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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 885

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

To be read together with Working paper No 895 from the 106th meeting

1. INTRODUCTION

In the process of preparations for the 102nd VAT Committee, Member States were invited to present their input in order to exchange views on the application of the 2015 VAT rules.

As a result, taking into account the received contributions, an attempt was made to reach conclusions as regards the application of Article 9a of the VAT Implementing Regulation¹. Doubts were however raised by some Member States, as they felt that additional discussion was needed in the VAT Committee before a common agreement could be reached.

The Commission was also approached by some stakeholders posing questions in relation to this new provision.

For these reasons, the Commission services have considered it would be convenient to provide the following analysis on the application of Article 9a of the VAT Implementing Regulation.

2. SUBJECT MATTER

When electronic and telecommunications services are supplied to a final consumer (B2C), it is the supplier of the services who is liable to pay the VAT to the tax authorities. The place of supply of these services is the place of the location of the customer.

Where the provider of the service does not supply it directly to the final customer but via supply chains, which are often long and can stretch across borders, it is essential to identify with certainty the person in the chain of suppliers that should be responsible for accounting for VAT in respect of the service provided to the final customer.

Therefore to provide legal certainty for all parties involved in such a chain of supplies and to ensure collection of the tax, it was necessary to define who in the chain must be seen as the supplier of the service. For this reason, as from 1 January 2015, a presumption was introduced by Article 9a of the VAT Implementing Regulation.

3. THE COMMISSION SERVICES' OPINION

3.1. Scope

Article 9a of the VAT Implementing Regulation envisages that when electronic services or telephone services provided through the internet are provided via intermediaries a presumption applies on who the supplier of the provided service is.

This presumption means that for each transaction in the supply chain between an electronic service provider and the end consumer, each taxable person (such as a content

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).

aggregator or a telecom operator, etc.) is deemed to have received and supplied further the electronic (or internet telephone) service himself. It is presumed that each person concerned acts in his own name but on behalf of the provider who is placed earlier in the supply chain. Therefore, normally, it will be the supplier placed in the supply chain just before the final consumer who will be seen as making the B2C supply of electronic service or telephone service provided through the internet to the latter.

Only suppliers of services consisting in processing of payments for electronic or telephone services provided through the internet who do not take part in the supply in any other way, are excluded from the scope of the presumption.

Taking into account the information and experience gathered up to now with the application of the new 2015 rules, the Commission services have come to the conclusion that any other engagement (than processing of payments) of a taxable person in the supply chain should be sufficient for that person to be seen as taking part in the supply within the meaning of Article 9a of the VAT Implementing Regulation and to be covered by the presumption. This position, on who is taking part in the supply, is slightly different from the one presented by the Commission services in the Explanatory Notes published in April 2014² where more situations (than just the processing of payment) were excluded from the application of the presumption from Article 9a of the VAT Implementing Regulation. It should however be recalled that the explanatory notes are to be considered as a work in progress reflecting the state of play at the time they were produced, based on the knowledge and experience available then.

In this specific case, the Commission services consider that the revised approach provides a clear-cut distinction and solves any doubts in that respect. Any other approach could only render the practical application of this presumption more difficult and subject to disputes. Clear-cut solutions are especially important in cross-border situations as otherwise there is a risk of double or non-taxation.

In this context it should not be forgotten that during the discussions in the Council there was a general consensus that the presumption from Article 9a of the VAT Implementing Regulation should be applied as widely as possible in the interest of simplicity.

3.2. Rebuttal of the presumption from Article 9a

Article 9a of the VAT Implementing Regulation is constructed in such a way that the presumption applies unless it is rebutted by a taxable person taking part in the supply. The rebuttal is only possible when all of the required conditions are fulfilled.

In order to refute the presumption (1st condition) the provider of the service placed earlier in the supply chain has to be explicitly indicated as the supplier by this taxable person and (2nd condition) this has to be reflected in the contractual arrangements.

For the first condition to be fulfilled a sufficiently clear indication of who the provider of the service is and what the service in question is, should be included (1) in the relevant invoices issued or made available by each taxable person taking part in the supply **and** (2) in a document for the final customer (like a bill, a receipt or an invoice where applicable) issued or made available by a taxable person taking part in the supply. For the second

² Pages 29-32 in the EN version.

condition to be fulfilled all elements covered by the first condition must be reflected in the contractual arrangements.

Further the rebuttal of the presumption is only possible if the taxable person taking part in the supply does not authorise the charge to the customer (for instance the telecom operator is not responsible for the payment between the final consumer and the content owner of the app) and he does not authorise delivery (for instance the delivery of the app from the content owner via the app store is not authorised by the app store) and he does not set the general terms and conditions of the supply (for example the terms of the sale of an app via an app store are not set by the app store).

It is only when a person taking part in the supply chain successfully rebuts the presumption that he is no longer seen as receiving and supplying further the given service. Then he is not covered any more by the presumption from Article 9a of the VAT Implementing Regulation.

3.3. How should Article 9a be applied in practice?

Generally, the presumption from Article 9a of the VAT Implementing Regulation should apply automatically where electronic services or telephone services provided through the internet are provided via a supply chain to the final consumer.

In cases of doubt (i.e. if it is not clear whether a supplier provides something more than just processing of payment) or where a taxable person wants to refute the presumption, the facts of the supply should be considered and the nature of the contractual arrangements examined. In cases where contractual arrangements do not describe in a sufficiently clear manner the way in which the taxable person takes part in the supply (for example there are doubts about who is setting the general terms and conditions of the supply) or where there is a contradiction between the contractual arrangements and the economic reality, then the latter must be decisive for the assessment of whether or not the presumption from Article 9a of the VAT Implementing Regulation applies.

Such an approach ensures that the presumption is applied widely, as envisaged by the Council, and ensures that economic actors having a stronger position on the market do not force taxable persons placed earlier in the supply chain to take responsibility for B2C supplies.

As a consequence 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. For the same reasons, 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.

3.4. Conclusions

It is important to recognise that in the interest of simplicity the presumption from Article 9a of the VAT Implementing Regulation should be applied as widely as possible and as a rule be valid for all taxable persons taking part in the supply. Therefore in

practice only suppliers of payment services are excluded from the application of the presumption.

The presumption from Article 9a of the VAT Implementing Regulation should normally apply to all suppliers participating in the supply chain with the exception only of those who fulfil all the conditions to rebut the presumption introduced by that provision and those who only provide for processing of payments.

Where there is a need to assess whether a taxable person is covered by the presumption from Article 9a of the VAT Implementing Regulation the facts of the supply must be assessed and the nature of the contractual relations examined. 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.

It flows from the above that a taxable person cannot, contrary to what the facts show, decide to be excluded from the presumption laid down by Article 9a of the VAT Implementing Regulation. Further a clause in a contract eliminating a taxable person from the presumption, where this is not reflected by the economic reality, cannot prevent its application.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on the position presented by the Commission services with a view to establishing VAT Committee guidelines.

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