



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
Indirect Taxation and Tax administration  
**Value added tax**

**taxud.c.1(2020)971538 – EN**

Brussels, 7 February 2020

**VALUE ADDED TAX COMMITTEE  
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)  
WORKING PAPER NO 989**

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

**ORIGIN:** Commission

**REFERENCE:** Article 138 of the VAT Directive

**SUBJECT:** Implementation of the Quick Fixes Package:  
Council Directive (EU) 2018/1910  
VAT identification number obtained after the moment of  
chargeability of the tax on the supply

## **1. INTRODUCTION**

The purpose of the present Working paper is to continue the discussion on the application of Article 138 of the VAT Directive<sup>1</sup>, which provides for exemption upon intra-Community supply, in cases where the acquirer has not indicated a VAT identification number to the supplier at the moment of the chargeability of VAT on the supply, but indicates such number afterwards.

## **2. BACKGROUND**

On 4 December 2018, the Council adopted the VAT ‘quick fixes’ legislative package, which consists of:

- a) Council Directive (EU) 2018/1910 of 4 December 2018 amending Directive 2006/112/EC as regards the harmonisation and simplification of certain rules in the value added tax system for the taxation of trade between Member States;
- b) Council Regulation (EU) 2018/1909 of 4 December 2018 amending Regulation (EU) No 904/2010 as regards the exchange of information for the purpose of monitoring the correct application of call-off stock arrangements;
- c) Council Implementing Regulation (EU) 2018/1912 of 4 December 2018 amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for intra-Community transactions.

After the adoption, the Commission services, in preparation of the Explanatory Notes issued in December 2019<sup>2</sup>, prepared Working papers<sup>3</sup> with explanations on those provisions considered the most pertinent. These Working papers were discussed in the VAT Expert Group (VEG) on 1 April 2019 and the Group on the Future of VAT (GFV) on 5 April 2019.

The discussions in the GFV made obvious that in view of ensuring a common interpretation and implementation it would be suitable for the VAT Committee to agree guidelines on a number of issues.

The Commission therefore submitted a Working paper<sup>4</sup> for discussion on these issues at the 113<sup>th</sup> meeting of the VAT Committee which was held on 3 June 2019.

The outcome of that discussion was reflected in a number of guidelines agreed by the VAT Committee<sup>5</sup>. Notably the discussions on the interaction between Article 138 of the

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<sup>1</sup> 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).

<sup>2</sup> [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/explanatory\\_notes\\_2020\\_quick\\_fixes\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/explanatory_notes_2020_quick_fixes_en.pdf)

<sup>3</sup> See [GFV No°084](#), [GFV No°085](#), [VEG 79](#) and [VEG 80](#).

<sup>4</sup> See [Working Paper No°968](#).

<sup>5</sup> [Guidelines](#) resulting from the 113<sup>th</sup> meeting of 3 June 2019 Documents B to H – 973-979 (p. 244-250).

VAT Directive, as amended by Council Directive (EU) 2018/1910, and Article 4 of the VAT Refund Directive<sup>6</sup> were the subject of a guideline<sup>7</sup>.

### **3. SUBJECT MATTER**

The agreed guideline states that *“The VAT Committee unanimously confirms that the amendment made by Council Directive (EU) 2018/1910 of 4 December 2018 to Article 138(1) of the VAT Directive adds a substantive condition for the application of the exemption of an intra-Community supply of goods. The VAT Committee unanimously agrees that this addition means that where the person acquiring the goods does not indicate his VAT identification number to the supplier or where the VAT identification number indicated has been issued by the Member State from which the goods are dispatched or transported, the conditions for applying the exemption of Article 138 must be seen as not being fulfilled and the supplier shall have no other option but to charge VAT.”*.

The guideline does, however, not deal with situations whereby the added substantive condition is not fulfilled at the moment of chargeability of the tax on the supply but is fulfilled at a later stage. This was a key issue at the previous discussions.

The Commission services are therefore of the view that the issue should be discussed further, based also on the observations previously made by the delegates.

### **4. THE COMMISSION SERVICES' OPINION**

The Commission services suggest continuing the discussions on the basis of a number of practical situations.

#### **4.1. Negligence or ignorance of the acquirer**

The acquirer has a VAT identification number but, by negligence or ignorance, did not communicate this VAT identification number to the supplier who therefore had no other option but to invoice VAT.

However, when at a later stage but still within the period in which a correction of the invoice can be made according to the rules of the Member State in which the supply takes place, the acquirer provides his VAT identification number and the supplier has no reason to suspect any fraudulent intention on the side of the acquirer, then the supplier should correct the initial invoice and apply the exemption provided for by Article 138 of the VAT Directive subject to all other conditions for applying that exemption being fulfilled.

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<sup>6</sup> Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ L 44, 20.2.2008, p. 23).

<sup>7</sup> See Document E (p. 247).

#### **4.2. VAT identification number requested but not attributed**

The acquirer has submitted to the competent tax authorities a request for obtaining a VAT identification number but is waiting for the attribution of that number. The acquirer is not in a position to provide a VAT identification number to the supplier who therefore has no other option but to charge VAT.

When once attributed, the acquirer provides the supplier the VAT identification number that is considered by the tax authorities which granted it to be retroactively valid at the moment VAT on the supply of goods became chargeable, the supplier should correct the initial invoice and apply the exemption provided by Article 138 of the VAT Directive subject to all other conditions for applying that exemption being fulfilled.

When administrative practices prevent the tax authorities from attributing a VAT identification number retroactively, and the supplier has no reasons to doubt the good faith of the acquirer and his status of a taxable person at the moment of the supply, the supplier may also correct the initial invoice and apply the exemption provided for by Article 138 of the VAT Directive subject to all other conditions for applying that exemption being fulfilled.

The above principles would also apply when a taxable person transfers goods to another Member State under call-off stock arrangements which, in accordance with Article 17a(1) of the VAT Directive, shall not be treated as a supply of goods for consideration. However, when at a later stage a transfer is deemed to take place for the reasons set out in Article 17a(4) or 17a(7) of the VAT Directive, the taxable person might at the moment the transfer is deemed to take place not have a VAT identification number in any Member State other than that from which the goods were transported. The conditions for exempting the transfer (treated as a supply of goods) under Article 138 are not fulfilled, which means that the taxable person would have to charge VAT on the transfer. Once that taxable person obtains the VAT identification number in the Member State of arrival of the goods, he can correct the initially charged VAT.

#### **4.3. Supplier stopped his activity**

There could be exceptional situations in which the acquirer cannot obtain from a supplier a corrected invoice. This can be the case when the acquirer has submitted to the competent tax authorities a request for obtaining a VAT identification number but is waiting for the attribution of that number. By the time the acquirer has the possibility to provide a VAT identification number, the supplier has stopped his activity.

Since at the moment of chargeability of the VAT on the supply the acquirer was not in a position to provide a VAT identification number to the supplier, the conditions for applying the exemption of Article 138 of the VAT Directive were not fulfilled and the supplier had no other option but to charge VAT.

Once the acquirer has obtained the VAT identification number, he might find himself in a position whereby he cannot obtain a corrected invoice from the supplier, for instance in case the supplier became insolvent in the meantime.

The Court of Justice of the European Union (CJEU) has dealt with a comparable situation in Case C-35/05 *Reemtsma Cigarettenfabriken*<sup>8</sup>. In its decision, the CJEU stated the following:

*“The answer to the second part of the second question must therefore be that the principles of neutrality, effectiveness and non-discrimination do not preclude national legislation, such as that at issue in the main proceedings, according to which only the supplier may seek reimbursement of the sums unduly paid as VAT to the tax authorities and the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due. However, where reimbursement of the VAT would become impossible or excessively difficult, the Member States must provide for the instruments necessary to enable that recipient to recover the unduly invoiced tax in order to respect the principle of effectiveness.”*

In order to comply with this jurisprudence, Member States must have a mechanism in place that ensures, in particular circumstances, direct refund to the acquirer of the unduly paid VAT, where reimbursement from the supplier becomes “impossible or excessively difficult”. This mechanism should also be applied in the situation described in this section so that Member States must ensure that the VAT initially invoiced is refunded to the acquirer when:

- (i) the acquirer will be in a position to provide a VAT identification number for the purposes of Article 138 of the VAT Directive which he could not initially provide at the time the VAT on the supply became chargeable; and
- (ii) the supplier has since stopped his activity and cannot therefore proceed to the correction of the invoice.

## **5. DELEGATIONS' OPINION**

Delegations are invited to give their opinion on the situations described in this document.

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<sup>8</sup> CJEU, judgment of 15 March 2007, C-35/05 *Reemtsma Cigarettenfabriken*, EU:C:2007:167.