

## Finance Bill 2016: VAT and online marketplaces

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**Tax analysis: How will the Finance Bill 2016 impact online marketplaces and operators? Etienne Wong, a barrister at Old Square Tax Chambers, advises that measures contained in the Bill will considerably widen HMRC's powers to counter VAT non-compliance.**

### Original news

Publication of Finance Bill 2016, LNB News 24/03/2016 16

*Finance Bill 2016 (formally known as Finance (No 2) Bill of the current Parliamentary session) has been published. The Bill contains 179 clauses and 25 schedules, running to 571 pages.*

### What are the VAT measures in the Finance Bill 2016 affecting overseas businesses and online marketplaces?

A sale of goods is subject to UK VAT where the goods are in the UK at the time of sale. This is the case even where the seller is based outside the UK and has no place of business in the UK. The non-UK seller is liable to pay VAT on the sale, and if they fail to comply with their UK VAT obligations, HMRC has the same powers to deal with the non-compliance as they would a UK-based seller. However, it is clearly not as easy to enforce against a non-UK person.

Under section 48 of the Value Added Tax Act 1994 (VATA 1994), HMRC has the power to require a non-UK business (inter alia) to appoint a VAT representative. The VAT representative would then stand in the shoes of the non-UK business, and take on personal liability as if the UK VAT obligations of the non-UK business were their own. This enables HMRC to enforce against the VAT representative even where the non-UK business itself remains out of reach.

The changes contained in the Finance Bill 2016, clause 113, widen HMRC's powers considerably.

Under the amended VATA 1994, s 48, HMRC could require the non-UK business not only to appoint a UK-based person as its VAT representative, but also to ensure that the VAT representative is registered (against the name of the non-UK business). They could also require the non-UK business to provide security against their liability to pay VAT (previously, they could only do this where the non-UK business has failed to appoint a VAT representative as required).

A new regime will also be introduced under which HMRC could notify the operator of any online marketplace through which the non-compliant non-UK business sells its goods to the effect that unless the operator stops (within a specified period—normally, 30 days) to offer goods from the non-UK business for sale through the online marketplace, the operator itself would become jointly and severally liable for the VAT due from the non-UK business on goods sold through that online marketplace.

The non-compliance of the non-UK business that triggers the application of this new regime does not have to have anything to do with transactions it effects through the online marketplace in question.

The notice by which the operator is notified is referred to as a 'liability notice'.

An 'online marketplace' is typically a website, but can be any medium by which information is made available over the Internet, as long as it is a means by which third parties in general are able to offer goods for sale.

The 'operator' is the person who controls access to, and the contents of, the online marketplace.

### When do these measures come into effect?

The date of Royal Assent.

### What powers do HMRC already have to combat VAT non-compliance by overseas traders?

HMRC already has a wide range of powers to counter non-compliance—from the ability to impose penalties to the ability to distrain (ie taking possession of goods belonging to the non-compliant taxpayer to sell at public auction to discharge the unpaid tax bill) and even the ability to bring criminal proceedings. The issue with non-compliant non-UK businesses, however, is not the adequacy or otherwise of HMRC's powers—it is the difficulty inherent in enforcing against a person based outside the jurisdiction.

The changes contained in the Finance Bill 2016 (as well as the measures discussed further below) are intended to address this.

Although the operator of an online marketplace may itself be based outside the UK, it is likely to be a substantial business (and thus more likely to comply with tax requirements than a rogue non-UK business selling goods through the online marketplace).

### **Why is the government making these changes now?**

A significant number of businesses selling goods through websites like Amazon and eBay are based outside the UK. Typically, goods are shipped to the UK prior to the sale, and stored in so-called fulfilment houses, to facilitate final intra-UK delivery. Because the goods are already in the UK at the point of sale, UK VAT is payable on the sale, and yet a significant number of non-UK businesses have simply not been paying such VAT. This gives them an unjustified price advantage against compliant businesses. It also now accounts for £1bn to £1.5bn of the total VAT gap (according to government estimates). In the circumstances, the government had to bring in counter measures.

### **What practical issues do you foresee with implementing the measures affecting online marketplaces?**

HMRC has indicated that, in practice, when they uncover non-compliance, they would first identify the non-compliant non-UK business, with the view to procuring their compliance (either via compulsory VAT registration or through the appointment of a VAT representative with or without security), and that only where non-compliance continues would they seek to serve a liability notice on the operator. The suggestion is that the liability notice—and the joint and several liability that may result—are measures of last resort.

Be that as it may, there is no escaping the fact that the new measures are in effect a requirement for operators to police their own customers. This will have compliance costs, and raise issues such as the extent to which operators are prepared to delve into what, to date, have been regarded as the private affairs of its customers (Amazon is reported to have said in 2015, 'We don't have the authority to review their tax affairs'). It is even possible that an operator may seek to challenge the validity of the joint and several liability envisaged under the new regime (ie whether it is consistent with the provisions of the Principal VAT Directive 2006/112/EC and applicable European law principles, for which, see Practice Note: VAT—European legal principles).

The most important question is whether the measures will be effective. The government is hoping to recoup £875m (of 'lost' VAT) over the next few years (while at the same time acknowledging that the measures will not halt VAT evasion altogether).

### **Is there also work being carried out to combat these issues at an EU or Organisation for Economic Co-operation and Development (OECD) level?**

HMRC is consulting with the EU and the OECD on this, but full details of these discussions have yet to emerge.

### **Any other points of interest?**

The above-mentioned changes form only part of the government's plans to tackle the problem.

The non-compliant non-UK business would normally ship its goods to the UK prior to their sale and store them in fulfilment houses. A fulfilment house is typically a business that provides storage services in relation to goods imported from outside the EU—breaking bulk, unpacking, re-packing and making (or arranging) delivery to consumers in the UK.

The government is proposing to register fulfilment houses, and introduce a due diligence scheme that will set out 'fit and proper' standards that houses will be required to meet in order to operate. They will also have to evidence the due diligence they have undertaken to ensure that their non-UK client is either registered for VAT in the UK or not so registered for legitimate reasons.

HMRC is consulting until 30 June 2016 on this scheme, see: Fulfilment house due diligence scheme.

Later in spring, they will also consult on a new penalty for VAT fraud.

*Etienne Wong qualified as a solicitor in 1990, and was a partner and head of the international VAT unit at Clifford Chance LLP from 1999 to 2014. Etienne was called to the Bar in 2014 and advises on all aspects of VAT. He also advises on disputes with HMRC.*

*Interviewed by Kate Beaumont.*

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