JPA INTERNATIONAL
Audit, Accounting, Tax, Consultancy
A Worldwide Network of Independent Firms

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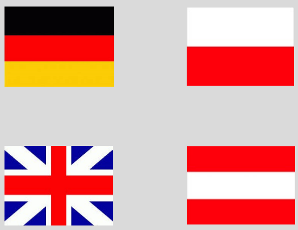

« The German solution at intellectual property haven: License Barrier Act»

GERMANY:

INTRODUCTION

LAW AGAINST HARMFUL TAX PRACTICES

Intellectual property tax havens are a problem for countries nowadays. Indeed, cross-border license fees for the right to use intellectual property (IP) are paid to a country with a low tax rate, and international companies are able to shift their profit. This situation had the effect that more and more countries created preferential tax regimes (e.g., from a so called "IP, patent or license box"). Therefore, it led to a harmful tax competition between the countries.

German solution: License Barrier Act

The German Ministry of Finance published a draft "act against harmful tax practices in connection with the licensing of intellectual property rights" dated December 19th, 2016 ("License Barrier Act").

The act intends to create a "License Barrier" to limit the tax deductibility of cross-border license fees incurred by a German tax-resident licensee for the right to use IP if:

1. The corresponding licensing income is subject to a low tax rate in the hands of an affiliated licensor due to the application of a preferential IP tax regime, and
2. Such tax regime is deemed inappropriate. In principle, the distinction between "appropriate" and "inappropriate" IP tax regimes will be based on the "nexus approach" described in OECD BEPS Action 5.

Pursuant to the new special tax rule "Sec. 4j German Income Tax Law" (Sec. 4j ITA), expenses incurred for the right to use IP may not be fully deducted from the income tax base if:

1. **The corresponding licensing income is taxed in the hands of an affiliated licensor** (or, in case of sublicensing or similar arrangements, an affiliated upper-tier creditor) **at a rate lower than 25%**, and
2. This low tax rate is not the standard tax rate applicable in the respective jurisdiction but results from a preferential tax regime.

To determine whether the effective tax rate is lower that 25%, all relevant tax provisions that have an impact on the taxation of the licensing income have to be considered. This includes tax reductions, exemptions, credits and relief.

If the licensing income is partly attributed to or taxed in the hands of a person other than the licensor, the aggregate sum of the tax burden needs to be determined.

Calculation

The percentage of non-deductible license fees is to be determined using the following formula:

25% MINUS the effective tax rate applicable to the licensing income

25%

Outlook

If sec. 4j German Income Tax Law is implemented, it will affect the tax deductibility of expenses incurred after December 31th, 2017.

The German Ministry of Finance expects that this will lead to a higher tax income of million Euros per year:

2019	€10,000,000
2020	€50,000,000
2021	€40,000,000

JPA INTERNATIONAL IN **GERMANY**

Breiler & Schnabl is a successful company with over 30 years of experience in the field of audit, tax, consulting and other services related to industry and business.

Its strengths lie in the high-quality service as well as in its extensive counseling and coaching oriented towards its clients' needs.

As a member of international (JPA International) and national networks (JPA Audit AG) the firm serves its clients locally, on a national level and globally. They are supported by a team of highly qualified and committed members of staff.

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« The range of the overall tax rates can vary from 2.5% to 36.8% »

JPA INTERNATIONAL IN **GERMANY**

RENTROP & PARTNER is one of the founding members of JPA INTERNATIONAL starting from its head office in Bonn to expand the network all over Germany where at present six different member firms are situated in eight different cities. Nearly all German members have joined JPA Audit AG, a company for common purposes and especially common audit work.

RENTROP & PARTNER, a medium sized company of about 30 people, 10 of them professionals, is serving its clients for more than 50 years with a focus on tax services, consulting and auditing. Hans Ronneberger Wirtschaftsprüfer and Steuerberater, the leading Senior partner, chairman of JPA Audit AG, started his career in PWC as auditor for airline businesses. He is very much engaged now with his team of different professionals to find the right way for medium sized clients in a world of accelerating globalization.

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JPA International Tax Game—Stage 8

« Debt or Equity Financing? »

The result of stage 8 of our international Tax Game was presented by Hans Ronneberger during our meeting in London in June 2017.

For inbound investment, most countries have different tax rules for debt or equity financing. The tax advantages for debt or equity financing were compared in this game. The facts of the case study are as follows:

One of your clients is an automotive supplier in the legal form of a corporation. It is the subsidiary of a foreign parent company, which is located in another European country. The subsidiary is currently expanding its production capacities which needs a €4.00 million investment. The parent company is ready to provide the funds but it is asked what is the most tax efficient method of financing:

- a cash payment of €4.00 million into the capital reserve of the subsidiary (Equity Financing), or

- to pay the amount of €4.00 million as a loan to the subsidiary (Debt Financing).

18 countries of our members participating to the game, making the comparative analysis relevant.

The results showed that for most countries, it is preferable to use debt financing (61%) than equity financing (39%) because of the interest deduction. The main differences between the countries are the assessment basis for tax and the different tax rates.

The model applies the national corporation tax rate (ranging from 12.5% in Cyprus or Ireland to 35% in Japan) to the Earnings Before Taxes (EBT) of the subsidiary. We have identified some special features that might interest you.

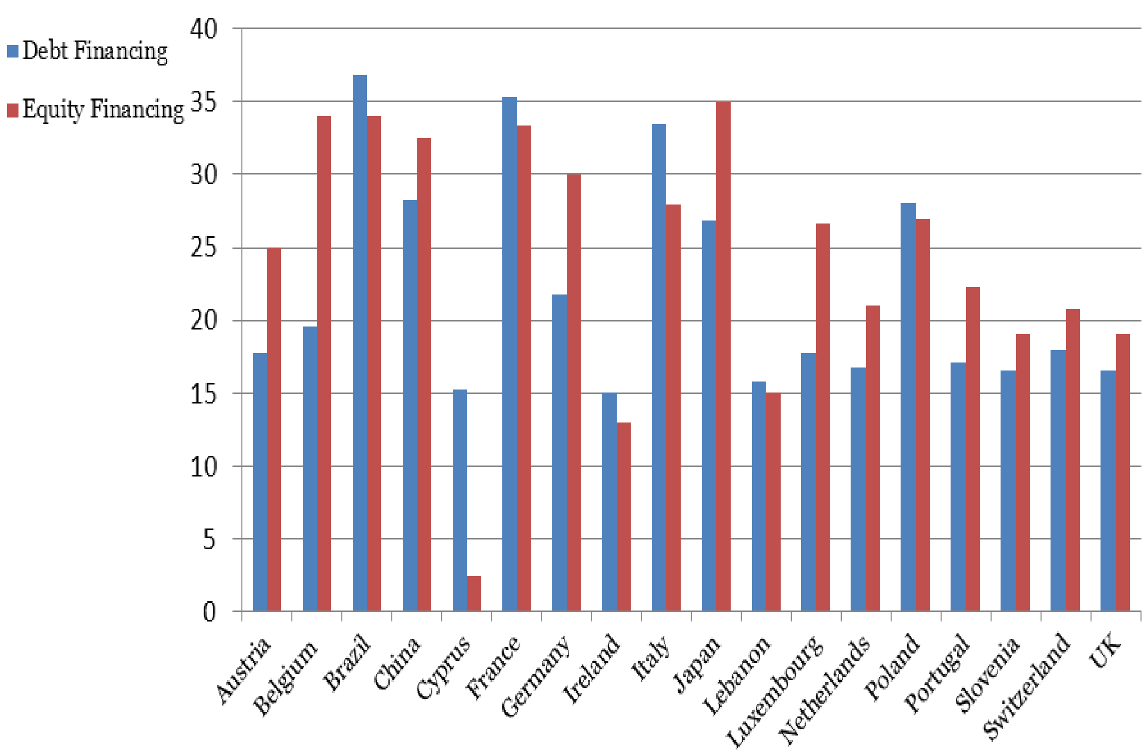
1. In Brazil, the tax assessment basis in the case of debt financing is on the loan (€4.00 million) to which they apply a specific tax rate on financial transactions of 1.5% per year, making the debt financing more favourable.

2. In Cyprus, if the company chooses equity financing, it can deduct the interest that it would have had with debt financing. The level of tax in the Cypriot subsidiary is therefore the same, making the equity financing better from a overall tax point of view.

3. In Poland, the assessment basis is the amount of interest in the debt case, with a corporation tax rate of 19%. In the equity case, two different taxes are required : a tax on civil law transaction (0.5% of the loan) and the corporation tax (19% of the EBT). At the end, the equity financing solution is preferable.

However, the winner of stage 8 is Cyprus as in this country equity financing is promoted by a National Interest Deduction, bringing the overall tax rate to 2.5%. On the other hand, the losing country with the highest overall tax rate reaching 36.8% is Brazil if debt financing is chosen.

Overall Tax Rate



JPA International - World Tax Game - Stage 8

« 2017 winners of the tax game on equity or debt financing»

« Over 100 countries are signatories to CRS and have committed to exchange certain information with first reporting in 2017 or 2018 »

THE ROLE OF THE TAX ADVISOR AS POLICEMAN FOR THE TAX AUTHORITIES

JPA INTERNATIONAL IN UNITED KINGDOM

In today's ever changing tax environment you must be well advised and kept up to date on tax.

Bourner Bullock's aim is to give you certainty.

Certainty that your company tax and personal tax liabilities are managed to suit your business goals. And to be certain you are legally only paying the least amount of corporate and personal tax.

Contact us to open a discussion about the tax challenges you face and what we can do to help !

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Over recent years the UK tax authority, HM Revenue & Customs (HMRC), have developed a strategy targeting offshore tax evasion. This strategy has been underpinned by closer international cooperation with Governments through agreements which have led to disclosure of financial information. This process started with the United States of America introducing the Foreign Account Tax Compliant Act (FATCA) which the UK tax authority quickly adapted for the UK to use and has culminated in The Organisation for Economic Co-operation and Development initiative, namely the Common Reporting Standard (CRS). Over 100 countries are signatories to CRS and have committed to exchange certain financial information with first reporting in 2017 or 2018.

The European Union (EU) Revised Directive on Administrative Cooperation (DAC) implements the CRS within the EU. The UK and other Member States were required to implement the DAC via domestic legislation by 31 December 2015.

HMRC expect to receive information under the CRS from 30 September 2018 and to coincide with this, have adopted a two layered strategy of:

- The Worldwide Disclosure Facility (WDF)
- THE HMRC branded letter.

Worldwide Disclosure Facility

UK taxpayers are being given the opportunity to correct historical non-compliance by 30 September 2018 through the Worldwide Disclosure Facility (WDF), HMRC view the WDF as the last chance for anyone to disclose a UK tax liability that relates wholly or partly to an offshore issue. An offshore issue includes unpaid or omitted tax relating to:

- income arising from a source in a territory outside the UK
- assets situated or held in a territory outside the UK
- activities carried on wholly or mainly in a territory outside the UK
- anything having effect as if it were income, assets or activities of a kind described above.

It also includes funds connected to unpaid or omitted UK tax not included above, that you've transferred to a territory outside the UK or are owned in a territory outside the UK.

The WDF does not reduce tax penalties or immunity from criminal prosecution, although using this Facility voluntarily and with full cooperation may reduce penalties.

HMRC branded letter

The second part of the strategy is to require certain Specified Financial Institutions (SFI) and Specified Relevant Persons (SRP) to send HMRC branded letters to certain clients and to insert standard paragraphs in the cover letter/email by 31 August 2017. The letter is to be sent to clients engaged with at 30 September 2016.

You will be a SRP if:

1. You are a relevant person, being a tax adviser and any other person who in the course of business gives advice to another person about that person's financial or legal affairs, or provides other financial or legal services to another person; and

2. In the year to 30 September 2016, you provided 'offshore advice or services' in the course of business, which is not solely in connection with the preparation and delivery of returns and accounts, statements and documents; or referred an individual to a connected person, for example a subsidiary, outside the UK for the provision of advice or services relating to the individual's personal tax affairs.

It is worth noting that the notification obligation may apply to overseas persons, defined as a body corporate or partnership who would be a SRP if they were in the UK.

The notification comprises two elements: an HMRC branded document, which cannot be amended or annotated in any way and standard wording which must be included in the SRP's covering letter or email that accompanies the HMRC branded document.

The HMRC branded letter contains information about the sharing of financial data under the Common Reporting Standard, recommends that taxpayers review their tax position if they are unsure whether they are compliant and explains how to come forward using the new online disclosure facility.

Standard paragraphs for inclusion in the covering letter or email:

"From 2016, HM Revenue & Customs (HMRC) is getting an unprecedented amount of information about people's overseas accounts, structures, trusts, and investments from more than 100 jurisdictions worldwide, thanks to agreements to increase global tax transparency. This gives HMRC unprecedented levels of information to check that, as in most cases, the right tax has been paid."

"If you have already declared all of your past and present income or gains to HMRC, including from overseas, you do not need to worry. But if you are in any doubt, HMRC recommends that you read the factsheet attached to help you decide now what to do next."

There is a flat rate penalty of £3,000 if an SRP fails to comply with sending the notification to their clients and even more onerous, may lead to disciplinary action for breach of professional rules.

Facilitators or enablers

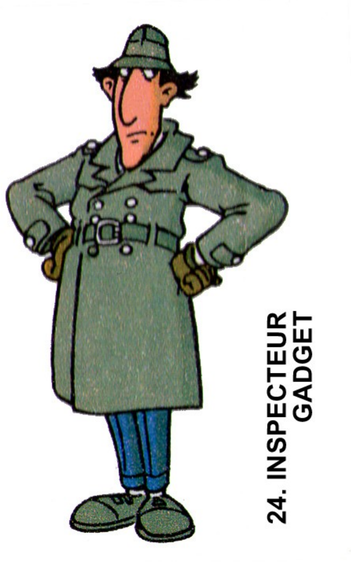
As part of their crackdown on tax evasion, the UK Government has introduced legislation over the past tax year which targets not just those who evade tax, but also those who HMRC regard as the facilitators or enablers in relation to income and capital gains tax for individuals. Legislation is wide ranging and applies to any person who has enabled another person to carry out offshore tax evasion or non-compliance if they have encouraged, assisted or otherwise facilitated conduct that constitutes offshore tax evasion or non-compliance. Therefore cheating the tax authority, evading tax, failing to give notice to being chargeable to tax, failure to file a tax return or filing an inaccurate tax return could lead to a criminal offence being committed.

The Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion

From 1 September 2017 a new corporate criminal offence, 'The Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion, is expected to come into force. This legislation will apply to UK and non-UK corporates and partnerships that have a business in the UK, whereby they will have to demonstrate senior-level involvement in the prevention of the facilitation of tax evasion. Where the legislation applies, corporates and partnerships will have to demonstrate that they had reasonable procedures in place to prevent the facilitation of tax evasion at the time that the offence takes place.

Conclusion

The UK tax authorities have sharpened their tools in their drive to tackle tax evasion and their net has been enlarged to tackle not only the offender but also the facilitator or enabler. This coincides with international agreements to exchange information about tax payers and we have certainly noticed HMRC asking more pertinent questions where cross-border transactions are involved. The EU are moving forward with their own proposals to tackle tax evasion and it will be interesting to read what the tax authorities JPA International network member firms are doing.



« [Royalties are] payments of any kind received as consideration for the use of, or the right to use, any copyright of literacy, artistic or scientific work »

The definition of royalties in the light of OECD Model Convention

Royalties are regulated by Article 12 OECD Model Convention. This article, being a provision dealing with income from assets, takes precedence over Article 7 (business profits), which means that, as a rule, royalty payments received by an enterprise from its business activities come under the provisions of Article 12 and not the provisions of Article 7.

In the light of the above it is very important to determine in which cases it has to be applied. In order to do this properly, it is necessary to define the concept of royalties which is regulated in Article 12(2) OECD MC as payments of any kind received as consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematographic films. Patents, trademarks, designs or models, plans, secret formulas or processes, or the information concerning industrial, commercial or scientific experience are specifically mentioned.

The first part of the definition deals with the use of, or the right to use certain types of intellectual property. The second part, which does not involve the granting of any rights, deals with the provision of know-how. However, tax treaties sometimes use other definitions for royalties.

Except for one change in 1992, this definition has been unchanged. This amendment deleted from the definition the phrase: "or for the use of, or the right to use, industrial, commercial, or scientific equipment". Of course, treaties entered into force before this amendment may still contain unchanged definition.

JPA INTERNATIONAL CONSULTING IN POLAND

KPFK Dr Piotr Rojek sp. Z.o.o. Has been acting as an audit and advisory company since 1990. We are support for our clients in areas of accounting, finance and tax law. KPFK has widely educated team of employees. We develop steadily having today more than 60 employees (also having ACCA qulifications—Association of Chartered Certified Accountant), inluding statutory auditors and tax advisors. Qualifications, knowledge and experience of our team are guarantee of high quality of performed work.

Our mission is to perform services in most professional way for the success of our clients respecting economical turnover security.

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Importantly after the 1992 amendments, Article 12 OECD MC deals only with royalties in respect of intangibles. Vogel (referred to below) further categorizes the contents of Article 12(2) as follows:

- the essential core of all intangible property rights enjoying absolute protection (copyrights, patents, trade marks);
- the "lesser" exclusive rights (designs, models, plans);
- secret knowledge enjoying relative protection, if any;
- unprotected know-how (information concerning industrial, commercial or scientific experience—Klaus Vogel, et al., Klaus Vogel on Double Taxation Conventions, 1997, at 791).

In order to put the treaty meaning of royalties in perspective, however, it is also useful to compare it with available European and domestic meanings.

The scope of the definition of royalties

Polish regulations	EU law	OECD Model Convention
copyright or related rights, rights to inventive designs, trademarks or ornamental designs, **including from the sale of those rights**	the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and software, any patent, trade mark, design or model, plan, secret formula or process	the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process
information associated with industrial, commercial or scientific experience (know-how),	information concerning industrial, commercial or scientific experience	information concerning industrial, commercial or scientific experience
use or right to use an industrial device, including means of transport, a commercial device or a scientific device	**the use of, or the right to use, industrial, commercial or scientific equipment**	*deleted in 1992*

Problem areas

1. Transfer of the full ownership of the rights

Where consideration is paid for the transfer of the full ownership of the rights in the copyright, the payment cannot represent a royalty and the provisions of the Article 12 are not applicable. This follows from the fact that where the ownership of rights has been alienated in full, the consideration cannot be for the use of the rights.

2. The use of, or the right to use, industrial, commercial or scientific equipment

There is no guidance in the Commentary on Article 12 with respect to the meaning of the terms „industrial, commercial and scientific equipment"

Article 3(2) OECD MC -> ... any term not defined therein shall, unless the context otherwise requires, **have the meaning that it has at that time under the law of that State** for the purposes of the taxes to which the Convention applies ...

Based on the practice we can say that equipment is any tangible, movable item used to perform a task.
Examples of industrial, commercial and scientific equipment therefore may include: aircraft, cranes, cars, containers, sattelites, ships

3. Computer Software

Royalties
- a payment is in respect of rights to use the copyright in a program, (e.g. by reproducing it and distributing it)

Sale of a product
- payments only give a user the right to operate the program, possibly by making a copy of it which runs on a personal computer

4. Payments for know-how versus payments for services

Payments for the supply of know-how	Payments for the provision of services
One of the parties agrees to impart to the other, so that he can use them for his own account, his <u>special knowledge and experience which remain unrevealed to the public</u>. It is recognised that the grantor is not required to play any part himself in the application of the formulas granted to the licensee and that he does not guarantee the result thereof.	One of the parties undertakes <u>to use the customary skills of his calling to execute work</u> himself for the other party Examples of payments which should therefore not be considered to be received as consideration for the provision of know-how but, rather, for the provision of services, include: — payments obtained as consideration for after-sales service, — payments for services rendered by a seller to the purchaser under a warranty, — payments for pure technical assistance, — payments for an opinion given by an engineer, an advocate or an accountant.

5. Leasing

Definition of royalties ***includes*** *income derived from the use of, or the right to use, industrial, commercial or scientific <u>equipment</u>*
- Leasing => royalties

Definition of royalties ***does not include*** *income derived from the use of, or the right to use, industrial, commercial or scientific equipment*
- Leasing => business profit

6. Music, film and other digital downloads

Payments for music, film and other digital downloads by consumers are not considered to be royalties,

because although the payment covers the right to make a copy of the song or film, it does not confer the right to reproduce it further.

« Senatex clarifies that an invoice can be corrected with retroactive effects »

Invoice correction in JPA countries – a comparative study

In September last year the ECJ published a fundamental judgment for VAT deduction called Senatex (ECJ, 15th September 2016, C-518/14). Any VAT invoice that is modified does not change the original invoice date for VAT deduction (retroactive effect - ex tunc). The previous formalism associated with the issuing of invoices should be considerably reduced in the future. Hence, e.g. interest for late payment of an initially defective and later on corrected invoice should be a thing of the past.

The ECJ has confirmed that the right to deduct input VAT immediately is a fundamental principle. This right must be exercised in respect of the period during which the right has arisen and the taxable person is in possession of an invoice - regardless of the fact that not all formal conditions (e.g.: VAT number of the supplier or customer´s name/address) are fulfilled at the time of issuing, but have been corrected later on. In contrast, there is no VAT deduction without an invoice (ECJ, 29th April 2004, C-152/02 - Terra Baubedarf-Handel).

The right to deduct VAT arises as soon as substantive conditions are met: The person concerned (deducting input VAT) must be a taxable person within the meaning of the VAT directive and the goods or services must be used for the purposes of his own taxed output transactions and of course those goods/services must be supplied by another taxable person.

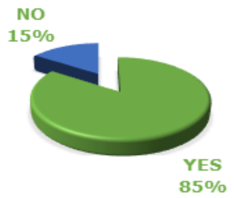
Senatex clarifies that an invoice can be corrected with retroactive effects (VAT deduction in the time of first issuing = ex tunc / and not as from the correction according to the formal conditions = ex nunc). Nevertheless member states may establish adequate penalties if formal requirements of invoicing are not fulfilled to ensure the correct collection of VAT and prevent evasion. Interest for late payment (e.g.: initially paid VAT regarded as to low due to the rejected deduction of input VAT) are contrary to the principle of neutrality and infringe EU-law.

Up to know the ECJ has neither exemplified as to when an invoice needs to be corrected nor if cancellation and issuing a new invoice is also seen as correction.

In our comparative study we analyzed the current legal situation in our JPA partner countries in respect of conformity with this ECJ jurisdiction.

What is particularly encouraging is that in most countries invoice correction has retroactive effects (YES: AT, BE, CH, CN, DE, IE, IT, JP, PL, UK, UZ / NO: PT, SI). Unfortunately up to now not all EU member states have implemented the gratifying ECJ jurisdiction. E.g. Slovenia and Portugal do not accept this retroactive effect. In Slovenia invoice correction has only an impact on the current financial year (ex nunc). Other countries do not allow a correction of the original invoice at all, so you have to cancel the initial invoice / issue a credit note and issue a new one.

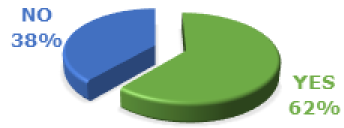
COUNTRY WITH RETROACTIVE INVOICE CORRECTION?



However, international consultants and clients have to be aware that restrictions, by when the invoice has to be corrected to have retroactive effect, are very different from country to country. One of the strictest is Japan, where all invoices have to be corrected by the filing of the annual tax return in order to have the favored retroactive effect. A bit of extra time you have in Switzerland and Poland: here all formal conditions have to be fulfilled till the end of the prescriptive period.

We all are aware that accountants often prefer the option to cancel the original invoice and issue a new invoice (with all formal requirements) instead of correcting the originally issued invoice by adding the missing data (e.g. VAT number). Have you ever thought about the possible disadvantages of this method? If not, you will be surprised at the result that 38% of our evaluated countries do not accept this option as a correction with retroactive effect (NO: DE?, IE, IT, PT, UK / YES: AT, BE, CH, CN, JP, PL, PL, SI, UZ).

CORRECTION = CANCELLATION PLUS (RE)ISSUING?



Our advice

Correct faulty invoices:

- immediately (as early as possible)
- without cancellation of the first issued invoice.

As presented, some EU fiscal authorities will still have to implement the Senatex judgement and (others) may not accept the reissued invoice as correction with retroactive effect. Up to now the ECJ has not confirmed that both options have the same consequences. In addition you have to be aware that suppliers may have been liquidated, merged or are no longer traceable.

Link to the ECJ Senatex judgement in your (EU-) language:

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...you might be interested ...

JPA iTRAVELER

Have you ever been faced with some **uncomfortable situations** abroad, during your **business travels,** where the **lack of information** on the **lifestyle** or the **different regulations proved fatal ?**

DO YOU REMEMBER

... beeing face to face with a new business partner for two hours in a restaurant **without any conversation topics** ?

... standing in meetings with your potential clients while they all look at you embarrassed because of an **unintended hasty action** of yours ?

*... explaining your point of view about a crossborder project and having **no idea of the regulatory consequences** of your choices ?*

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