EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax Administration
Value Added Tax

VAT expert group
22nd meeting – 1 April 2019

taxud.c.1(2019)1233276 – EN

Brussels, 20 February 2019

VAT EXPERT GROUP

VEG NO 080

VAT "quick fixes" legislative package

Chain transactions
Exemption of an intra-Community supply of goods: conditions and proof

1 PURPOSE OF THE DOCUMENT

On 4 December 2018, the Council adopted the VAT "quick fixes" legislative package, which has been published in the Official Journal of the European Union L 311 of 7 December 2018. This package consists of:

a) Council Directive (EU) 2018/1910 amending Directive 2006/112/EC as regards the harmonisation and simplification of certain rules in the value added tax system for the taxation of trade between Member States;

b) Council Regulation (EU) 2018/1909 amending Regulation (EU) No 904/2010 as regards the exchange of information for the purpose of monitoring the correct application of call-off stock arrangements;

c) Council Implementing Regulation (EU) 2018/1912 amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for intra-Community transactions.

The purpose of the present document is to provide, for discussion, an outline of the provisions within that legislative package that deal with:

- chain transactions,
- the conditions for the exemption of an intra-Community supply,
- the proof of transport in the context of the exemption of an intra-Community supply.

The provisions relating to the call-off stock arrangements will however be the subject of a separate Working Document (VEG 079).

The Commission services have provided detailed explanations on those provisions that it considered most pertinent. However, in case members wish to discuss other provisions, they are invited to inform the Commission services by e-mail (TAXUD-VAT-EXPERT-GROUP@ec.europa.eu) **at the latest on 8 March 2019** about any further issues to be discussed. The received requests will be circulated before the meeting.

2 CHAIN TRANSACTIONS

2.1 Definition of chain transaction

Directive 2018/1910 has introduced a new Article 36a in the VAT Directive. This Article addresses the issue of what is the supply to which the transport or dispatch of the goods is to be ascribed when a chain transaction (a chain of successive supplies of the same goods) involving intra-Community transport takes place, that is to say, what supply is the intra-Community supply.

In order for Article 36a(1) to apply, the following conditions have to be met:

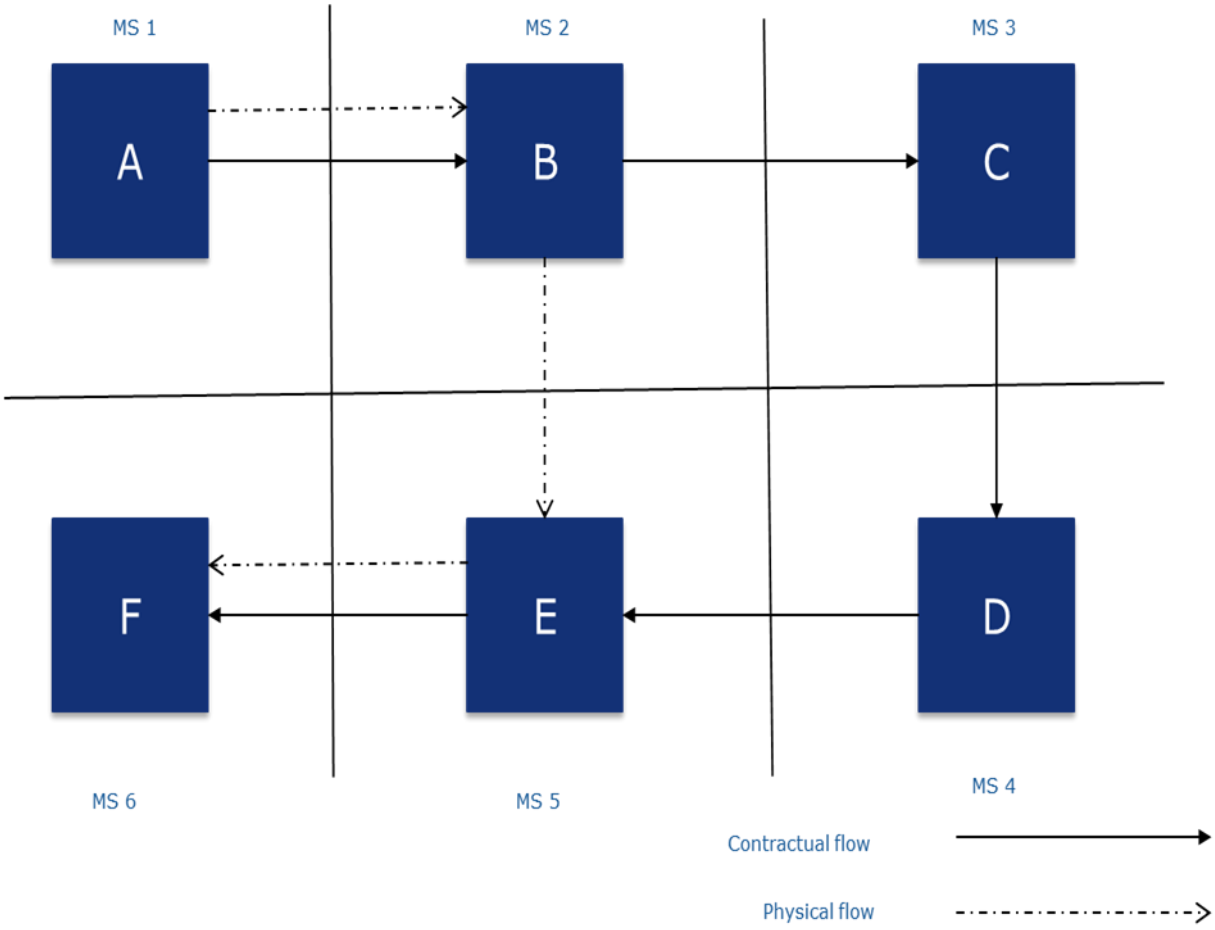
– The goods must be supplied successively. Therefore, it is necessary that at least three persons are involved in the chain transaction;

– The goods must be dispatched or transported from one Member State to another Member State. As a result, chain transactions involving imports and exports, or involving only supplies within the territory of a Member State, are excluded from the provision;

– The goods must be transported or dispatched directly from the first supplier to the last customer in the chain.

When determining the VAT rules applicable to a series of transactions involving different transports within the EU, it is important to analyse which transactions fall within the scope of the measure put in place by Article 36a(1) and which are not covered and therefore have to be considered separately.

Take the following scheme (example 1):



In this example there are three different transports: from A to B, from B to E and from E to F. It is assumed not only that the transports take place successively in time but also that there is a clear break between them so as to make it impossible to consider them as one single transport. The supply from A to B and the supply from E to F fall outside the scope of the measure put in place for the chain transaction, as they do not meet the conditions set

out in Article 36a(1), in particular the direct transport from the first supplier to the last customer in the chain. Therefore, the supplies between A and B, and from E to F are "normal" intra-Community supplies.

Conversely, the transactions between B, C, D and E are covered by the measure put in place for the chain transaction: the goods are supplied successively between these four parties, the goods are dispatched or transported from one Member State (MS 2) to another Member State (MS 5), and the goods are transported directly from the first supplier (B) to the last customer (E) in the chain.

Only the 3 transactions between these 4 parties will therefore be considered hereafter for assigning the transport in accordance with Article 36a(1).

2.2 Assigning the transport to one of the supplies in the chain

Article 36a(1) lays down the general rule. The transport will be ascribed only to the supply made to the "intermediary operator". One first conclusion can be inferred from this rule, namely that the transport or dispatch can only be ascribed to one supply. Therefore, the other supplies in the chain will follow the rules on supplies of goods without transport and will qualify as domestic supplies, either in the Member State of departure of the goods (MS 2) or in the Member State of arrival of the goods (MS 5) (see example 1).

Article 36a(3) includes a definition of intermediary operator. This is the supplier in the chain other than the first supplier, who dispatches or transports the goods, himself or by a third party on his behalf. To prove his status of intermediary operator, he will need to keep evidence that he transported the goods or that he arranged the transport of the goods with a third party acting on his behalf.

It should be noted that the scope of the rules in Article 36a of the VAT Directive is limited to clarify which transaction in the chain the transport is assigned to. These rules do not have any impact on the liability of the tax which is determined according to the general rules.

2.2.1 The first supplier in the chain organising the dispatch or transport

The legal provision explicitly excludes the first supplier from the concept of intermediary operator. In that regard, it should be kept in mind that the first supplier only participates in one transaction within the chain transaction, the supply made by him. Therefore, if the first supplier is the one organising the dispatch or transport of the goods, the transport or dispatch can only be ascribed to the transaction in which he intervenes, the supply made by him. That transaction will then be the intra-Community supply of goods, exempt according to Article 138 if the conditions in that Article are fulfilled. Consequently such situations are excluded from the scope of the rule laid down in Article 36a.

In the scheme set out in example 1, the chain transaction involves a transport of goods from MS 2 to MS 5 directly from B to E and comprises the supplies between B, C, D and E, so B is the first supplier in the chain. Hence, if B is organising the transport or dispatch of the goods, it will be ascribed to the supply made by B to C, which leads to an intra-Community supply of goods by B exempt in MS 2 (if the conditions in Article 138 are

fulfilled), and an intra-Community acquisition by C taxable in MS 5. The supplies from C to D and from D to E will in that case be domestic transactions in MS 5.

As indicated above, the supply of goods from A to B, which gives rise to a specific transport from MS 1 to MS 2 directly from A to B is excluded from the chain transaction. The supply from A to B is, in its own right, an intra-Community supply of goods exempt in MS 1 (if the conditions in Article 138 are fulfilled), leading to an intra-Community acquisition by B taxable in MS 2.

2.2.2 The last customer in the chain organising the dispatch or transport

The last customer in the chain cannot be the intermediary operator either. This is because he can never meet the condition of being a "**supplier** in the chain" as referred to in Article 36a(3). The last customer only participates in one transaction within the chain, the supply made to him. Therefore, if he organises the dispatch or transport of the goods, such dispatch or transport can only be ascribed to that transaction, the supply made to the last customer. Consequently such situations are excluded from the scope of the rule included in Article 36a.

Going back to example 1, the chain transaction involves the supplies between B, C, D and E, so E is the last customer in the chain. Hence, if E is organising the transport or dispatch of the goods, it will be ascribed to the supply made by D to E, which leads to an intra-Community supply of goods by D exempt in MS 2 (if the conditions in Article 138 are fulfilled), and an intra-Community acquisition by E taxable in MS 5. The supplies from B to C and from C to D will be domestic transactions in MS 2.

As indicated above, the supply of goods from E to F is excluded from the chain transaction since it involves a specific transport from E to F, different from the transport from B to E. The supply from E to F is an intra-Community supply of goods exempt in MS 5 (if the conditions in Article 138 are fulfilled), leading to an intra-Community acquisition made by F taxable in MS 6.

2.2.3 An intermediary operator in the chain organises the dispatch or transport

Now we are going to analyse what happens when in example 1 the intermediary operator is either C or D.

As previously said, Article 36a(1) lays down the general rule: the transport is ascribed to the supply made to the intermediary operator (who cannot be the first or the last person in the chain of supplies).

However, Article 36a(2) lays down a derogation to the general rule. In case the intermediary operator communicates to his supplier the VAT identification number issued to him by the Member State from which the goods are dispatched or transported, then the dispatch or transport shall be ascribed to the supply of goods made by this intermediary operator.

For instance, if the intermediary operator is C, the general rule would lead to the transport being ascribed to the supply made to the intermediary operator, that is to say the supply from B to C. Thus, the supply by B will be an intra-Community supply of goods exempt in MS 2 (if the conditions in Article 138 are fulfilled), and there would be an intra-

Community acquisition by C taxable in MS 5. The supplies from C to D and from D to E will be domestic transactions in MS 5.

However, the transaction to which the transport is ascribed would change if C communicates to his supplier, B, the VAT identification number issued to him by the Member State from which the goods are dispatched or transported, MS 2. If that is the case, then the dispatch or transport would be ascribed to the supply made by him, that is to say to the supply from C to D.

Thus, there would be an intra-Community supply of goods by C exempt in MS 2 (if the conditions in Article 138 are fulfilled), and an intra-Community acquisition by D taxable in MS 5. The supply from B to C will be a domestic transaction in MS 2 and the supply from D to E will be a domestic transaction in MS 5.

2.3 Other issues

2.3.1 Condition for the application of the derogation to the general rule

In order to apply the rule in Article 36a(2) the intermediary operator has to communicate the VAT identification number of the Member State from where the goods are dispatched or transported (MS 2 in our example 1) **to his supplier**.

Article 36a(2) does not require a communication to any of the tax administrations involved, only to the supplier.

That communication has to be made to his supplier; it is irrelevant if the intermediary operator communicates the VAT identification number to any of the other participants in the chain transaction.

In our example, if D is the intermediary operator and he communicates to C the VAT identification number assigned to him (D) by MS 2, then the transport will be ascribed to the supply made by D to E. Any communication by D of his VAT identification number to B or E would not be relevant for the purposes of Article 36a(2). Therefore, if D communicates that number to B or E but fails to communicate it to C, then the general rule will apply and the transport or dispatch will be ascribed to the supply made by C to D.

The communication of the VAT identification number does not need to be done according to any special formality. It can be done by any means allowing to prove that the communication has been received by the supplier. In that regard, an exchange of emails could be enough.

The intermediary operator has to keep proof of the communication and present such proof to the tax authorities when required in order to verify the correct application of the rule. Therefore, some kind of written communication, electronically or not, is required in order to prove that the VAT identification number has been communicated.

However, even if the intermediary operator is not able to submit any evidence that he communicated to his supplier the VAT number assigned to him by the Member State from which the goods are dispatched, that will be considered to be the case if all of the following conditions are met:

a) the VAT identification number of the intermediary operator issued by the Member State from which the goods are dispatched or transported is shown in the invoice issued to him by his supplier,

b) the VAT amount payable in the Member State from which the goods are dispatched or transported has been charged in the invoice, and

c) that VAT amount is included in the VAT registers of the intermediary operator.

In case the intermediary operator cannot prove that he communicated to his supplier the VAT identification number issued to him by the Member State from which the goods are dispatched or transported, and the abovementioned conditions are not fulfilled, it can be presumed that the conditions for the application of the rule in Article 36a(2) are not met and the general rule in Article 36a(1) will apply.

Regarding the time by when the communication has to take place, Article 36a does not specify. In principle it would seem that, under normal circumstances, this communication should be done before the chargeable event takes place, in order to be able to assess whether or not VAT is due on the transaction. In case nothing has been communicated by the intermediary operator to his supplier by that date, then the general rule in Article 36a(1) will apply.

Finally, we would like to point out that, as repeatedly mentioned, the intermediary operator needs to prove that the goods have been transported or dispatched by himself or by a third party on his behalf. Such proof is necessary to determine to which transaction in the chain the transport is ascribed. However, the nature of this proof is different and needs to be assessed separately from that needed in order to benefit from the exemption in Article 138(1) of the VAT Directive. The party applying the exemption, who may or may not coincide with the intermediary operator, will indeed have to submit evidence certifying that the conditions to apply that exemption are met[1].

2.3.2 Triangular transactions simplifications

As already said, the scope of the rules in Article 36a of the VAT Directive is limited to clarifying which transaction in the chain the transport is assigned to. These rules do not have any impact on the liability of the tax which is determined according to the general rules. Nor do they have an impact on the possibility to apply the simplification laid down for triangular transactions when all conditions in Article 141 of the VAT Directive are met.

By way of example, we can assume that in our example 1, C is the intermediary operator. C communicates to B his VAT identification number issued by MS 2. Therefore, the supply made by B to C will be a domestic supply in MS 2 and the supply made by C to D will be an intra-Community supply of goods exempt in MS 2 (if the conditions in Article 138 are fulfilled).

[1] Therefore, where the transport is assigned to the supply made to the intermediary operator, the supplier will have to keep evidence of the transport in order to justify the exemption of the intra-Community supply. Further, in order to benefit from the presumption in Article 45a(1)(b) of the VAT Implementing Regulation the supplier will have to be in possession of the documents required by that provision.

The intra-Community acquisition is made by D, who is not established in MS 5, the Member State of arrival of the goods, but is registered in MS 4. The goods are acquired by D for the purposes of a subsequent supply of goods to E in that same Member State, MS 5. The goods have been directly transported from a Member State (MS 2) other than that in which D is identified for VAT purposes (MS 4), to the person for whom he is to carry out the subsequent supply (E). E is a taxable person identified for VAT purposes in MS 5. Therefore, if E is the person liable for payment of the VAT due on the supply carried out by the person not established in MS 5 (D) in accordance with Article 197 of the VAT Directive, the rule in Article 141 of the VAT Directive applies.

In that situation, no VAT should be charged on the intra-Community acquisition made by D in MS 5. The person liable for the VAT on the supply made from D to E in MS 5 will be E according to Article 197 of the VAT Directive. D will not need to register in MS 5.

If in the same situation C communicates to B his VAT identification number in MS 3, then the transport will be assigned to the supply made by B to C. C will be making an intra-Community acquisition taxable in MS 5. In view of the literal wording of Article 141 of the VAT Directive, it might be thought that this exemption could not be applied to that intra-Community acquisition by C. This is because the condition in Article 141(c) would not be met: the goods are not dispatched or transported to the person for whom C carries out his supply, D, but to another person, E, who is further down the chain. If so, C would need to be registered in MS 5 and account for the VAT on the intra-Community acquisition in MS 5[2].

However, the Commission services consider that the exemption in Article 141 could still be applied in that situation. C, the intermediary operator, is selling the goods to D. D has told C to send the goods to MS 5 but C might not even be aware that the final recipient of the goods is E rather than D. As long as the goods are directly transported to the place D has indicated to C in MS 5, and D is identified for VAT purposes in that MS 5, the conditions in Article 141 would be fulfilled. The goods are transported directly to D given that they have been transported to the place D has indicated to C.

Therefore, the intra-Community acquisition of the goods by C in MS 5 should be exempt and C will not need to register in MS 5. D would be liable for the payment of VAT in MS 5 regarding the domestic supply made in that Member State by C to D, and the supply from D to E would also be a domestic supply taxed in MS 5.

2.3.3 The last person in the chain being a final customer

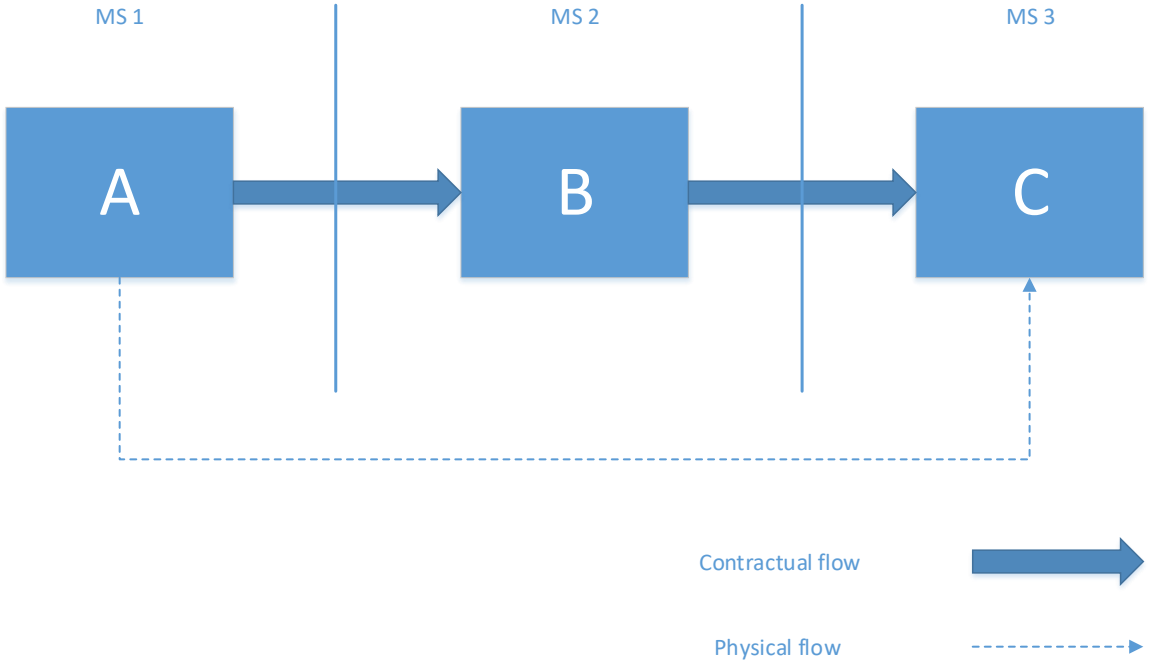
As said in section 2.1, the minimum number of persons involved in a chain transaction is three. However, it is not necessary that all of them are taxable persons.

Indeed, it is possible that the last person in the chain could be a non-taxable person, that is a final consumer. Therefore, we could apply the rules on chain transactions to a situation

[2] However, if the exemption in Article 140(c) of the VAT Directive applies (which would be the case if MS 5 applies the optional reverse charge provided for by Article 194 in the subsequent supply between C and D) then C would be obliged to register in MS 5 owing to the intra-Community acquisition made but would not be obliged to account for that intra-Community acquisition since the acquisition would be exempt.

where a taxable person A sells goods to a taxable person B, who sells the same goods to an individual C. The transport is done directly from A to C from MS 1 to MS 3.

Example 2



In this situation, the only person that can be the intermediary operator to apply the rules on the chain transaction is B.

If the general rule applies, the transport will be assigned to the supply made by A to B. Therefore, the supply by A will be an intra-Community supply of goods exempt in MS 1 (if the conditions in Article 138 are fulfilled), and there would be an intra-Community acquisition by B taxable in MS 3. The supply from B to C will be a domestic transaction in MS 3.

If B, intermediary operator, communicates to A the VAT identification number issued to him by the Member State from which the goods are dispatched or transported, MS 1, then the dispatch or transport would be ascribed to the supply made by him, that is to say to the supply from B to C. The supply from A to B will be a domestic transaction taxable in MS 1. The supply from B to C would qualify as a distance sale of goods taxable in MS 3, unless the conditions in Article 34 of the VAT Directive are met, in which case the transaction would be taxed in MS 1.

Members are invited to express their views on the comments made by the Commission services regarding this provision.

3 CONDITIONS FOR THE EXEMPTION OF AN INTRA-COMMUNITY SUPPLY OF GOODS

The amendment of Article 138 of the VAT Directive consists of 2 elements:

- paragraph 1 is re-structured and a new condition is added;
- a paragraph 1a is added.

Article 138(1) of the VAT Directive

- The content of point (a) in Article 138(1) corresponds to the content of Article 138(1) in its previous version, which is the version still applicable until 31 December 2019.

- Point (b) sets a new condition, namely that the taxable person or non-taxable legal person for whom the supply is made is identified for VAT purposes in a Member State other than that in which the dispatch or transport begins and has indicated this VAT identification number to the supplier.

  To be noted that the VAT identification number of the taxable person or non-taxable legal person to whom the supply is made does not necessarily have to be a VAT identification number in the Member State to which the goods are transported; it is sufficient that it is a VAT identification number attributed by a Member State other than that in which the dispatch or the transport begins.

  Point (b) also stipulates that the taxable person or non-taxable legal person has to indicate his VAT identification number to the supplier. The way this information is shared amongst the contracting parties should be left to their discretion. In view of the Commission services, this should not be subject to any formal requirements (use of a specific document for instance) laid down in national legislation. Similar to what is stipulated above in the context of Article 36a(2), by the fact that the supplier has mentioned the VAT identification number of his customer in the invoice, it can be considered that the customer has indicated his VAT identification number to the supplier.

  Point (b) of Article 138(1) however also implies that in case the acquirer does not give any indication of his VAT identification number to the supplier, or if the VAT identification number indicated has been issued by the Member State from which the goods are dispatched or transported, then the conditions for applying the exemption of Article 138 will not have been fulfilled and the supplier has to charge VAT. This will be the case even where all other conditions for applying the exemption are met and the supplier has reasons to believe, for instance because of the type or quantity of the goods supplied, that the customer is a taxable person or a non-taxable legal person. This is without prejudice to the intra-Community acquisition made by the customer being taxable in the Member State where the dispatch or transport of the goods ends.

  The fact the supplier has to charge VAT since the conditions for applying the exemption of Article 138 are not met also implies that the acquirer, in case he is

not established in the Member State where the tax is due, can claim the refund of the VAT paid to the supplier on the basis of Directive 2008/9/EC.

While Article 4 of Directive 2008/9/EC states that the Directive shall not apply to amounts of VAT which have been invoiced in respect of supplies which are, or may be, exempt under Article 138, this exclusion will not be applicable in this particular case since the supplier has no other choice than to charge VAT.

Article 138(1a) of the VAT Directive

- A new paragraph 1a is added to Article 138, according to which the exemption provided for in paragraph 1 shall not apply where the supplier has not complied with the obligation provided for in Articles 262 and 263 to submit a recapitulative statement or the recapitulative statement already submitted by him does not set out the correct information concerning the supply in question as required under Article 264, unless the supplier can duly justify his shortcoming to the satisfaction of the competent authorities.

  The last part of paragraph 1a hints at a case-by–case handling of non-compliance situations and might therefore at some point give rise to disputes between taxable persons and tax authorities.

  It could therefore be useful to have an exchange of views on the practical implementation of this provision.

  In view of launching this exchange of views, the Commission services have hereafter listed some examples of cases in which they would consider that shortcomings of a supplier could be duly justified, unless the tax authorities prove they are an element of a fraud scheme.

  Examples:
  - The supplier has not included the exempt intra-Community supply in the recapitulative statement covering the period in which the supply took place but has included it in a recapitulative statement covering the subsequent period;
  - The supplier has included the exempt intra-Community supply in the recapitulative statement covering the period in which the supply took place but made an unintentional mistake as regards the value of the supply in question;
  - A re-structuring of the company acquiring the goods has resulted in a new name and a new VAT identification number but the old name and VAT identification number continue to exist during a short interim period. On the recapitulative statement, the supplier has by mistake included the transactions under that old VAT identification number.

Members are invited to express their views on the comments made by the Commission services regarding this provision.

4 PROOF FOR THE EXEMPTION OF AN INTRA-COMMUNITY SUPPLY OF GOODS

Article 45a which has been included in the VAT Implementing Regulation provides that a condition for exempting an intra-Community supply of goods according to Article 138 of the VAT Directive, namely that the goods have been dispatched or transported from a Member State to a destination outside its territory but within the Community, is presumed to be fulfilled in the cases set out in points (a) or (b) of Article 45a(1) occur.

This also means that:

- being in one of the cases set out in points (a) or (b) is not on its own sufficient for the supply to be exempt according to Article 138 of the VAT Directive. It is presumed that a basic condition is fulfilled but for the exemption to be applicable, also the other conditions set out in Article 138 will need to be fulfilled;

- applying the presumption in the reversed way is not possible. In other words, the fact that the conditions of the presumption are not met should not mean automatically that the exemption of Article 138 of the VAT Directive does not apply. In such case, it will remain up to the supplier to prove, to the satisfaction of the tax authorities, that the conditions for the exemption (transport included) are met. In other words where the presumption does not apply, the situation will stay the same as it is today.

Article 45(a)(2) of the VAT Implementing Regulation stipulates that a tax authority may rebut the presumption that has been put in place under paragraph 1, namely that goods have been dispatched or transported from a Member State to a destination outside its territory but within the Community.

Rebutting the presumption implies therefore that the tax authorities are able to provide the necessary elements demonstrating that the goods have in fact not been dispatched or transported from a Member State to a destination outside its territory but within the Community. This can for instance be the case when during a control the tax authorities find out that the goods are still present in the warehouse of the supplier or the tax authorities are aware of an incidence during transport that resulted in the goods being destroyed before leaving the territory.

When the tax authorities have the necessary elements for rebutting the presumption (given the nature of the elements required for these to serve that purpose), obviously the exemption of Article 138 of the VAT Directive does not apply.

Rebutting the presumption is different to the situation whereby a tax authority can demonstrate that one of the documents enumerated in paragraph 3 of Article 45 of the VAT Implementing Regulation that is submitted as evidence either contains incorrect information or is even fake. The consequence would then be that the conditions for being in one of the cases set out under points (a) or b) of paragraph 1 are not fulfilled. Therefore the supplier can no longer rely on the presumption of the dispatch or transport having been made from a Member State to a destination outside its territory but within the Community. However, the supplier might still be in a position to either provide other documents as referred to in Article 45a, which would enable him to benefit from the presumption (unless the tax authorities prove again that those documents are incorrect or fake) or provide

sufficient evidence to substantiate that the conditions of the exemption of Article 138 are fulfilled.

Members are invited to express their views on the comments made by the Commission services regarding this provision.

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