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VIA EMAIL

Piet Battiau
Head, Consumption Taxes Unit
Organisation for Economic Cooperation and Development
2 rue Andre-Pascal
75775, Paris
Cedex 16
France
(piet.battiau@oecd.org)

Re: USCIB Comment Letter on the OECD Discussion Draft on International VAT/GST Guidelines

Dear Mr. Battiau,

USCIB¹ is pleased to have this opportunity to provide comments on OECD's discussion draft on VAT/GST Guidelines. Nancy Perks will be presenting remarks on behalf of USCIB at the public consultation.

General Comments

- 1) The business community appreciates the role the OECD has taken with regard to the development of the International VAT/GST (hereinafter VAT) guidelines. The secretariat has designed a process that obtains business input into the guidelines both through the TAG process as well as through the public consultation. The success of the global forum in Tokyo and the broad support of the B2B guidelines by governments from all over the world is also indicative of the thoughtfulness and care that went into drafting those guidelines. However, USCIB believes that the rushed approach to finalizing the B2C guidelines resulted in much more limited and fairly narrow business input into the process. To accelerate the process the OECD limited business participation in the working meetings. There is a plan for only one public consultation. USCIB feels that the urgency for finalization is somewhat artificial as it was driven largely by the BEPS timeline.

¹ USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

- 2) The BEPS debate has been almost entirely focused on income tax. Despite some “lip service” to VAT as part of action plan 1, to date there has been a lack of discussion around the role of VATs in the overall balance of tax rights. We think this is a discussion that sorely needs to take place. Tax policy makers should be more cognizant of the overall burdens of various taxes and who bears them. Tax policy should not be made in separate silos. USCIB believes that a much more cogent discussion of the role of tax policy in a digital economy could be had if both VAT and income taxes were part of the same discussion.
- 3) Clarity in the application of VATs is critically important. This is so because unlike income taxes there is no agreed upon method for resolving VAT disputes.² Thus, if VAT rules are unclear, a business may find that two (or more countries) may assert the right to impose VAT. This is especially likely to occur when the transaction involves remote suppliers of digital services. Even if countries agree on the standard to be applied (usual residence of the customer) if the criteria used to determine that residence are prescribed and differ, then double taxation is likely. Double VAT will create a significant barrier to trade and should be avoided.
- 4) Due to competition and the price elasticity of demand, it would be erroneous to assume that VAT's are economically born by consumers in all cases. Since most VAT countries (Canada is a notable exception) require that prices are stated inclusive of the tax, multinational companies complying with remote seller registration requirements will necessarily bear all or a portion of the cost of VATs where they are constrained from raising prices. Significant differences in VAT rates in the EU combined with competitive pressure for uniform pricing, for example, increase the VAT cost borne by digital economy businesses. This impact is well understood by the business community but we believe that it is not as well understood by governments. The resulting increased tax on business needs to be factored into the BEPS debate to avoid a skewed result to the process.
- 5) VATs may be a far more efficient means of collecting a tax from companies that are able to exploit a market without being within the market. There are many reasons for this and we point out some of the key factors:
 - The base upon which a VAT is computed is simpler and subject to few adjustments meaning that the base of a VAT is much more likely to be highly

² USCIB has been critical of the OECD's proposals on Action 14: Make Dispute Resolution Mechanisms More Effective. We stand by those criticisms, but at least there is a dispute resolution mechanism available to resolve income tax disputes, that is not the case for VAT.

similar if not identical across jurisdictions making it far simpler to comply with, administer and audit.

- The base of VAT is far more objective than the base of an income tax. Therefore, the disputes over where the tax is due are likely to be much more limited than with an income tax where tax authorities often cannot even agree on what parts of the productive process creates value and where that occurs.

- 6) Since VATs tax consumption the market jurisdiction is able to tax 100% of any final consumption that occurs in that jurisdiction. This gives the market jurisdiction a significant share of the total taxes -- both VAT and income -- borne by a corporation accessing that market. USCIB continues to believe that a combination of an origin-based income tax and a destination based VAT appropriately divides the jurisdiction to tax between the countries where income producing activities occur and the countries where consumption of goods and services occur.³
- 7) In general USCIB endorses the guidelines. However, the principle reason for this endorsement stems from the need to ensure that businesses operate as much as possible on a level playing field that does not create artificial advantages of one business over another solely as a result of the location of the business establishment. (This is to be distinguished from sources of advantage that arise through competences in approach, suitability of products, more effective business and operational models.) USCIB recognizes that for many of the jurisdictions that adopt VATs that they are a significant, if not a primary source of revenue. Thus, the guidelines need to and do propose a uniform system for applying VAT to international transactions. Whether the proposed solution will achieve the intended result will only be ascertainable as jurisdictions adopt the guidelines into their national legislation. In this regard we believe that the guidelines do not go far enough in recommending that governments take simple and pragmatic approaches. For example, the discussion on the usefulness of thresholds as a way to ease the administrative burden for small traders or “incidental transactions” could be developed in a way to provide useful guidance to governments that were interested in considering them. While we agree such information might not be appropriately part of “the guidelines”, we do believe that the OECD has a role to play in defining best practices for national legislation. Best practices require an appropriate balance between the local need for remote seller taxation due to competitive distortions, and the administrative burden that such entails.
- 8) As indicated above, we believe the B2C guidelines were rushed and suffer from the lack of broader business input. While we make some specific suggestions for corrections and clarifications below, we wanted to suggest an alternative approach. The primary driver

³ This issue is discussed at length in our comment letter on the digital economy. A link to that letter is included here <http://www.uscib.org/index.asp?documentID=827>. The in depth discussion of this issue is on pages 11 and 12 and 20 – 23 of that comment letter.

for the guidelines appears to be the need to create a level playing field between domestic suppliers that are required to charge VAT to their customers and non-resident suppliers that currently are not obligated to charge VAT when they sell into countries that do not impose a remote supplier registration obligation. The sale of electronically delivered goods and services across border is appropriate to cover in OECD guidelines. However, we have some concern about the extent to which the guidelines address transactions which are entirely domestic—for instance the on the spot rule would seem to address transaction that are essentially domestic and already addressed in national law. Similarly, transactions relating to immovable property are also likely to be domestic transactions in a B2C scenario.

- 9) An alternative approach for the B2C guidelines might be that since consumer transactions are largely domestic, they remain outside the scope of the OECD guidelines except for B2C supplies of electronically delivered goods and services. This would significantly simplify the document as well as highlight the principal intent which is to create a level playing field where, absent the guideline, there is a competitive disadvantage for local suppliers. In addition, such an approach would reduce the need to focus on rules that principally address domestic transactions and thus might be more acceptable to a larger number of governments.
- 10) If the OECD determines that it is preferable to retain the existing approach outlined in the draft guidelines, we have the following suggestions.
- 11) USCIB endorses the “on the spot guideline” of paragraph 3.5 (box top of page 7). It appropriately creates a separate rule for transactions when everything happens in the same place and at the same time. This rule is critical to permitting legacy transactions to continue to be taxed as they always have been.
- 12) Paragraph 3.8 provides for the use of a tax identification number to establish a customer’s status as a business or consumer. USCIB supports the use of VAT registration numbers to identify a customer as a business. We do not, however, support the adoption of verification requirements. Even simple verification requirements will slow transactions. In the case of remotely delivered electronic transactions, slowing the transaction will mean that some transactions will not take place. In addition, the costs of verification may make a small transaction uneconomical. The benefit to governments must be balanced with the additional burden on business. A verification requirement would not reflect an appropriate balance between the benefit and burden. We also do not believe that the personal tax identification numbers of individual taxpayers ought to be used to identify individuals as consumers. These numbers are sensitive information the disclosure of which can lead to identity theft and should be protected from routine disclosure. Requiring individuals to provide personal tax identification numbers to

determine whether VAT is applicable will discourage individuals from engaging in transactions because they do not wish to disclose this information.

- 13) Paragraph 3.18 refers to paragraphs that do not exist in the consultative document. Those paragraphs in the International VAT Guidelines discuss the application of the main rule to MLE's. This cross-reference seems inaccurate, as it should refer to the specific rules. Thus either the cross-reference is incorrect or it is not clear what the reference is intended to signify.
- 14) USCIB also endorses guideline 3.6 (box bottom of page 7). However, USCIB has significant concerns with the commentary on determining the jurisdiction of the usual residence of the customer. For example, we have concerns about the statement in paragraph 3.23:

Particularly in e-commerce, where activities often involve high volume, low-value supplies that rely on minimal interaction and communication between the supplier and its customer, suppliers might not be able to rely on one single source of information, such as a contract, to reliably determine the place of usual residence of the customer of a business to consumer supply.
- 15) The sentence can be read to suggest that it would be appropriate for governments to require a business to obtain more data points to support the taxation determination for a 99 cent transaction than for a large business contract. The paragraph continues:

Jurisdictions should provide clear and realistic guidance for suppliers on the information that is required to determine the place of usual residence of their customers in a business to consumer context.
- 16) USCIB is concerned that this guidance might encourage governments to write overly prescriptive rules (such as the EU rules) that run the risk of becoming obsolete as technologies, business models and payment methods continue to evolve very rapidly. It would make more sense to require businesses to use the "best" information available to determine customer location. Such a standards based approach to drafting legislation is much more likely to remain relevant over the long term in rapidly changing environments. This would eliminate the need for constant revisions to legislation which add significant cost to governments as well as taxpayers.
- 17) The requirement to use the best available information is a high standard. Businesses would be required to explain why they believe the information used is better than other potential sources. It is important to note, that businesses will most likely use the same information on customer location to meet a variety of business and other regulatory purposes. For example US businesses are required to screen customers in order to comply with US laws that prohibit sales into certain countries or to certain parties.

Companies have business reasons to want to understand where customers are located in order to determine where to spend marketing dollars, and which teams should be paid incentive compensation bonuses. Knowing where consumers are located is simply fundamental to understanding what customers want and how to market to them. If a business uses the same information on customer location for all purposes or has a reasonable explanation for a variation, governments should realize that this is in fact a very high standard.

18) There is cost and risk with collection of customer location data. Personally identifiable information (PII), is risky and costly to retain due to the critical importance of keeping that information safe and confidential as well as accurate. It is important the governments bear in mind the costs of safely storing customer location taxation data in formulating their approaches to what their legislation requires as regards the amount of information collected and the length of time it is required to be retained. Governments should note that sensitive data subject to intensive safeguards will be more costly for them to examine.

19) There is an ambiguity in the last sentence of paragraph 3.23 that we recommend be clarified:

. . . while safeguarding flexibility for businesses with respect to the information that is accepted for identification of their non-business customers and for determining their place of usual residence.

20) It is not clear from the language whether the intended meaning is that businesses take measures to determine whether a customer is not a business or whether the language requires that non-business customers be named. Clearly we believe that the former is what was intended as the latter is simply not appropriate. A final draft should eliminate the ambiguity.

21) USCIB fundamentally disagrees with the suggestion in paragraph 3.24 that “Jurisdictions may require that the reliability of such information be further supported through appropriate indicia of residence.” The requirement to use multiple indicia to determine residence raises the risk that a transaction could be viewed as taxable in multiple countries simply because there is a failure of the IP address to match the credit card billing address because a customer happened to make a purchase while on vacation. Such a result is avoided where a standards based approach is deployed that requires businesses to use the best available information.

- 22) Paragraph 3.26 of the discussion draft reference to paragraphs 3.60-61 of the consolidated guidelines is unclear. A better reference would be to the same paragraph numbers of the International VAT/GST guidelines published in April 2014.
- 23) Guideline 3.7 (box on page 10) poses some problems as currently drafted. First, it creates a difference in the level of burden governments have in developing rules to tax on the spot supplies for Business to Business transactions that is not created for Business to Consumer transactions. This difference could be exploited by governments or businesses potentially to achieve results that were never intended. USCIB recognizes that this current construct arises from the way the work was originally organized and appreciates the sensitivities around work that would be viewed as “re-opening agreed guidelines.” However, we believe a solution is desirable and it is likely that it would have been achieved by the TAG if it had a more appropriate amount of time to produce the B2C guidelines. One suggestion is to propose a work plan that will manage a careful and thoughtful consolidation of the B2B and B2C guidelines. The consolidated guidelines would establish a common default rule (no longer a main rule) based on customer location (as appropriately defined for businesses and consumers). 3.7 would remain as the criteria for the Specific Rules. 3.5 would become a specific rule for both B2B and B2C in its current form with the added requirement that the supplies in questions are made to both businesses and consumers. 3.8 would be another example of a specific rule. With both 3.5 and 3.8 recognized as appropriate specific rules internationally, there should be broad recognition that these are specific rules the take precedence over the default.
- 24) Paragraph 3.36 refers to “use and enjoyment” as potential proxies for place of taxation. USCIB believes that “use and enjoyment” is never an appropriate proxy as a supplier is rarely privy to this information at the time of transaction. Reference to use and enjoyment should be deleted from this section.
- 25) It is not clear from the organization of the paper whether the framework outlined in D.1 is applicable to supplies connected with movable and immovable property. USCIB thinks they should both be governed by that framework and that this should be made clearer in the paper.
- 26) Paragraph 3.48 and section D.3.5 is really an insufficient development of a complex area—work on tangible goods. The nature of supplies falling under work on goods area could potentially change significantly with the growth of devices connected to the internet and create the potential for confusion as to whether guidelines 3.2 (location of the customer for B2B supplies) and 3.6 (customers usual residence for B2C supplies) are preferable to a rule referencing the location of the property. USCIB recommends that the OECD simply indicate that work on movable goods is an area that requires additional

study prior to the development of recommendations. We believe this is much more responsible than the current paragraph which essentially suggests that countries can do as they wish.

Annex 3

- 27) Annex 3 paragraph 4 lists the information required to register under a simplified registration procedure. The last two bullets should be limited to the websites (URL) of the business with respect to sites through which commerce in the specific country is conducted. Similarly it is unclear which national tax identification number is required. At the most, a remote business should only be required to provide the national tax identification numbers of the country of consumption and its country of establishment (or tax residence).
- 28) Paragraphs 11 and 12 of annex 3) should clearly state that no formal tax invoice is required for B2C transactions. Issuing formal tax invoices or complying with complex electronic invoicing systems is not warranted for B2C transactions where the customer has no right of input tax deduction. Paper invoices and or invoices that require either ink or digital signatures often cost more than the value of the underlying transaction.
- 29) USCIB also wishes to stress the importance of using a standards based approach to determine customer location. Only this type of approach would allow businesses to deploy a consistent global solution. The cost of complying with different requirements to use different indicia will escalate with the number of countries that adopt such an approach. Annex 3 should include guidance on customer location and such guidance should be standards based as described above.
- 30) USCIB wishes to stress, that as a practical matter businesses will only comply if the cost and effort of doing so is reasonable given the size of the market opportunity. Countries that seek to require businesses to create local establishments, or register a PE, will likely find that their opportunity to enjoy the internal growth in their economies and in the skill sets of their populations will be significantly curtailed.

Chapter 4

- 31) Chapter 4 only highlights the amount of work that remains to be done in order to create a fair and effective regime for VAT imposed on cross border transactions. The business community has devoted a significant amount of time and effort to assist the OECD and national governments to help them understand how this regime might be developed and what options may be workable. Chapter 4 makes clear that governments will always have recourse to discuss disputes and work with other tax authorities regarding issues with taxpayers and abusive schemes. However, there is still no means by which

companies that are subject to multiple claims of taxation on the same transaction can seek effective redress.

32) As these guidelines are implemented into national law and enforced by national tax administration, the primary focus may shift from maintaining neutrality and achieving a level playing field to one of revenue maximization. It is far from clear what recourse businesses would have at their disposal to address multiple claims of taxation of the same transaction arising simply from different tax authorities differing preferences for indicia. This is one of the principle reasons that we feel a standards based approach to determining customer location is so critical to the success of the guidelines.

Sincerely,

A handwritten signature in black ink, appearing to read 'William J. Sample', written in a cursive style.

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)

Washington Office

1400 K Street, N.W., Suite 905
Washington, D.C. 20005
202.371.1316 tel
202.371.8249 fax
www.uscib.org

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