would simplify all aspects of tax compliance, including registration, identification of turnover and calculation of tax, electronic submission of returns and audit processes [2, p. 6].

In another report issued in December 2000 by the Technology Technical Advisory Group (hereinafter – the Technology TAG Report), these mechanisms are explained in more detail. In particular, it is stated that the consumer self-assessment mechanism provides that tax is collected directly from consumers relying on a self-assessment process. Consumers would be required to determine the tax owing on imports of goods and services. This amount would then be remitted to their domestic revenue authority [3, p. 15]. The mechanism of registration of non-resident suppliers provides that a non-resident supplier is required to register with the revenue authority in the consumer's jurisdiction and collect and remit consumption taxes to that revenue authority of that jurisdiction [3, p. 16]. The tax at source and transfer mechanism provides that a business would collect indirect taxes on exports to non-residents at the rate payable in the consumer's jurisdiction. This amount would then be remitted to the business' domestic revenue authority, for on-forwarding to its counterpart in the country of consumption. [3, p. 17]. The next mechanism described in the Technology TAG Report is the trusted third party model. This mechanism provides for the split of functions between the supplier and the authorized third party, where the relevant tax obligations are performed by such third party. This mechanism requires the interaction of the supplier, a trusted third party and the tax authority [3, p. 17-18]. The withholding by financial institutions model is considered as a variation of the trusted third party mechanism, where such a third party is a financial institution [3, p. 19]. It is important to note that the Technology TAG Report also considers the possibility of applying a hybrid approach, that takes parts of both the tax at source and transfer and the clearinghouse (trusted third party) models, where the strengths and weaknesses of these two models in some ways counteract each other [3, p. 65].

Subsequently, a Report from Working Party No. 9 on Consumption Taxes to the Committee of Fiscal Affairs "Consumption Tax Aspects of Electronic Commerce" issued in 2001 (hereinafter – the Working Party Report) regarding the place of consumption clarifies that for B2B transactions intangible services should be viewed as consumed where the recipient has located its business presence. In turn, for B2C transactions, a more appropriate criterion for determining the place of consumption is the jurisdiction in which the customer has his/her usual place of residence [4, p. 12-13].

As to the tax collection mechanisms, the Working Party Report further considered the possibility of using technology-based and/or technology-facilitated options, which are technological solutions for tax collection and might assist in developing alternative tax collection mechanisms in the future. The Technology Technical Advisory Group pointed out the need to study hybrid models and its own favoured approach, from a technological perspective, was to combine elements of a global registration, tax at source and transfer and

trusted third party models. [4, p. 16-17]. It was also emphasized the importance of further examination of the possibilities of using such technology-based models, given their potential [4, p. 8]. At the same time, as previously, it was considered that for B2B transactions an effective mechanisms of tax collection would be reverse charge or self-assessment. In turn, for B2C transactions, in the short term it was recommended to consider a system of simplified registration for non-resident suppliers, which ensures that the potential compliance burden is minimised, consistent with the effective collection of tax. In the medium and long terms a move towards technology-based options was supposed to be envisaged [4, p. 18].

At the same time, it was stressed that when introducing tax collection mechanisms based on the registration of non-resident suppliers as taxpayers, a number of considerations are recommended to be taken into account, in particular ensuring that the potential compliance burden is minimised, application of registration thresholds in a non-discriminatory manner and consideration of appropriate control and enforcement measures to ensure compliance of non-residents [4, p. 27]. These developments have formed the basis of more comprehensive documents, including "Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework Conditions" issued in 2001, Consumption Tax Guidance Series issued and approved in 2003 and other OECD documents. Subsequently, the issue of suitable mechanisms for collecting consumption taxes was included in the Action Plan on Base Erosion and Profit Shifting (hereinafter – the BEPS Action Plan), which consists of 15 Actions.

In particular, in the document "Addressing the Tax Challenges of the Digital Economy" issued by the OECD in 2014, which is dedicated to Action 1 of the BEPS Action Plan, it is stated that the first challenge regarding collection of VAT arises from the growth that has occurred in e-commerce and in particular, online purchases of physical goods made by consumers from suppliers in another jurisdiction. [5, p. 133]. The second challenge regarding collection of VAT arises from the strong growth in cross-border B2C supplies of remotely delivered services and intangibles. In turn, such remote supplies of services and intangibles present challenges to VAT systems, as they often result in no or an inappropriately low amount of VAT being collected and create potential competitive pressures on domestic suppliers. It is further stated that the approach that allocates the taxing rights to the jurisdiction where the customer is resident would, in principle, result in taxation in the jurisdiction of consumption, but the question arises as to how to ensure effective tax collection in the jurisdiction of the consumer. One option is to require the private consumer to remit the VAT in its jurisdiction at the rate applicable in this jurisdiction, however, such consumer self-assessment mechanism has proven to be largely ineffective and as result, it is highly likely that no VAT would be paid by the consumer in this scenario. The OECD's E-commerce Guidelines therefore recommend a mechanism that requires the non-resident supplier to register, collect and remit VAT according to the rules of the jurisdiction in which the consumer is resident. At the same time, if such jurisdiction does not implement a suitable mechanism to collect the tax in this jurisdiction, no VAT would be paid [5, p. 135-136].

One of the most comprehensive studies, which examines in detail the issue of taxation by VAT of cross-border supply of goods and services, is reflected in International VAT/GST Guidelines which were presented in 2015 and later in 2016 were adopted as a Recommendation by the Council of the OECD. First of all, these Guidelines once again declare, in particular with reference to the World Trade Organization, that there is widespread consensus that the destination principle, with revenue accruing to the country of import where final consumption occurs, is preferable to the origin principle from both a theoretical and practical standpoint [6, p. 16]. Further the Guidelines state that for cross-border B2B supplies of services and intangibles that are taxable in the jurisdiction where the customer is located these Guidelines recommend the implementation of a reverse charge mechanism. At the same time, this mechanism does not offer an appropriate solution for collecting VAT on B2C supplies of services and intangibles from non-resident suppliers. The level of compliance with a reverse charge mechanism for B2C is likely to be low, since private consumers have little incentive to declare and pay the tax due, at least in the absence of meaningful sanctions for failing to comply with such an obligation. Moreover, enforcing the collection of small amounts of VAT from large numbers of private consumers is likely to involve considerable costs that would outweigh the revenue involved. Work carried out by the OECD and other international organisations, as well as individual country experience, indicate that, at the present time, the most effective and efficient approach to ensure the appropriate collection of VAT on cross-border B2C supplies is to require the non-resident supplier to register and account for the VAT

in the jurisdiction of taxation. When implementing a registration-based collection mechanism for non-resident suppliers, it is recommended that jurisdictions consider establishing a simplified registration and compliance regime to facilitate compliance for non-resident suppliers. The highest feasible levels of compliance by non-resident suppliers are likely to be achieved if compliance obligations in the jurisdiction of taxation are limited to what is strictly necessary for the effective collection of the tax [6, p. 71].

In the document "Consumption Tax Trends 2020: VAT/GST and Excise Rates, Trends and Policy Issues" it is stated that most OECD countries apply a reverse charge mechanism to collect VAT on inbound B2B supplies of services and intangibles. At the same time, for B2C supplies, all OECD countries that operate a VAT, except for Canada and Israel, now require the foreign supplier to register and account for VAT. A simplified registration and collection regime (without right to deduct input taxes in the taxing jurisdiction) applies in these countries, except in Japan and Switzerland. At the same time, such non-residents are usually allowed to use the standard registration regime as an option [7].

It should be noted that some challenges of taxation of transactions in e-commerce has been studied by Ukrainian scientists. T. Zatonatska and O. Melnychuk, with reference to foreign research studies, point out that the basic principles of Internet taxation in the EU are the following: a) there is no need to introduce new taxes. All efforts should be focused on the accelerated adaptation of existing taxes, primarily VAT, to the peculiarities of the e-commerce market; b) electronic supply of products should be considered for VAT purposes as a supply of services; c) in order to avoid unfair competition, the neutrality of the tax system between EU and non-EU suppliers, as well as between online and offline sales, must be maintained; d) ensuring compliance with the tax rules of all e-commerce operators; e) the tax system and its management tools should ensure that the supply of services within the EU in the e-commerce market to both businesses and individuals are taxed. e) the tax system should be transparent and fair, avoiding the levelling of the benefits of working in this market [8, p. 18].

I. Belik, with reference to T. Fetzer and S. Poznyakov, when examining the experience of the EU points out that the provisions of the Directive on the application of value added tax (VAT) to the sale of services through telecommunications channels are based on proposals from the European Commission as of 7 June 2000. The Directive stipulates that supplies of digital products consumed within the EU are subject to VAT, while supplies of digital products outside the EU are exempt from VAT. Foreign suppliers of digital products should register for VAT purposes in the competent authorities of one of the EU member states (it is assumed that this will be the country to which the first delivery takes place).

However, the tax will be levied at the rate applicable in the country where the consumer is located. These rules should apply only to those foreign suppliers who sell their products in the EU to non-entrepreneurs (B2C). If the sale is carried out according to the B2B model, the VAT should be accrued, withheld and paid directly by the purchaser located in the EU. The EU Council emphasized that such VAT regulation is in line with the principles of indirect taxation developed at the OECD Conference in Ottawa in 1998. According to these principles, VAT should be levied in the country of consumption of goods and services. The mentioned rules of taxation of e-commerce by VAT were introduced in the EU in 2002. These rules, on the one hand, allow tax authorities to effectively exercise state control in the field of e-commerce, and on the other hand, – to encourage businesses to legitimate economic activities and timely payment of taxes [9, p. 52].

Thus, as an intermediate conclusion, it should be noted that within the OECD as a reputable international organization, considerable attention is paid to taxation by VAT of the supply of services and intangibles when the supplier and consumer are located in different jurisdictions. The importance of this issue comes from the need to respond to changes in business models, in particular due to the intensive development of the Internet and e-commerce, when the provision of services often does not require the presence of supplier and consumer in the same state (jurisdiction). The destination principle according to which the place of supply of services and intangibles should be the jurisdiction of the presence of the consumer is widely accepted. This raises the question of applying effective VAT collection mechanisms.

Such mechanisms vary depending on who is the consumer of the services or intangibles. In particular, if the consumer is representative of a business (B2B transactions), the most effective mechanism to charge VAT is reverse-charge. If the consumer is an individual who is not a representative of a business, the most effective mechanism to charge VAT is the registration of a non-resident supplier as a VAT payer in the jurisdiction of the consumer. The

expediency of using these approaches is confirmed by the practice of OECD countries, the vast majority of which have introduced these VAT collection mechanisms.

It should be noted that the experience of Ukraine shows the adherence to these approaches. In particular, in accordance with Article 208 of the Tax Code of Ukraine (hereinafter – the TCU) [10] in case of supply of services by a non-resident, where the place of supply is the customs territory of Ukraine, to Ukrainian VAT payer or other resident of Ukraine which is representative of a business (except for individual entrepreneurs), or to a permanent establishment of a non-resident in Ukraine, the recipient of services must accrue and charge VAT. The standard VAT rate is 20%, while 7% rate applies in the cases specifically provided by the TCU. In this case, the procedure of accrual and payment of tax, as well as the possibility of including the amount of VAT to the tax credit depends on the VAT status of the recipient of services [10].

If the recipient of services is registered as a VAT payer, it must issue a tax invoice indicating the amount of VAT charged, and this invoice should serve as the basis for accruing by the recipient of VAT credit for the same amount as the tax accrued. Such a tax invoice must be registered in the Unified Register of Tax Invoices. The amounts of VAT obligations and VAT credit must be reflected in the VAT return. In turn, if the recipient of services is not registered as a taxpayer, the tax invoice is not issued. Such a recipient prepares the calculation of tax liabilities in the established form and pays the tax to the budget. In this case, the recipient of services is not entitled to get VAT credit against the tax payable [10].

Thus, for taxation of B2B transactions on the supply by non-residents of services, the place of supply of which is located in the customs territory of Ukraine, Ukrainian legislation provides reverse-charge mechanism. It should also be noted that the place of supply of a significant part of B2B services is defined as the location of the recipient of services (destination principle). This approach is in line with OECD recommendations and the practice of European countries.

As to the taxation by VAT of B2C transactions on the supply of services by non-residents to Ukrainian end consumers, it should be noted that Ukraine has recently adopted the Law of Ukraine "On Amendments to the Tax Code of Ukraine on Abolishment of Taxation of Income Received by Non-residents in the Form of Payment for Production and / or Distribution of Advertising and Improvement of Taxation by Value Added Tax of Transactions on Provision of Electronic Services by Non-Residents to Individual" [11] (hereinafter – the Law), which introduces a mechanism for such a taxation. Prior to the adoption of the Law, the legislation of Ukraine did not provide for such a special mechanism.

In particular, according to the Law non-residents which supply electronic services to Ukrainian consumers are required to register as VAT payers in Ukraine, submit VAT returns, pay tax to the budget and comply with other formalities. This Law, among other things, introduces the definition of electronic services and establishes that place of supply of such services should be identified by the location of the recipient, provides simplified procedures for registration and cancellation of registration of non-residents by VAT payers, submission of tax returns, special procedure for interaction of such non-residents with Ukrainian tax authorities, accrual and payment of VAT. The relevant rules will apply in tax periods starting from 1 January 2022 [11].

Thus, the adoption of the Law shows that Ukraine has chosen the concept according to which in case of supply of electronic services by non-residents to Ukrainian end consumers such non-residents shall be responsible for charging and paying VAT and for this purpose they are obliged to register as a VAT payers in Ukraine. At the same time, non-residents are subject to a simplified registration and tax compliance procedures, and they are provided with the possibility of remote interaction with the tax authority. This approach shows that the legislator considered the peculiarities of relations with non-residents due to potential absence of their representatives in Ukraine. In addition, this Law testifies the expansion by Ukraine of the destination principle for determining the place of supply of services. This approach is in line with OECD recommendations and the practice of European countries.

At the same time, as the mechanism of registration of non-resident suppliers as VAT payers in Ukraine is new and has not yet started its operation in practice, it is currently impossible to assess the practical aspect of such a mechanism. Due to this, it is important to ensure proper control over the implementation of this mechanism and its effectiveness, as well as timely response of the legislator and authorized executive bodies to practical problems that may arise in the process of implementation and operation of this mechanism. Such control and

response will facilitate the ability of non-resident suppliers to perform their tax obligations and exercise their rights, as well as the ability of public authorities to perform their functions effectively, while reducing the probability of occurrence of controversial issues and disputes.

Conclusions. Changes in the interaction between suppliers of services and consumers due to the expansion of opportunities with use of the Internet, in particular due to the rapid growth of e-commerce, led to a revision of approaches on taxation by VAT and other consumption taxes of cross-border supply of services. In particular, the international community has come to consensus that the place of supply of services should be determined primarily by the location of the recipient of services. This raised the necessity of developing tax collection mechanisms. In particular, for B2B transactions it was defined that the most effective VAT collection model is the reverse-charge mechanism, according to which the recipient of services from a non-resident must charge tax in the jurisdiction of its location. Instead, for B2C transactions, the most effective mechanism is the registration of a non-resident service provider as a VAT payer in the jurisdiction of the consumer (recipient of services). The acceptability of such approaches is confirmed, in particular, by the practice of OECD countries, the vast majority of which have implemented these approaches.

Ukrainian legislation is also in line with such approaches. In particular, for cross-border B2B transactions on supply of services with the place of supply on the customs territory of Ukraine the legislation provides reverse-charge mechanism. For cross-border B2C transactions on supply of electronic services with the place of supply on the customs territory of Ukraine, a mechanism for registration of a non-resident supplier as a VAT payer has already been introduced. Thus, considering current Ukrainian legislation, it should be noted that it is in line with OECD recommendations and the practice of other European countries. At the same time, since registration of non-resident as VAT payers will operate only starting from 1 January 2022, it is quite important to ensure effective control over implementation and operation of this mechanism in order to properly address potential problems which may arise in practice.

Conflict of Interest and other Ethics Statements

The author declares no conflict of interest.

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Віталій ЛАБАДІН
МЕХАНІЗМИ ОПОДАТКУВАННЯ ПДВ ОПЕРАЦІЙ З ТРАНСКОРДОННОГО
ПОСТАЧАННЯ ПОСЛУГ В РАМКАХ ЕЛЕКТРОННОЇ КОМЕРЦІЇ:
МІЖНАРОДНИЙ КОНТЕКСТ І УКРАЇНА

Анотація. Статтю присвячено дослідженню механізмів оподаткування ПДВ операцій з постачання послуг в рамках електронної комерції за умови, коли постачальник і споживач є резидентами різних держав (юрисдикцій).

У статті проаналізовано міжнародно визнані підходи щодо порядку оподаткування ПДВ та подібними податками на споживання операцій з такого постачання послуг. З'ясовано, що для цілей визначення прийняттого механізму доцільно розділяти відносини із такого постачання послуг залежно від статусу їх отримувача. Зокрема, якщо отримувач послуг є представником бізнесу (суб'єктом господарювання), найбільш доцільним механізмом оподаткування ПДВ операцій із такого постачання послуг є нарахування та сплата податку отримувачем послуг у юрисдикції його реєстрації як суб'єкта господарювання (reverse-charge). Якщо отримувачем послуг є кінцевий споживач, найбільш доцільним механізмом оподаткування ПДВ операцій із постачання таких послуг є реєстрація нерезидента-постачальника платником податку у юрисдикції отримувача послуг із відповідним покладенням на нього обов'язків платника ПДВ.

Встановлено, що чинне законодавство України узгоджується із такими міжнародно визнаними підходами. Зокрема в Україні законодавчо передбачено та діє механізм, відповідно до якого резидент, який є суб'єктом господарювання, у разі отримання послуг з місцем постачання на митній території України повинен виконати обов'язки із нарахування та сплати ПДВ.

Також в законодавстві України нещодавно запроваджено механізм реєстрації платниками ПДВ нерезидентів, які постачають електронні послуги на користь кінцевих споживачів або фізичних осіб-підприємців, які не є платниками ПДВ. Такі нерезиденти повинні самостійно виконувати обов'язки із нарахування та сплати ПДВ. Однак на практиці цей механізм почне діяти з 1 січня 2022 року. У зв'язку з цим наголошено на важливості контролю за впровадженням цього механізму і оперативного реагування на проблеми, які можуть виникати у процесі його реалізації.

Ключові слова: оподаткування, ПДВ, транскордонна електронна комерція, ОЕСР, нерезидент.