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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)

GUIDANCE

WORKING PAPER NO 614 FINAL

86TH MEETING OF THE VAT COMMITTEE
– 18 AND 19 MARCH 2009 –

GUIDELINES FROM THE MEETING

4. QUESTIONS CONCERNING THE APPLICATION OF COMMUNITY VAT PROVISIONS

4.2 Origin: Slovakia
References: Articles 38, 39 and 195
Subject: Supplies of gas or electricity to dealers – concept of fixed establishment – determination of taxable person
(Document TAXUD/2404/09 – Working paper No 602)

The VAT Committee almost unanimously agrees that when natural gas or electricity is supplied by or to a company which has, in the Member State concerned, a licence in order to practise an economic activity in the natural gas or electricity sectors, including the purchase for resale of natural gas or electricity, the existence of this licence is not in itself sufficient to consider that the company has, in that Member State, a fixed establishment within the meaning of Articles 38 and 39 of the VAT Directive. For such a fixed establishment to exist, it is necessary that that company has, in that Member State, an establishment which is of a certain minimum size with permanently both the necessary human and technical resources.

5. NEW LEGISLATION – MATTERS CONCERNING THE IMPLEMENTATION OF RECENTLY ADOPTED COMMUNITY VAT PROVISIONS

5.1 Origin: Commission
References: New Articles 55 and 57
Subject: Follow-up to the VAT package – definition of restaurant and catering services
(Document TAXUD/2408/09 – Working paper No 606)

The VAT Committee almost unanimously agrees that, similar to restaurant services, catering is characterised by a cluster of features and acts in which services largely predominate, and of which the provision of food and/or beverages is only one component. Restaurant services consist of the supply, rendered in the premises of the supplier, of prepared or unprepared food and/or beverages for human consumption, accompanied by a sufficient support service allowing for the immediate consumption thereof while catering services consist of the same supply, rendered off the premises of the supplier.

The place of supply of restaurant and catering services shall be determined on the basis of Articles 55 or 57 of the VAT Directive, in their wording in force as of 1 January 2010. Member States may apply a reduced rate to such services in accordance with category 12a of Annex III of the VAT Directive.

The following is to be considered neither as catering, nor as restaurant services:

– the mere supply of prepared or unprepared foods (for example take-away food from restaurants, supermarkets and the like);

– supplies consisting of the mere preparation and transport of food;

– in general, supplies consisting of the preparation and delivery of food and/or beverages without any other support service.

In these cases, the supply of food and/or beverages without accompanying services will be a supply of goods, the place of which shall be determined on the basis of Articles 31 to 37

of the VAT Directive. Member States may apply a reduced rate to the supply of food (including beverages, but excluding alcoholic beverages) in accordance with category 1 of Annex III of the VAT Directive.

When the provision of food and/or beverages is made by one taxable person, and the support services are provided to the same customer by a separate taxable person, the supply effected by each taxable person shall be assessed separately on its own merits, provided no evidence of abuse of law exists.

5.3 Origin: Commission
Reference: New Article 56
Subject: Follow-up to the VAT package – issues particular to the hiring of means of transport
(Document TAXUD/2409/09 – Working paper No 607)

– **What is a means of transport?**

General definition of a means of transport

The VAT Committee almost unanimously agrees that vehicles, motorised or not, and other equipment and devices designed to transport goods or persons from one place to another, which might be pulled or drawn or pushed by vehicles and which are normally designed and actually capable to be used for carrying out transport of goods or persons shall be regarded as means of transport within the meaning of Articles 56 and 59 of the VAT Directive, in their wording in force as of 1 January 2010.

Trailers, semi-trailers and railway wagons

The VAT Committee unanimously confirms that, in accordance with Article 10 of Regulation (EC) No 1777/2005, trailers and semi-trailers, as well as railway wagons, are means of transport for the purposes of Articles 56 and 59 of the VAT Directive, in their wording in force as of 1 January 2010.

Illustrative list of means of transport

In addition to Article 10 of Regulation (EC) No 1777/2005, the VAT Committee almost unanimously agrees that, subject to the general definition, the following items, in particular, shall be means of transport:

– motorised and non motorised land vehicles, such as cars, motor cycles, bicycles, tricycles, and caravans unless fixed to the soil;

– motorised and non motorised vessels;

– motorised and non motorised aircraft;

– vehicles specifically designed for the transport of sick or injured persons;

– agricultural tractors and other agricultural vehicles;

– non-combat military vehicles and vehicles for surveillance or civil defence purposes;

– mechanically or electronically propelled invalid carriages.

In consequence, the hiring of these goods shall fall under the rules applicable for hiring of means of transport.

Containers

The VAT Committee unanimously agrees that containers are not a means of transport for the purposes of Articles 56 and 59 of the VAT Directive, in their wording in force as of 1 January 2010. In consequence, the hiring of containers shall fall under the general rule provided for in Article 44, in its wording in force as of 1 January 2010 (if supplied to a taxable person) or in Article 45, in its wording in force as of 1 January 2010 (if supplied to a non-taxable person).

– **What is "continuous possession or use"?**

The VAT Committee almost unanimously agrees that, for the application of Article 56 of the VAT Directive, in its wording in force as of 1 January 2010, the duration of the continuous possession or use of a means of transport is a matter of facts. The duration of the possession or use shall be assessed on the basis of the contractual agreement between the parties involved, including any tacit agreement within that contract. The contract is a simple presumption only which may be rebutted by any means in fact or law in order to establish the actual duration of the continuous possession or use.

The VAT Committee is of the almost unanimous view that when two or more contracts for the hiring of the same means of transport follow each other with an interruption of 2 days or less, the first term of the contract shall be taken into account in the assessment of whether the second contract is regarded as short term or not.

The duration of each previous contract shall be taken into account when assessing the duration of subsequent contracts when made between the same parties for the same means of transport.

However, the duration of a short term contract, before a subsequent contract which qualifies as long term by dint of the previous contracts, shall not be reassessed retroactively, provided no evidence of abuse of law exists.

When a short term contract is subject to an extension which has the effect of causing it to exceed the 30 (90) days, a reassessment of the contract shall be required. However, when the prolongation is due to clearly established circumstances outside the control of the parties involved (force majeure), no reassessment of the contract shall take place.

If a short term contract is succeeded by another short term contract between the same parties but relating to separate means of transport, each contract will need to be examined separately in order to determine whether it is of a short duration or not, provided no evidence of abuse of law exists.

– **Where is a means of transport "actually put at the disposal of the customer"?**

The VAT Committee unanimously agrees that, for the application of Article 56(1), in its wording in force as of 1 January 2010, a means of transport shall be considered as "actually put at the disposal of the customer" at the place where the means of transport is when the customer actually takes physical control over it. Legal control (signature of contract, taking possession of the keys) is not in itself sufficient in this respect.

5.4 Origin: **Commission**
Reference: **New Article 192a**
Subject: **Follow-up to the VAT package – person liable for payment of VAT – concept of establishment not intervening in the supply**
(Document TAXUD/2405/09 – Working paper No 605)

For the purposes of the application of Article 192a of the VAT Directive, in its wording in force as of 1 January 2010, the VAT Committee almost unanimously confirms that the presence of a fixed establishment that the supplier has within the territory of the Member State where the taxable supply of goods or services is made, does not in itself signify that this taxable person must be regarded as established within that Member State for the purposes of ascertaining who is the person liable for payment of VAT.

If the fixed establishment that the supplier has in the Member State where the taxable supply of goods or services is carried out in no way intervenes in that supply, i.e. the technical or human resources of the establishment are in no way used by him for the fulfilment of that supply, the supplier shall not, as far as that supply is concerned, be regarded as a taxable person who is established within that Member State for the purposes of ascertaining who is the person liable for payment of VAT.

The VAT Committee almost unanimously agrees that where the fixed establishment does intervene in the supply of goods or services before or during its fulfilment, or under the agreement it is envisaged that the establishment may intervene subsequently, via such as an after-sale service or the application of guarantee clauses, and this potential intervention does not constitute a separate supply for VAT purposes, the extent of the use of its technical and/or human resources relating to that supply is irrelevant as it shall always be regarded as intervening in the supply. In the case of an intervention in the supply, the taxable person shall be in any event, for the purposes of ascertaining who is the person liable for payment of VAT and as far as that supply is concerned, regarded as being established within the Member State where the tax is due.

Where the taxable person uses the technical and/or human resources of the fixed establishment only for administrative support tasks such as accounting, invoicing and collection of debt-claims, such use of these resources should not be considered as for the fulfilment of the supply but only for the enforcement of legal and accounting obligations related to this transaction. The fixed establishment shall in that case not be regarded as intervening in the supply.

For the purposes of control, considering that the invoice must contain the VAT identification number under which the taxable person has supplied the goods or services, where the invoice is issued under the VAT identification number of the taxable person attributed by the Member State of the fixed establishment, the fixed establishment shall be regarded as having intervened in the supply unless there is proof to the contrary.

5.6 Origin: **Commission**
References: **New Articles 43, 44 and 45 read in conjunction with recital 4 of Directive 2008/8/EC**
Subject: **Follow-up to the VAT package – how to determine the scope of either of the main rules – identification of a customer as a taxable person acting as such or as a non-taxable person**
(Document TAXUD/2412/09 – Working paper No 609)

The VAT Committee almost unanimously agrees that the correct identification of the customer needed in order to apply Articles 44 and 45 of the VAT Directive, in their wording as of 1 January 2010, on the place of supply of services, shall require the supplier to respect several elements.

When it comes to the assessment of the status of the customer, the supplier is assumed to have acted in good faith when he has:

(a) established whether the customer is a taxable person via the VAT number communicated to him or through any other proof presented to him to show that the customer is a taxable person or a non-taxable legal person identified for VAT purposes, and

(b) obtained confirmation of the validity of the VAT number of the customer and carried out a reasonable level of verification via existing security procedures.

It is accepted that in order to assess whether the service supplied is intended for the own personal use or that of the staff of a taxable person or a non-taxable legal person (identified for VAT purposes), who has communicated a VAT number or provided other proof to be a taxable person, the supplier must take account of the nature of the service. Only if the nature of the service makes it appropriate the supplier may be required to obtain a self-declaration from the customer on the planned purpose of the acquired service.

Where these conditions are met, the supplier is presumed to have been acting in good faith and is released from any further liability in the case of an incorrect assessment of the status of the customer, provided no evidence of abuse of law exists. Under such circumstances, the customer may, in accordance with Article 205, be designated as liable for payment of the VAT due in place of the supplier.

The VAT Committee almost unanimously agrees that where a service is intended in part for personal use or that of the staff of the customer and in part for professional use, including activities or transactions that are out of scope (as covered by Article 43 of the VAT Directive, in its wording as of 1 January 2010), the supply of that service will be treated as falling within the scope of Article 44 of the VAT Directive, in its wording as of 1 January 2010.

The assessment of the purpose to which each service will be put, which is necessary to determine the place of supply of that service, shall take into account only the circumstances present at the moment of supply. Any subsequent changes to the use of the service received shall therefore be without consequences for the place of taxation of that purchase, provided no evidence of abuse of law exists.