
Opinion Statement FC 3/2018 on Problems Caused by VAT Numbers

Prepared by the CFE Fiscal Committee
Submitted to the European Institutions in June 2018

This Opinion Statement seeks to highlight two problems that arise from the way in which the place of supply rules and VAT invoicing requirements interrelate. The first problem relates to supplies of services to a trader established in a different Member State who does not have a VAT number. The second problem relates to what VAT number a trader should use on an invoice when it sells goods situated in another Member State where the business is not registered to a third Member State.

CFE Tax Advisers Europe is a Brussels-based association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 European countries, representing more than 200,000 tax advisers. CFE is part of the European Union Transparency Register no. 3543183647-05. We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Ms. Stella Raventós, Chair of the CFE Fiscal Committee or Aleksandar Ivanovski, Tax Policy Manager, at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

I. Background and Issues

This Opinion Statement seeks to highlight two problems that arise from the way in which the place of supply rules and VAT invoicing requirements interrelate. The first problem relates to supplies of services to a trader established in a different Member State who does not have a VAT number, which will generally benefit from the exemption for small enterprises or possibly because its supplies are more generally exempt. The second problem relates to what VAT number a trader should use on an invoice when it sells goods situated in another Member State where the business is not registered to a third Member State.

II. Supplies of Services to Taxable Persons in Another Member State Who Do Not Have a VAT Registration Number

Introduction

The general rule¹ for determining the place of supply of services is contained in Article 44 of Directive 2006/112², which provides that the recipient of the services must have the status of a **taxable person acting as such**. For this purpose a “taxable person” is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity³. Accordingly, the rules depend on the **status of the recipient**.

For this purpose, Article 18(1) of the Council Implementing Regulation (EU) No 282/2011 (hereinafter referred as Regulation 282/2011), states that unless a person has information to the contrary he may treat his customer as a taxable person if he has a **valid VAT number**.

Article 18 (2) of Regulation 282/2011 determines that unless he has information to the contrary, the supplier **may** regard a customer established within the Community as a non-taxable person when he can demonstrate that the customer has not communicated his individual VAT identification number to him.

Meaning of Article 18 (2) of Regulation 282/2011

The European Commission has stated that as a result of Article 18(2):

“Irrespective of information to the contrary, the supplier ‘may’ regard a customer as a non-taxable person as long as that customer has not communicated his individual VAT identification number. The second subparagraph of Article 18(2) does not, however, compel him to do so.

¹ There are some exceptions, in which the status of the recipient of the services is not important, for example in relation to services related to land.

² The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.

³ Article 9 of Directive 2006/112.

*If he has other information to substantiate the status of the customer as a taxable person, the supplier can treat him as such but he **then assumes the risk in case things go wrong with his customer**".*

*The use of 'may' in the second subparagraph of Article 18(2) makes it **optional** for the supplier to use this provision. A reference to 'shall' would have forced a supplier who did not receive a VAT identification number from his customer to treat this customer as a non-taxable person. However it is not excluded that, even in the absence of a VAT identification number, the supplier knows that his customer is in fact a taxable person and the reference to 'may' then allows him to refrain from treating that customer as a non-taxable person. If the supplier has sufficient information to substantiate that the customer is in fact a taxable person, he is therefore not compelled to treat that customer as a non-taxable person and can issue an invoice without VAT if, in accordance with Article 196 of the VAT Directive, the latter is required to account for VAT.*

*In the absence of a VAT identification number, when the supplier does not use the option in the second subparagraph of Article 18(2), he needs to be able to substantiate that the customer is in fact a taxable person. If this is not possible, **the supplier could be held liable for payment of the VAT on account of the customer being a non-taxable person**⁴".*

Although Article 18(2) of Regulation 282/2011 states that the status can be determined by other evidence, in practice traders can have considerable difficulties in persuading tax authorities that their customer is a taxable person if they do not have a VAT number. For these reasons businesses can be reluctant to accept alternative evidence that the business is a taxable person. This can in turn impose onerous obligations upon them to register as taxable persons in other Member States. This is illustrated by the following examples:

Example 1

Dentist A from **MS1** provides dental services to Hospital B from **MS2**. Hospital B is not registered for VAT purposes and has no intention of registering or to seek a VAT number in according with Article 214 (1)(d) of Directive 2006/112⁵ since such services are exempt from VAT in **MS2** according to Article 132 (1)(b) of Directive 2006/112. Dental services are not exempt from VAT in **MS1**.

Since Hospital B is not registered for VAT purposes, Dentist A does not treat it as a taxable person. Therefore, the general rule under Article 45 of Directive 2006/112⁶ shall be taken into account. Dentist A charges local VAT for its dental services in **MS1**, even though as a matter of substance the hospital is clearly a taxable person so Article 44 should apply, so the supply ought to be treated as one made in **MS2**.

⁴ Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that entered into force in 2015, published on 3 April 2014 (see points 5.5.1, 5.5.3 and 5.5.4): https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/telecom/explanatory_notes_2_015_en.pdf

⁵ Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number and also every taxable person who within their respective territory receives services for which he is liable to pay VAT pursuant to Article 196.

⁶ The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides.

If the dental services are taxable in both **MS1** and **MS2** but the hospital's supplies are exempt a form of double taxation would arise as A would be accounting for VAT in **MS1** while the hospital would have obligations to account for VAT in **MS2** under Article 196.

Example 2

Company A from **MS1** provides electronic services to Company B from **MS2**. Company B is a small company and therefore not registered for VAT purposes in **MS2**. Company B should, but does not, obtain a VAT number in **MS2** according to Article 214 (1) (d) of Directive 2006/112.

Since Company B is not registered for VAT purposes, Company A does not treat it as a taxable person and the specific provision in Article 58 of Directive 2006/1127 directed at electronic supplies apply. Company A uses MOSS in order to fulfil its VAT obligations in **MS2**.

Example 3

Company A from **MS1** provides construction services in **MS2**. Company A is not registered for VAT purposes in **MS1** as a small company; however, it is registered for VAT purposes in **MS2** as a foreign taxable person. Accountant B from **MS2** provides accountancy services to Company A.

Since Company A is registered for VAT purposes in **MS2**, the Accountant treats it as a taxable person. According to Article 44 of Directive 2006/112 the place of taxation of the accountancy services is **MS1**, since Company A has no fixed establishment in **MS2**. However, since Company A has no VAT number the Accountant cannot report such services in its Recapitulative Statement and it might happen that VAT will not be paid in **MS1** under the reverse charge mechanism.

Possible Solutions

As a way of mitigating these problems, the CFE considers it would be desirable if Member States could keep a number of different registers of taxable persons. It is already the position in some Member States (for example in Slovenia and Malta) that taxable persons can register just for the purposes of the reverse charge, so that the registration has no impact on the supplies made by the taxable persons. In the United Kingdom a person can rely on the exemption for small enterprises to avoid having to account for VAT on supplies from other Member States provided those supplies and any supplies the trader makes are below the registration threshold. We consider that it would be helpful if such traders could be given a special registration which recognises their status as a business that is exempt from VAT.

Alternatively, it might be helpful if national tax authorities kept a database of bodies that it accepts are taxable persons who do not have a VAT number. So as to make it more accessible to people in other

⁷ The place of supply of the electronic services to a non-taxable person shall be the place where that person is established, has his permanent address or usually resides.

Member States, this information should also appear on an EU portal. In this way, suppliers can be more confident that they can treat the customer as a taxable person and thereby avoid the risks of double taxation highlighted in Example 1 and also ensure that VAT is not accounted for in a state under Article 45 when it is clear that the customer is a taxable person so the VAT ought to be accounted for in that state.

Article 18(2) of the Regulation should also be amended so that it only applies if the person has evidence that suggests that the other person is not a taxable person. We also consider that Recapitulative Statement should be changed so that supplies can be shown even if there is no VAT number, and it should be made clear that this is a legitimate action for a supplier to take in circumstances such as those in Example 3.

III. VAT NUMBER AND ISSUING INVOICES

Introduction

As a general rule, Article 219a of Directive 2006/112 requires invoices to be produced in accordance with the “**rules applying in the Member State in which the supply of goods or services is deemed to be made**”. However, there are two exemptions:

- cross-border supplies, which are subject to the reverse charge mechanism; and
- supplies which are taxable outside the EU.

In these two cases, the invoicing rules of the Member State where the supplier is established or has a fixed establishment from which the supply is made or has his permanent address or usually resides shall apply.

According to Article 226 of Directive 2006/112 invoices should also include the VAT identification number under which the taxable person supplies the goods or services.

Presented Problem

The following example illustrates how the interrelation of these provisions can cause problems.

Example

Company A from **MS1** buys goods in **MS2** and exports these goods from **MS2** to its buyer in a third country. Company A is registered for VAT purposes in **MS1**, but not in **MS2**, since there is no obligation to register when its only supplies are exportations of goods from **MS2** to third countries.

In this example, the place of supply of goods is **MS2** (the place where the goods are located at the time when dispatch or transport of the goods to the customer begins⁸). According to the basic rule, Company A must issue an invoice to the buyer of the goods under local VAT rules in **MS2**.

The issue is which VAT number should be mentioned on such invoices.

⁸ Article 32 of Directive 2006/112.

Proposed Solution

Article 219a of Directive 2006/112 should be amended so that, in cases where there is no obligation to register in the Member State where the supply takes place, a trader can use the invoicing rules of the Member State where the supplier is established or has a fixed establishment from which the supply is made or has his permanent address or usually resides.