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DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
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Value added tax

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**VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 895**

NEW LEGISLATION

**MATTERS CONCERNING THE IMPLEMENTATION
OF RECENTLY ADOPTED EU VAT PROVISIONS**

ORIGIN: Commission
REFERENCE: Article 9a of the VAT Implementing Regulation
SUBJECT: VAT 2015: Harmonised application of the presumption
(follow-up)

To be read together with Working paper No 885 from the 105th meeting

1. INTRODUCTION

During the 105th meeting of the VAT Committee, Working paper No 885 on the application of Article 9a of the VAT Implementing Regulation¹ was presented and discussed.

This document took into account earlier contributions and questions received from Member States and business together with attempts made at arriving at guidelines and proposed a wider, more clear-cut application of the presumption included in the said provision. The presented approach slightly differed from the position included in the non-binding Explanatory Notes prepared by the Commission services as published at the beginning of April 2014 on the Commission's webpage².

The main objective of the discussion was to avoid differences in approach by Member States as reported by businesses and to ensure a more uniform application of the rule. This discussion was however not conclusive because some Member States embraced this slightly modified approach whilst others asked for more proof that this shift in approach is necessary. It was therefore concluded that a further discussion was needed, based on additional input on the application of Article 9a.

For this reason, the Commission services have prepared the present follow-up document on Article 9a which aims at clarifying the position of the VAT Committee on the scope of this provision to the extent possible.

To have a full picture of the issues discussed below it is necessary for this current paper to be read together with Working paper No 885.

2. SUBJECT MATTER

As already explained, Article 9a of the VAT Implementing Regulation introduced a presumption on who is to be seen as the supplier of electronic and telecommunications services³, liable to pay VAT to the tax authorities, when they are provided via supply chains to a final consumer (B2C).

In general it is so that in order to be covered by the presumption a taxable person included in the supply chain should take part in the supply of electronic or telecommunications services. However, it flows explicitly from paragraph 3 of Article 9a that the providers of payment services are not seen as taking part in the supply for the application of this provision.

¹ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).

² Explanatory Notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015; pages 22-44.
http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2015_en.pdf

³ Whenever reference is made to telecommunications services, this is intended to cover only telephone services provided through the internet, including voice over internet Protocol (VoIP).

The Explanatory Notes indicate that not all taxable persons involved in the supply of electronic or telecommunications services can be seen as taking part in the supply. Apart from payment service providers, they exclude from the group of taxable persons taking part in the supply those who make the internet or telecommunications network available for the carrying of content and/or the collection of payment.

Taking into account the experience gathered with regard to the application of Article 9a and the issues raised by stakeholders throughout 2015, the Commission services, in Working paper No 885, proposed for consideration a slightly different and more clear-cut approach limiting the situations where this provision would not apply. It was suggested that any engagement (other than the provision of payment services) of a taxable person in the provision of electronic or telecommunications services via a supply chain should be seen as sufficient for that person to be taking part in the supply within the meaning of Article 9a.

Further, the rebuttal of this presumption should be possible only when indicated conditions would be properly fulfilled.

3. THE COMMISSION SERVICES' OPINION

3.1. Who is concerned?

Article 9a of the VAT Implementing Regulation clarifies that the presumption concerns telecommunications networks, interfaces or portals such as marketplaces for applications via which electronic and telecommunications services are supplied.

Also suppliers providing electronic and telecommunications services are concerned. The scope of application of Article 9a being wide or more limited will be decisive as to whether they are liable for payment of VAT in respect of supplies to final consumers or not.

3.2. Information gathered

The comments received from stakeholders during 2015 (in particular during the Fiscalis Seminar that took place in Dublin on 7-9 September 2015 and in the context of the study commissioned by the Directorate-General Taxation and Customs Union, to be finalised in the first part of 2016, on VAT aspects of cross-border e-commerce which includes the assessment of the currently existing legislation), could be summarised as follows:

1) The main problem raised by many stakeholders is that Member States vary in the way they interpret the same activity as far as the scope of application of Article 9a is concerned. Therefore it is widely underlined that further clarification and a common interpretation by all Member States are very much needed.

2) It appears that to some extent interfaces and portals are in practice faced with slightly different issues than those faced by telecommunications companies.

3) In the case of interfaces and portals there seems to be very limited communication between them on the one side and the suppliers on the other. Because of the strong position of interfaces (portals) and/or their unwillingness to make adjustments to clarify

(existing) contracts this can result in ambiguity, as there is no explicit confirmation about who is supplying the services to the final consumer.

This situation may lead to disagreements between tax authorities and business. It can be also very burdensome for tax authorities to establish whether a business not registered in MOSS is non-compliant or trades through platforms. It is especially relevant from the perspective of both business and tax authorities in the case of smaller businesses which are very active in the domain.

4) As for telecommunications companies they underline two problems. Firstly, the same activities carried out by telecommunications companies can in some Member States be seen as covered by Article 9a and in others as not covered. And secondly, when telecommunications companies are seen as covered by the presumption certain Member States are making its rebuttal impossible in practice.

5) Uncertainty about whether interfaces, portals and telecommunications companies are covered by the presumption from Article 9a negatively influences suppliers, especially – which is very often the case – when they are located in a Member State other than that of the interface, the portal or the telecommunications company. According to information, there have been situations where suppliers, placed higher up in the supply chain, had to provide additional proof that VAT was paid by a telecommunications company in order not to be obliged to pay it themselves.

3.3. Application of Article 9a in the light of the information gathered

Information collected from various stakeholders shows that there is a serious issue of varying positions between Member States on the scope of application of Article 9a and the way in which the presumption can be rebutted.

Therefore the Commission services think that a clear-cut approach whereby all interfaces (portals, platforms) and telecommunications networks would as a rule be caught by the presumption from Article 9a could provide a much more uniform application of the rule and solve the issue of varying interpretation of the scope of Article 9a by Member States.

As far as rebuttal of the presumption is concerned, there are two aspects linked with it. On the one hand it should be remembered that Article 9a was constructed by the Council in such a way as to make it difficult to rebut the presumption. On the other hand when the conditions to rebut the presumption are fulfilled the taxable person should not be required to provide other additional elements in order for rebuttal to take place.

3.4. Additional elements to consider when deciding on the possible VAT Committee guidelines on Article 9a

The discussions in the VAT Committee aim at providing clarification and arriving at a more uniform application of VAT provisions by Member States. A common stance is particularly important for all the provisions which are relevant in a cross-border context.

The Commission services have reopened the question because of all the comments collected from various stakeholders about the complexity that the application of the presumption from Article 9a entails and given the serious issue of varying interpretations by Member States as regards the scope of application of this provision.

Currently, the interpretation publicly available (via non-binding Explanatory Notes prepared by the Commission services and widely consulted with Member States and business) excludes from the scope of the presumption from Article 9a situations where internet or telecom providers make their networks available for carrying of the content and/or collection of payment. Explanatory Notes provide a non-exhaustive list of indicators which may show that a taxable person is doing more than just making its network available and therefore is taking part in the supply.

Being well aware that the Explanatory Notes are not VAT Committee guidelines (which are also not binding) the Commission services believe that this publicly available interpretation should be modified only in the case that a consensus between Member States results from the discussions. In any other situation changes in the Explanatory Notes are not desirable as they may only bring more confusion to stakeholders.

The Commission services still believe that the presented approach of a wider interpretation of the scope of Article 9a (in this document and in Working paper No 885) could improve the current situation as it would provide a clear-cut distinction and simplify its application, while staying true to the general consensus reached in the Council that this presumption should be applied as widely as possible in the interest of simplicity.

Article 9a is a new VAT provision and therefore the current discussion provides the opportunity for Member States to fine tune their application in such a way as to ensure a truly harmonised approach across the EU. Further, digital technology changes very fast and a simpler approach to the scope of Article 9a could be more helpful for addressing future developments.

3.5. The questions to answer

With that in mind, the Commission services would like to ask all Member States to take a position on the following questions in order to be able to identify a possible way forward.

- 1) Do you agree that the presumption from Article 9a of the VAT Implementing Regulation should apply automatically to all suppliers, with the only exception of providers of payment services, where electronic services or telephone services delivered through the internet or the mobile network are provided via a supply chain to the final consumer?
 - a. Do you believe that this wider interpretation should apply only to internet providers?
 - b. Do you believe that this wider interpretation should apply only to mobile networks providers?
- 2) Do you rather agree with the more limited interpretation of the scope of Article 9a presented in the Explanatory Notes published at the beginning of April 2014 on the Commission's webpage (i.e. exclusion of providers who only make their networks available for carrying the content and/or collection of payment)?

- 3) Do you agree that the presumption from Article 9a of the VAT Implementing Regulation applies to all suppliers taking part in the supply chain with the exception only of those who fulfil all the conditions to rebut the presumption introduced by that provision?
- 4) Do you agree that where all the conditions from Article 9a for rebutting the presumption are fulfilled, no further requirements are needed in order for this to be rebutted?

As the current Working paper should be read together with Working paper No 885, the questions below retake subjects mentioned there in order to cover all identified issues in respect of Article 9a.

- 5) Do you agree that in cases of doubt or where a taxable person wants to rebut the presumption, the facts of the supply should be considered and the nature of the contractual arrangements examined?
- 6) Do you agree that in cases where the contractual arrangements are not sufficiently clear or there is a contradiction between the contractual arrangements and the economic reality the latter should be decisive for the assessment of whether or not the presumption from Article 9a of the VAT Implementing Regulation applies?
- 7) Do you agree that a supplier from the supply chain cannot, contrary to the facts and relevant legal requirements, decide that he is not taking part in the supply and that he is therefore not covered by the presumption from Article 9a of the VAT Implementing Regulation?
- 8) Do you agree that a clause in a contract eliminating a taxable person from a chain of transactions, where this does not reflect economic reality, cannot be seen as sufficient for that taxable person to be excluded from the supply chain and thereby from the presumption of Article 9a of the VAT Implementing Regulation?

4. DELEGATIONS' OPINION

Delegations are invited to express their views on the position presented by the Commission services and in particular to answer the questions listed under section 3.5.

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