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OPINION STATEMENT

Opinion Statement FC 4/2021 on Issues With Supply of Goods with Transport Under e-Commerce Rules

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We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Bruno Gouthière, Chair of the CFE Fiscal Committee or Aleksandar Ivanovski, Director of Tax Policy at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page http://www.taxadviserseurope.org/

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1. Introduction

Determining the nature of a transaction is one of the most important steps when determining the VAT treatment of supplies, including how the place of supply rules operate. It is only after the nature of a supply has been determined, including determining whether a supply should be considered a supply of goods or services, that the different rules regarding determination of the place of taxation can be applied. The situation becomes particularly complicated in cases where the supplier provides to its buyer both supplies of goods and services at the same time.

In such cases it must be established whether, for the purposes of VAT, the supply should be treated as two distinct taxable transactions or as a single composite supply for VAT purposes. This question often arises when the supplier supplies goods and provides transport of the goods at the same time. Such a situation is even more common with e-commerce activities, when businesses are selling goods online to final consumers located in other Member States (distance sales of goods).

2. Rules Regarding Place of Taxation

Supply of Goods

In accordance with Article 32 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter referred as the Principal VAT Directive), where goods are dispatched or transported by the supplier, or by the customer, or a third person, the place of supply is deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins. This general rule recognises that the supplier and the buyer can both alternatively be responsible for the transport.

However, by way of derogation, Article 33 of that Directive provides that the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends is, subject to compliance with certain conditions set out in that provision, deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends. Where the goods supplied are dispatched or transported from a third territory or a third country and imported by the supplier into a Member State other than that in which dispatch or transport of the goods to the customer ends, they shall be regarded as having been dispatched or transported from the Member State of importation. This article thereby creates a special rule for distance sales of goods where the supplier arranges for their transport between different Member States, and treats the place of supply as being where the dispatch ends.

The rules that are referred to above, regarding the determination of place of taxation for distance sales of goods, will remain in force after 1 July 2021[1]. Article 2 of Directive 2017/2455[2] provides additional clarification by making it clear that goods are dispatched or transported by or on behalf of the supplier include cases, where the supplier intervenes indirectly in the transport or dispatch of the goods[3]. This provision has already been considered by the ECJ[4] in case C-276/18[5] *KrakVet Marek Batko*, where the Court decided that when goods are sold by a supplier established in one Member State to purchasers residing in another Member State and are delivered to those purchasers by a company recommended by that supplier, but with which the purchasers are free to enter into a contract for the purpose of that delivery, those goods must be regarded as dispatched or transported "by or on behalf of the supplier" where the role of that supplier is predominant in terms of initiating and organising the essential stages of the dispatch or transport of those goods, which it is for the referring court to ascertain, taking account of all the facts of the dispute in the main proceedings. This decision brought a more clear understanding of the term "goods dispatched or transported by or on behalf of the supplier". However, the question, whether the transport and the supply of goods should in such circumstances be treated as one single supply was not raised or considered by the ECJ in that case.

Transport of Goods

With services supplied to a taxable person, the general rule for determining the place of supply is found in Article 44 of the Principal VAT Directive. Under that article, the place of supply of services to a taxable person acting as such is 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.

In accordance with Article 49 of the Principal VAT Directive, the place of supply of the transport of goods, other than the intra-Community transport of goods, to non-taxable persons shall be the place where the transport takes place, proportionate to the distances covered. However, Article 50 of the Principal VAT Directive determines that the place of supply of the intra-Community transport of goods to non-taxable persons shall be the place of departure. "Intra-

1 It has to be noted, that the existing threshold for intra-Community distance sales of goods will be abolished and replaced by a new EU-wide threshold of EUR 10 000.
2 Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods.
3 It must be pointed out, that this amendment to Directive 2006/112 will take effect on 1. July 2021 according to Council Decision (EU) 2020/1109 of 20 July 2020 amending Directives (EU) 2017/2455 and (EU) 2019/1995 as regards the dates of transposition and application in response to the COVID-19 pandemic
4 Court of Justice of the European Union.
5 Judgment of the Court of 18 June 2020, C-276/18, EU:C:2020:485.

Community transport of goods" for this purpose means any transport of goods in respect of which the place of departure and the place of arrival are situated within the territories of two different Member States. "Place of departure" shall mean the place where transport of the goods actually begins, irrespective of distances covered in order to reach the place where the goods are located, and "place of arrival" shall mean the place where transport of the goods actually ends (Article 50 of the Principal VAT Directive).

Issues in Practice

From the above, it will be apparent that different rules apply when determining the place of supply of goods and the transport of goods, which often cause administrative problems in practice. The differences can be seen from the following cases:

Case 1
A company established and registered for VAT purposes in Italy purchases goods from a German seller under its Greek VAT number. The Italian company has no fixed establishment in Greece. The German seller transports the goods to Greece and charges the supply of the goods and the transport of goods separately on one single invoice. If the goods and transport should be treated as two distinct taxable transactions, the German seller must put both the Italian and Greek VAT number of the buyer on the invoice and report the transactions separately in its Recapitulative Statement. The Italian purchaser must also charge VAT under the reverse charge mechanism in two different Member States and use two different VAT rates.
Case 2
A company from Hungary exceeded the threshold for distance sales of goods to a non-taxable person in Croatia. The Hungarian seller transports the goods from Hungary to its final consumer in Croatia and charges the supply of goods and transport of goods separately on one single invoice. If the supply is treated as two distinct taxable transactions, the Hungarian seller must charge Croatian VAT for the supply of goods and Hungarian VAT for the transport of the goods, in accordance with Article 50 of the Principal VAT Directive.

3. Single Taxable Supply

Conditions Given by the ECJ

When dealing with supplies by a single taxable person, the ECJ has held that there is a single supply in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded, by contrast, as ancillary supplies which

share the tax treatment of the principal supply[6]. The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split[7].

It follows from the case law of the ECJ that this resolves cases in a case-by-case manner and assesses whether the specific case is a single supply in the light of the circumstances of the case. In case C-111/05[8] *Aktiebolaget NN*, the ECJ considered that the supply and installation of a cable, which ran between the territories of two Member States and outside EU territory and where clearly the greater part of the total cost was attributable to the cable, should be considered a supply of goods for the purposes of the VAT Directive regarding the place of taxable transactions. The Court also concluded that the supply and laying of a cable should be regarded as forming a single transaction for the purposes of VAT. This judgement was based on the fact that all the elements of the transaction appeared to be necessary to its completion and they were all closely linked. It was also highlighted that in those circumstances it was not possible, without undue contrivance, to take the view that such a consumer would acquire, firstly, the fibre-optic cable and, subsequently, from the same supplier, the supply of services relating to the laying thereof.

It is our opinion that a similar analysis can be applied to the supply of goods that are dispatched or transported by or on behalf of the supplier. We consider that, when a supplier supplies goods and also arranges for the transport of the goods, the transaction should be considered to be a single supply in the circumstances mentioned above. This is because the supply of the goods is a predominant element of the supply, the transport of the goods being just an ancillary service, because it does not constitute for customers an aim in itself, but a means of better enjoying the goods[9]. In such circumstances the transactions should be treated as single supply even if the supplier separately indicates the amounts charged for the goods and the transport services on the invoice[10]. Indeed, although it is focusing on the place of supply rules in Article 33 of the Principal Directive, C-276/18 *KrakVet Marek Batko* possibly suggests this may extend to all cases where goods are sold by a supplier established in one Member State to purchasers residing in another Member State and delivered to those purchasers by a company recommended by that supplier, even though the purchasers are not

6 Judgment of the Court of 25 February 1999, CPP, C-349/96, EU:C:1999:93, paragraph 30.
7 Judgment of the Court of 27 October 2005, Levob Verzekeringen and OV Bank, C-41/04, EU:C:2005:649, paragraph 22.
8 Judgment of the Court of 29 March 2007, C-111/05, EU:C:2007:195.
9 Judgment of the Court of 2 May 1996, Faaborg-Gelting Linien v Finanzamt Flensburg, C-231/94, EU:C:1996:184, paragraphs 12 and 14, Judgment of the Court of 25 February 1999, CPP, C-349/96, EU:C:1999:93, paragraph 30 and Judgment of the Court of 19 November 2009, Don Bosco Onroerend Goed, C-461/08, EU:C:2009:722, paragraphs 39 and 40.
10 Judgment of the Court of 2 December 2010, Everything Everywhere, C-276/09, EU:C:2010:730, paragraph 29. This is also consistent with article 78 of the Principal VAT Directive which states that incidental expenses of packaging and transport form party of the consideration for a supply. However, no account is taken of separately charged transport costs when determining whether goods have an intrinsic value exceeding EUR 150 for the purposes of the Import One Stop Shop (IOSS). However, VAT can be charged on importations of goods even if there is no supply.

required to enter into any contract for the delivery with the company recommended by the supplier, provided the supplier plays a predominant role having regard both to the initiation and the organisation of the essential stages of the dispatch or transport of the goods.

When assessing whether this is the position, consideration needs to be given to:

- the significance of the issue of the delivery of the goods to the purchasers in the light of the commercial practices which characterise the activity carried on by the supplier concerned (the organisation of the delivery by that supplier is an essential part of that activity),
- the choices relating to the methods of dispatch or transport of the goods concerned must be attributed to the supplier,
- the burden of risk in relation to the dispatch and supply of the goods at issue bears the supplier and
- the acquisition of goods and their dispatch or transport are the subject of a single financial transaction.

VAT Rate

The rate at which VAT is charged may be impacted depending on whether the transport costs are considered part of a composite supply or a separate supply of services. If it is a separate supply of services, it will be charged at the appropriate rate for the services in question. If the supply of goods and the transport of these goods can be treated as a single supply, the VAT rate for the supply of those goods should be used. If the goods are charged at different rates, the transport costs would need to be appropriately apportioned, so that part is appropriately taxed at the different rates.

4. Conclusion

Since there are different rules regarding determination of place of taxation for transportation services and supply of goods, it would be helpful if there could be some Commission guidance issued clarifying what the position is or, alternatively, if consideration could be given to making changes to the VAT Directive so that transport services are dealt with more consistently with the underlying supply.