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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 906

NEW LEGISLATION

MATTERS CONCERNING THE IMPLEMENTATION
OF RECENTLY ADOPTED EU VAT PROVISIONS

ORIGIN: Commission

REFERENCES: Articles 44, 46 and 58 of the VAT Directive
Article 7(3)(t) and (u) of the VAT Implementing Regulation

SUBJECT: VAT 2015: Interaction between electronically supplied services and intermediation services and initial discussion on the scope of the concept of intermediation services when taken in a broader context

1. INTRODUCTION

The issue of how to deal with intermediation services in the context of the new place of supply rules for telecommunications, broadcasting and electronically supplied services, which entered into force on 1 January 2015, was already raised in the VAT Committee:

- First, during the 101st VAT Committee meeting when the issue of online supplies made by a travel agent to final consumers was dealt with¹.
- Next, when in the process of preparing 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 on when intermediation services should be seen as covered by the definition of electronically supplied services in Article 7(1) of the VAT Implementing Regulation². Doubts were however raised by some Member States, as they felt that additional discussion of certain aspects was needed in the VAT Committee before a common agreement could be reached.

The Commission has also been approached by some stakeholders posing questions about the relation between intermediation services and electronically supplied services. This only serves to illustrate the importance of reaching a common view.

For these reasons, the Commission services have considered it necessary to provide the following analysis.

2. SUBJECT MATTER

In accordance with the general rule from Article 44 of the VAT Directive³, services supplied to taxable persons (B2B transactions) are, with some few exceptions, taxable at the place where the customer is located – it applies to intermediation services and electronically supplied services amongst others.

As from 1 January 2015 telecommunications, broadcasting and electronic services supplied to non-taxable persons (B2C transactions) are, in accordance with Article 58 of the VAT Directive, subject to VAT at the place where the final consumer is located. At the same time Article 46 of the VAT Directive stipulates that intermediation services supplied to non-taxable persons are taxable at the place where the underlying transaction is taxed.

¹ Working paper No 814.

² 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), as amended.

³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

The aforementioned provisions of the VAT Directive are relevant in relation to Article 7(3)(t) and (u) of the VAT Implementing Regulation which started to apply as from 1 January 2015. In accordance with the latter provision the following are not covered by the definition of electronically supplied services:

- point (t): tickets to cultural, artistic, sporting, scientific, educational, entertainment or similar events booked online;
- point (u): accommodation, car-hire, restaurant services, passenger transport or similar services booked online.

The question however remains, as raised by some, whether, and if so to what extent, intermediation services should be seen as included under those two points cited above.

Further to the position taken by the Commission services as it is presented below, at the end of the document, the question of the scope of intermediation services as such is raised, inviting Member States to present their views in this respect.

3. THE COMMISSION SERVICES' OPINION

3.1. Intermediation services and their possible interaction with electronically supplied services

Services can be provided by a taxable person acting in his own name or in the name of another person.

When the taxable person supplies a service in his own name acting on behalf of another person he acts as a principal which means that in accordance with Article 28 of the VAT Directive he is seen as the supplier – a person who himself receives a service and supplies it onwards. In such a situation there is no question of whether or not an intermediation service is provided in relation to tickets booked online as mentioned in point (t) or the tangible services listed under point (u) of Article 7(3) of the VAT Implementing Regulation. Such services, supplied by a taxable person in his own name acting on behalf of the supplier, who acts as a principal, are covered by Article 7(3)(t) and (u) and therefore excluded from the scope of electronically supplied services.

It is only when a taxable person provides a service in the name of another person that this can qualify as intermediation and the question on how to treat such an intermediation service will need to be analysed in the context of Article 7(3)(t) and (u).

In the case of intermediation services the following set-ups in general are possible:

- 1) Intermediation services are supplied to a taxable person (B2B supply) who pays for the services. These services can be offered by the intermediary in the context of the underlying services (hotel accommodation, transport, etc.) provided by the taxable person to his customers who may be taxable persons and/or final consumers. The assessment of the place of supply rules should be done from a B2B point of supply as it is a taxable person receiving the intermediation service and paying for it.

- 2) Intermediation services are supplied to a final consumer (B2C supply) who pays for the services. These services can be offered by the intermediary in the context of the underlying services provided by a taxable person to taxable persons and/or final consumers. The assessment of the place of supply rules should be done from a B2C point of supply as it is a final consumer receiving the intermediation service and paying for it.
- 3) Intermediation services are supplied to a final consumer and to a taxable person both of whom (in respective parts) pay for the services. In such a situation two separate transactions take place (B2C and B2B). These services can be offered by the intermediary in the context of the underlying services provided by a taxable person to taxable persons and/or final consumers. The assessment of the place of supply rules should be done separately for the B2C transaction and the B2B transaction.

When supplied B2B both intermediation services and electronically supplied services are covered by Article 44 of the VAT Directive – the place of supply is at the location of the customer. It is only when the services in question are supplied to final consumers that there could be a problem of conflicting application of Articles 46 and 58 of the VAT Directive. Therefore the focus of this paper is on intermediation services supplied directly to final consumers (hereinafter referred to as B2C supplies).

Concerning the relation between Articles 46 and 58 for the services in question that are supplied B2C, two basic approaches are possible. Either intermediation services are excluded from points (t) and (u) of Article 7(3) of the VAT Implementing Regulation or they are covered by these two points.

In the first case, intermediation services relating to tickets for various events or to the various tangible services like accommodation, car-hire, restaurant services, passenger transport or similar being booked online, would rather be seen as electronically supplied services. This could lead in practice to varying interpretations and conflicts causing issues of double taxation or non-taxation especially as a result of divergent application of Articles 46 and 58 of the VAT Directive.

In the second case, intermediation services relating to the listed services would be excluded from the scope of Article 58 of the VAT Directive and taxed in accordance with Article 46 of the VAT Directive (where the underlying services are taxable).

3.2. Position previously taken in relation to B2C supplies

In Working paper No 814 the Commission services analysed, amongst others, the interaction between Article 46 and Article 58 of the VAT Directive in situations where intermediation services are supplied to a non-taxable person in an automated manner, with only minimal human intervention and depending on the use of information technology and the internet⁴.

In particular, it was observed there that where an intermediary, acting in the name and on behalf of another person, supplies services which are of a tangible nature, those intermediation services should not be qualified as electronically supplied services. This

⁴ Working paper No 814, section 3.2.

position was based on the understanding that intermediation services are closely connected with the underlying service and therefore both should be taxable at the same place. Disconnecting an intermediation service from the underlying service puts at risk revenue of the Member State of consumption and artificially divides two very closely associated supplies. It is of particular importance as regards supplies made to non-taxable persons as explained under section 3.1. This stance is only strengthened by the wording of Article 46 of the VAT Directive.

In the VAT Committee, it appeared that the views were divided: however, it was recognised that further efforts were needed in order to progress on a common approach, given the risks of conflicts and double or non-taxation it creates.

3.3. The need for simplicity in how the place of supply rules are applied in a cross-border context

The Commission services recognise that it is possible to take a different approach than the one presented under section 3.2 and analyse each intermediation service separately from the underlying one.

However, as explained above it is believed to be going against the very nature of an intermediation service, provided in the name and on behalf of another person, which is intrinsically linked with the underlying service.

Further, taking into account the experience gathered in the context of applying the new rules on the place of supply of services which entered into force on 1 January 2015, the increasing complexity of economic set-ups and new ways of providing business thanks to changing technology, the Commission services believe that the rules regulating the place of supply should be applied in the most simple way possible to accommodate for the cross-border context. What matters, obviously, is to ensure that taxation takes place at the place of consumption.

With that in mind, intermediation services supplied to a non-taxable person where an intermediary acts in the name and on behalf of another person should better be taxable at the place of supply of the underlying service. Consequently, in relation to points (t) and (u) of Article 7(3) of the VAT Implementing Regulation it means that intermediation services supplied to non-taxable persons (B2C supplies) and relating to the activities mentioned there should also be seen as included under those two points. In other words, intermediation services provided to non-taxable persons linked with supplies covered by these points should be taxable at the same place where the underlying services are located.

3.4. Scope of intermediation services in the VAT Directive when taken in a broader context

With the approach proposed above by the Commission services (i.e. to always link intermediation services supplied directly to a final consumer with the underlying services in accordance with Article 46 of the VAT Directive and closely connected with that, to include intermediation services under points (t) and (u) of Article 7(3) of the VAT Implementing Regulation when they concern activities listed there) it would be important to reflect further in more general terms on when a given supply should be seen as intermediation services and when not.

In other words, it would be important to develop a set of additional indicators helping to decide whether a given supply is still to be seen as an intermediation service for the purposes of the VAT Directive or not any more. It is essential especially in the context of a supply of intermediation services to non-taxable persons (as underlined above).

During the consultation process with Member States which led up to some discussions that took place during the 102nd VAT Committee meeting a couple of Member States gave their opinion on what should and should not be seen as covered by the scope of intermediation services.

Below a short summary is provided as concerns the key messages sent to the Commission:

One Member State explained that, where a supplier makes available for consideration a database that allows putting movable and immovable property on sale or up for rent, two different situations can be distinguished:

- 1) One where the price for the service rendered by the owner of the database is not influenced by the price of the goods offered. In this case the Member State believes that advertising services are provided and these could be treated as electronically supplied services if they fulfil the conditions in the definition.
- 2) Another situation where the price for the service rendered by the owner of the database is influenced by the price of the goods offered. Here the Member State believes that in such a case intermediation services are provided – the place of supply of which should, in principle, be determined in accordance with Article 44 (B2B supplies) or Article 46 of the VAT Directive (B2C supplies).

Concerning the second case another Member State concluded that for them for "Article 46 of Directive 2006/112/EC to apply the platform provider should play a deliberate role in the arrangements made between the service provider and the customer such that they assess the customer's needs, a supplier's suitability, exert an influence over pricing or who makes the underlying supply. How the platform is paid (i.e. by subscription or successful transaction) is not determinative. A platform that only provides passive automated facilities for a customer to contact a supplier through its website should fall within Article 58.".

Finally, it was underlined by one Member State that the situation set out above in the second case is different from the one in which a supply for consideration consists in the attribution of the right to sell goods or services via a website, that functions as an online marketplace where the potential buyers bid through an automatic procedure and the parties are notified of the conclusion of a purchase through an e-mail generated by a computer. This service is to be considered to be an electronically supplied service and the place of supply must be determined according to Article 58 of the VAT Directive.

The Commission services would like to invite other Member States to provide their opinion of what should be included within the scope of intermediation services, especially taking into account technological developments which influence the way businesses nowadays are modelled.

3.5. Conclusion

Having in mind the arguments presented above, the Commission services believe that intermediation services supplied directly to a non-taxable person where an intermediary acts in the name and on behalf of another person should be taxable at the place of supply of the underlying service to which the former service (intermediation) relates.

As a consequence, where intermediation services fulfilling the conditions from Article 46 of the VAT Directive relate to electronically supplied services they should be taxable at the place where the customer is located.

Equally, when intermediation services relate to services which are not qualified as electronically supplied services, like in the case of Article 7(3)(t) and (u) of the VAT Implementing Regulation, the former should also be excluded from this definition.

In the opinion of the Commission services this approach takes into account the nature of intermediation services which can be supplied only if there is an underlying transaction to which the intermediation service relates. Further, this stance should reduce the number of cases of double taxation or non-taxation and introduce more legal certainty for Member States and businesses in the everyday application of the rules by providing more simplicity.

It cannot however be disregarded or forgotten that such a position should apply only to services where there is no doubt that all their key elements indicate there being an intermediation service which is also why it is important for a set of additional indicators to be developed. In the case of services with features excluding them from the scope of intermediation services a separate analysis and discussion would have to take place.

4. DELEGATIONS' OPINION

The delegations are invited to give their opinion on the presented issues.

First of all, they are asked to state whether they agree with the Commission services' approach on how to treat intermediation services, in particular as regards Article 7(3)(t) and (u) of the VAT Implementing Regulation with a view of establishing possible VAT Committee guidelines.

Further, the delegations are invited to present their stance as concerns the scope of intermediation services as such in a broader context, also taking into account the latest technological developments, the need for a simple application of the rules in a cross-border environment and the objective of reducing possible cases of double taxation and non-taxation.

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