

Fiscal representation

Many (European) customs brokers and forwarders offer Fiscal Representation for VAT ("VAT-Rep") as service to their customers. On many occasions the service is seen as an additional administrative service. Fees are usually not high. Risks can, however, be quite big for the VAT-Rep.

VAT treatment of transactions

In the Netherlands, import need not be a risk. Under EC Directive 77/388 ("the Sixth VAT Directive") and the Dutch VAT Act 1968, a VAT-Rep can obtain permission to defer import VAT, which is immediately due upon import, to the periodical return it must file for its client. As Import VAT may be set off in that periodical return, nil Import VAT is cash payable for imports when using this so called "article 23" deferral-license. Not all EC countries have implemented this option in the Sixth VAT Directive for deferral.

Risks usually emanate in the first transaction after import (in case of limited VAT-Rep, see below) resp. transactions after import (in case of general VAT-Rep, see below). Below are some of the most occurring transactions.

If a transaction is a national supply, (A in EC state X sells and delivers to B in EC state X) national (X) VAT is due. This VAT must be paid to national (X) Tax Authorities. A invoices that VAT to B. B pays to A, and A (or its VAT-Rep) declares that VAT to national (X) Tax Authorities.

The transaction can also be an intra community supply (seller A in EC state X delivers to buyer B in EC state Y, the goods are transported from state X to state Y). In that case a 0 % VAT rate can be applied by A. To apply the 0 % VAT rate A must issue an invoice with its VAT-Rep in X's VAT number and the VAT number of B. Further, A (and his VAT-Rep) must be able to prove that the goods were physically delivered to the buyer (for example by CMR waybills signed for receipt by B and/or transport-invoices). If A (and/or his VAT-Rep) has doubt in respect of B's VAT number being correct, he must verify that VAT number with Tax Authorities. It is subject to discussion whether A (and/or his VAT-Rep) must verify B's VAT number on all occasions. B reports his acquisition to his Tax Authorities as an intra-community acquisition and must pay VAT.

The transaction can also be a simplified ABC transaction (A in EC state X sells to B in EC state Y and B sells to C in EC state Z, the goods are transported directly from state X to state Z). In that case VAT can be deferred to C. A issues an invoice to B as if the supply by A to B was an intra community supply (see above). Instead of reporting an intra-community acquisition and paying (Y) VAT, B issues an invoice to C bearing both parties' VAT numbers and a clause referring to article 28 quarter of the Sixth VAT Directive. The exact clause varies per EC state. This clause in principle must be on the invoice B-C to apply this structure. In that case nil (Y) VAT is due by B. C subsequently reports the acquisition to his (Z) Tax Authorities and pays (Z) VAT. Again, transport from A to C must be proven.

Types of VAT representation

There are two forms of VAT-Rep: limited and general.

A limited VAT-Rep is responsible for filing an import declaration and reporting (in periodical VAT-returns) the import as well as the first transaction after import. The limited VAT-Rep is jointly and severable liable –together with his principal- of all VAT, fines and interest due in respect of these transactions. The license issued to the limited VAT-Rep by Tax Authorities can (in the Netherlands) be withdrawn upon request of the limited VAT-Rep.

A general VAT-Rep is responsible for reporting (in periodical VAT returns) all transactions of the principal subject to VAT. The general VAT-Rep is jointly and severely liable –together with his principal- of all VAT, fines and interest due in respect of these transactions. The tax liability of the general VAT-Rep is, however, limited to the amount of the bond he is required to provide to Tax Authorities in order to obtain a license to act as general VAT-Rep. The license issued to the general VAT-Rep by Tax Authorities can (in the Netherlands) be withdrawn only upon the joint request of the limited VAT-Rep and his principal.

Recommendations

The obvious risk for any VAT-Rep is financial: having to pay VAT, fines and/or interest to Tax Authorities without being able to collect same from the principal. In view of its unlimited tax liability this risk is larger for the limited VAT-Rep than for the general VAT-Rep. I would recommend both to ask for security by the principal prior to commencement of the representation. The time bar applicable to re-assessments for VAT is five years. It is not uncommon that VAT-Reps require bonds by their principal to remain in effect for five years after rescinding their contract, but that may commercially not always be possible.

Another risk is that in order to be able to file correct VAT returns, any VAT-Rep must have access to his principals books and records. The VAT-Rep must be aware of the VAT treatment of transactions by his principal's customers, particularly in case of ABC transactions as mentioned above. Generally, the VAT-Rep must have access to the records of his principal in respect of these transactions; preferably keeping the relevant part of these records himself. In case of ABC transactions, the VAT-Rep also wants to verify whether B correctly complies with (invoicing) requirements for such transactions.

VAT fraud in many occasions concerns intra community supplies to non-existing buyers, who receive the goods without reporting and paying VAT. A VAT-Rep should, in my opinion, always verify the VAT number of his principal's customers. Netherlands Tax Authorities can provide such verification, also for companies registered for VAT in other EC states.

Because a VAT-Rep may also have to have a clear view of the flow of goods (and have supporting documentation available) I wouldn't want to advise any logistics provider to become VAT-Rep for a principal whose logistics are taken care of by another service provider, unless the VAT-Rep has complete access to the

administration regarding the logistics operation and has satisfied himself that it is adequate and correct.

The general VAT-Rep wants to obtain a power of attorney from his principal enabling him to request withdrawal of the license beforehand.

Generally, no one should undertake VAT representation without a written contract. In the Netherlands the best general conditions of trade to apply in such a contract are the Netherlands Forwarding Conditions (or "Fenex-conditions"). The Dutch Forwarding Association (Fenex) provides a standard contract in its handbook made available to its members

Fiscal representation in practice:

A carrier can be a limited fiscal representative for some customers. Globally the procedure as described below:

- The goods are imported and cleared through Customs by using the license limited fiscal representative.

On the entry document will be filled in as address, the 3PL as limited fiscal representative for:

Company name

Number and street

Zip code, State/Province

Country

VAT ID number NL 001234567 B02

- The goods are cleared by the Customs and are ready for transport.

The ID number of the buyer will be checked by the ICT in Deventer (delivery can only take place if the ID number is approved). A CMR will be made up stating our VAT ID number and the ID number of the customer.

- The Intrastat must be processed by the end of the month.

The administration makes up the monthly VAT declaration every month. The carrier or logistics service provider acts on behalf of the customer. The service provider is also responsible for the correct dealing with the process. If something goes wrong the carrier will be levied at first for 19,0% of VAT. It is therefore absolutely necessary to act correctly

Points of interest:

- ? Do never deliver when the ID number is not approved yet.
- ? The carrier can never act as a fiscal representative for private individuals, they always pay VAT.
- ? The carrier must keep complete files to prove that it was dealt with correctly.
- ? When the goods, which were cleared through Customs by the carrier as fiscal representative, are being picked up by a shipper who is not appointed by the carrier, the goods can only be taken after approval by the management of the carrier.