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VAT EXPERT GROUP[1]

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VAT and the platform economy - Focus on specific issues

[1] Group of experts on value added tax to advise the Commission on the preparation of legislative acts and other policy initiatives in the field of VAT and to provide insight concerning the practical implementation of legislative acts and other EU policy initiatives in that field.

1. INTRODUCTION

The Group on the Future of VAT have been analysing various elements of the VAT treatment of platforms, and the Commission services considered it would be useful if members of the VAT Expert Group also considered some elements further.

In light of the above, the Commission services present the working paper as discussed in the 38th meeting of the Group on the Future of VAT, and ask members to consider their responses.

2. THE IMPACT OF THE DEEMED SUPPLIER REGIME AND THE GROUP OF FOUR, IN PARTICULAR SMES

2.1. The deemed supplier regime and the upcoming SME changes

The new scheme

Council Directive (EU) 2020/285 on the common system of value added tax as regards the special scheme for small enterprises[2] comes into application in January 2025. This updates and amends how the special scheme for small enterprises operates and, as it is very unlikely that any changes to the VAT treatment of the platform economy will apply before 2025, it is worthwhile examining how the deemed supplier regime would operate within the framework of the new rules.

Under the new rules, Member States may exempt the supply of goods and services made within their territory by taxable persons established in that territory providing their annual turnover does not exceed a set amount, which Member States can determine, but which cannot exceed EUR 85,000. Member States may apply different thresholds for different business sectors, providing that each threshold does not exceed EUR 85,000. Businesses who use the special scheme are referred to as an 'exempt small enterprise'.

This differs from the current scheme by a) removing any graduated relief which Member State might have implemented; b) applying the exemption to the supplies of the goods and services themselves, rather than the taxable person; and c) applying a higher upper limit to the threshold, giving Member States more freedom in choosing an appropriate threshold.

In addition, the special scheme is made available for businesses established in other Member States, provided that: a) total sales within the EU do not exceed EUR 100,000, and b) sales in the Member State of supply do not exceed the domestic threshold. There is a notification and reporting mechanism for businesses wishing to use the scheme in a Member State in which they are not established.

Identification of the status of the supplier

Under the deemed supplier regime, an exempt small enterprise will not charge VAT on its supplies facilitated via a platform, and the platform will charge the VAT. Member States can,

[2] Council Directive (EU) 2020/285

under Article 292b of the VAT Directive, release exempt small enterprises applying the exemption within their Member State from the obligation to be identified by means of an individual number (a VAT number). Therefore, if an exempt small enterprise does not have a VAT number to provide to the platform, then the deemed supplier rule would apply, and the platform would charge VAT on the supply.

There are instances, however, where a Member State will allocate a number to an exempt small enterprise – either because they do so as a matter of course for domestic suppliers, or because the exempt small enterprise wishes to avail itself of the special scheme in another Member State (in which case the number will have an 'EX' suffix). Whilst it would be easy for a platform to identify an exempt small enterprise if it has the 'EX' suffix, it would not be the case if exempt small enterprises were given VAT numbers similar to those used by other businesses (which could be the case for small enterprises only availing of exemption in their own Member State).

This is the reason the Commission services proposed, in the previous working paper, a second step in the identification process, in that a question is asked of the provider as to whether or not he would normally charge VAT on the supply.

However, it would appear that this second step (or something similar) would only be necessary in those Member States which allocate a VAT number to exempt small enterprises, and this VAT number does not enable a platform to distinguish exempt small enterprises from the main body of VAT registered enterprises. In other cases (where the exempt small enterprise does not have a VAT number, or where it does but it is clearly identified with an 'EX' suffix) the platform should be able to clarify whether the deemed supplier regime applies.

Therefore, the Commission services would propose that the platform is not required to go through the second step of authentication in the following situations:

- Where the provider is established in a Member State which does not allocate a VAT number to exempt small enterprises, and/or;
- Where the provider is established in a Member State which allocates a VAT number to an exempt small enterprise, but this VAT number allows such an enterprise to be distinguished from the general business population, and/or
- Where the VAT number provided to the platform has the 'EX' suffix.

However, where the Member State allocates a VAT number to the exempt small enterprise which does not allow the exempt small enterprise to be distinguished as such, then the platform will be required to go through the second step of identification, such as a statement that the enterprise is an exempt small enterprise. In this respect, it can be assumed that, having taken the steps to register as such, the small enterprise is fully aware of its status and can communicate that fact to the platform.

Further, it is the Commission services' view that it is not the role of the platform to police the special scheme, in that they are not required to keep track of each sale by each provider in order to determine whether that provider has exceeded a domestic or the Union threshold. This role continues to be carried out by the Member States.

Further to this, it appears to the Commission services that, should Member States allocate a VAT number to exempt small enterprises, some means of identifying this status via the VAT number would make the system much easier to operate.

2.2. The consequences of the platform becoming the supplier – identification of the customer

As a consequence of becoming the deemed supplier, the platform will need to know whether the customer (the person receiving the underlying service) is a taxable person or not, as this would dictate how the platform accounts for VAT on the supply. For domestic supplies this would not be such an issue, but it could become more complicated for cross-border supplies, particularly in situations where the customer is not established in the Member State of the platform. In such a case the status of the customer could determine whether a) the platform can declare the sale via the One-Stop Shop (OSS), b) the platform can use the reverse charge, or c) the platform would be required to register in the Member State of the supply or customer.

Article 5(d) of the VAT Implementing Regulation allows for the deemed supplier under Article 14a of the VAT Directive (i.e. the facilitator of distance sales of goods from 3rd countries with a value lower than EUR 150, or the sale of goods to a non-taxable person by a person outside the EU) to regard the person selling the goods as a taxable person, and the person receiving the goods as a non-taxable person.

It would be possible that a similar presumption could be introduced to the deemed supply of a service by a platform, but relating only to the status of the customer, rather than the supplier and customer. A measure could be introduced so that, unless it has information otherwise, the platform, when acting as the deemed supplier, can consider the recipient of the service as a non-taxable person where that person does not provide a VAT number.

This could work well for domestic supplies, but would be more complicated for cross-border supplies, particularly relating to exempt small enterprises. The question would be, whether the lack of a VAT number, whilst being sufficient for the platform to regard the customer as a non-taxable person, would also be sufficient to allow the platform to declare the VAT due in another Member State via the OSS. Article 369b(c) of the VAT Directive would suggest not – however, an amendment could be made to allow for such sales to be declared via the OSS. When looking at the consequences of such an action, it appears to the Commission services that the VAT accrues to the correct Member State, and this is merely a means of facilitation in that it allows the platform to declare the VAT without the necessity of further checks on the status of the customer.

Even with this simplification, there remain instances in which the platform may be required to register in another Member State – an example being a deemed supply of short-term rental of accommodation in one Member State, to a business customer in another Member State, via a platform in a third Member State. In this instance, the platform cannot use the reverse charge (because the customer is not established in the Member State of supply), and neither can it use the OSS (because the customer is a business). In such an instance the platform would be required to register in the Member State where the immovable property is located.

These and similar instances will need to be outlined in any explanatory notes which would accompany the legislative changes once adopted by the Council.

2.3. The impact on SME thresholds (do sales count towards the threshold of the supplier, the platform, or both)

In their deliberation of how and whether a turnover threshold should apply to platforms themselves, below which the deemed supplier regime would not apply, the Commission services looked at other similar measures, and in particular that in place in Canada, which applies to platforms facilitating the supply of certain accommodation services (specifically short-term residential letting).

In the Canadian system, a threshold of $30,000 CAN applies, which is around EUR 20,000. Where a platform does not anticipate facilitating supplies of a total value above that amount, it is not required to register for goods and services tax (GST) purposes, and declare GST on its supplies. It should be noted that the $30,000 CAN is the general SME threshold, below which any business is not required to register for and declare their GST.

In short, under the Canadian system, the platform is required to include the value of any underlying supplies when considering whether it has exceeded the turnover threshold to both a) register itself for GST and declare the GST due on its facilitation services, and b) act as the deemed supplier for those providers who are themselves not required to register and account for their GST. This system works well in Canada, and businesses are generally supportive, in that it is simple to apply.

There is no specific threshold for platforms other than the general SME threshold, and it would seem prudent to the Commission services to follow this model – in particular given the variety of turnover thresholds Member States apply (including to different business sectors). To introduce a specific threshold, below which the deemed supplier regime would not apply, would, in the Commission services' opinion, simply add another level of complexity to the system when businesses have stressed that any new system should be simple to operate and understand.

For the provider, the special scheme for small enterprises would also apply, and, when calculating whether the threshold has been exceeded, all supplies by the provider[3] should be taken into account, regardless of whether or not the platform was the deemed supplier. To do otherwise would mean that a business would be able to consider itself below the threshold even if the turnover was much higher than the threshold, as long as all supplies were carried out via a platform.

Therefore, the Commission services would suggest the following regarding thresholds:

- A platform is entitled to follow the same rules as any other business when it comes to assessing whether is it entitled to use the special scheme for small enterprises.
- If a platform is entitled to, and does use, the special scheme for small enterprises, no VAT is charged on its facilitation service, and it is not required to become the deemed supplier when the underlying supply is provided by a person who does not charge VAT.[4]

[3] This may require a clarification to Article 288 of the VAT Directive.

[4] In all likelihood, this would be a rare occurrence, as most platforms exceed the SME thresholds and are VAT registered.

- When assessing its turnover, the platform must include the value of the underlying supplies it facilitates.
- A provider is also entitled to use the special scheme for small enterprises.
- When assessing its turnover, the provider must include the value of all supplies, even those for which the platform was the deemed supplier.

3. OTHER ISSUES

3.1 The deemed supplier model and the travel agents scheme

The Commission services have commissioned a study to look at the special scheme for travel agents, along with passenger transport and refunds for non-EU tourists. Work has only just begun and any proposal, if the impact assessment indicates that a legislative approach may be appropriate, is not expected until sometime in 2023. Therefore, it is appropriate to look at the special scheme for travel agents as it currently applies, and its interaction with the deemed supplier model.

As outlined in GFV No 116, the Commission services consider there may be a risk that a platform could be seen as acting as a travel agent in certain circumstances, and therefore be required not to charge VAT on the value of the underlying supply, but on the margin between the cost of the supply, and the price charged by the platform (which would, in effect, be the facilitation fee).

Outline of the special scheme for travel agents

The special scheme applies to travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons in the provision of travel facilities. The VAT Directive does not define what a travel agent[5] is, but says that tour operators are regarded as travel agents.

Under the scheme, transactions made by the travel agent in respect of a single journey are regarded as a single supply from the agent to the traveller, which is taxable where the travel agent has established his business. The taxable amount is the difference between the price paid by the travel agent for the supplies received, and the amount paid by the traveller.

There is no right of deduction for the travel agent for those travel supplies which are of direct benefit for the traveller.

As an example, if it costs a travel agent established in Belgium EUR 500 for a flight to Spain and EUR 200 for 3 nights' accommodation in Madrid, for which it charges the customer EUR 1,000, VAT is due on EUR 300 in Belgium. The travel agent has no right of deduction in respect of the VAT included in the EUR 700 it paid for the flight and accommodation.

[5] And indeed there is no definition of 'travel agents' per se in Directive (EU) 2015/2302 on package travel arrangements and linked travel arrangements merely definitions of 'organisers' and 'retailers'.

The special scheme for travel agents and the deemed supplier

There are perhaps two elements to consider, the first relating to the supplies made to the platform and whether they can be regarded as a supply by a taxable person in the provision of travel facilities, and the second regarding the differentiation between platforms dealing in (say) accommodation, and online travel agents, and how platforms can be excluded from the special scheme whilst not excluding legitimate travel agents.

Supplies made to the platform

In the first instance, the special scheme commonly applies where there is more than one supply (i.e. a supply of travel and a supply of accommodation provided by different taxable persons) which is packaged together by the travel agent and sold as a single supply to the customer. Many of the supplies which are facilitated by a platform, and on which the VAT in the Digital Age initiative is focussed, would be single supplies only. Whilst the Court of Justice of the European Union has held, in C-552/17 *Alpenchalets Resorts*, that the mere supply of holiday accommodation rented from another taxable person can be considered as a single supply under the special scheme for travel agents, it is questionable as to whether the platform actually 'rents' the accommodation when it is deemed to be the supplier (it is in fact a facilitation service which is leading to the fiction of a deemed supply). Nevertheless, it would be useful to add clarity to the legislation.

And indeed, that is not to say that a platform could not develop business models which offer 'package' supplies, whereby, for example, accommodation in one destination is offered for three days, followed by accommodation in a different destination for four days as part of one package.

For the special scheme to apply, the supplies made to the travel agent however have to be made by other taxable persons. Therefore, it seems clear that, where a platform facilitates a supply by a natural person, that transaction cannot qualify for the special scheme.

Where a platform facilitates a supply provided by a VAT registered taxable person, the deemed supplier regime does not apply, and as it is a supply between the VAT registered provider and the customer, the special scheme cannot apply and the platform cannot be regarded as a travel agent. In any sense, where the platform merely acts as an intermediary, the scheme cannot apply.

The difficulty lies where a platform facilitates supplies from non-registered taxable persons in which case the deemed supplier regime applies, and the persons supplying the services are taxable persons. Here an argument can perhaps be made that, when facilitating multiple supplies as a single supply, the platform could be seen as acting as a travel agent.

Therefore, it would seem prudent to specifically exclude such supplies from the special scheme. Indeed, platforms themselves may welcome such a clarification, as the mandatory use of the special scheme for certain transactions would add to the complexity of the application of the deemed supplier regime.

Differentiation between deemed suppliers and travel agents

If the Commission were to legislate that particular supplies cannot be included in the special scheme (that is, supplies made by the group of four via a platform for which the deemed

supplier model applies) it would reduce or eliminate the necessity to differentiate between deemed suppliers and travel agents, because it is the types of transactions which are excluded from the scheme and not who is facilitating the transaction. A travel agent would generally buy supplies from other taxable persons to sell them to travellers in his own name, and so would not act as a deemed supplier, and so will continue to use the special scheme.

As a conclusion, the Commission services would recommend taking steps to exclude specific supplies (supplies falling under the deemed supplier regime where the underlying supplier is in the group of four) from the scope of the special scheme for travel agents.

3.2 The exemption of short-term accommodation rental

The study on VAT in the Digital Age highlighted that a number of Member States exempt short-term accommodation rental, often with various caveats (cleaning/linen supplied, kitchen provided etc.) to help define what qualifies for the exemption. This appears to be a based on an interpretation of Article 135(1)(l) of the VAT Directive, along with a particular understanding of the exception to the exemption in Article 135(2)(a).

Whilst the Commission services can perhaps understand the reasoning behind this interpretation (that by having the exemption there is not the necessity to control the large numbers of smaller suppliers) it is difficult to justify in relation to the goal of the VAT and the platform economy initiative, in that we are attempting to ensure VAT neutrality and equality. It appears to the Commission services that by exempting short-term accommodation rental, any measure taken under this initiative to ensure VAT equality and neutrality, will be undermined as a significant number of supplies in the accommodation sector will continue to be untaxed, in comparison with hotels and the like.

Therefore, the Commission services are more inclined to specifically exclude short-term accommodation rental from Article 135(1)(l). For the Commission services, this is a clarification, as, in their understanding, it would be easy to argue that short-term accommodation of the type typically offered by platforms is sufficiently similar to the hotel sector to warrant exclusion from the exemption.

Small suppliers would, then, ordinarily be required to charge VAT on their supplies, but, if the deemed supplier measure is adopted and these suppliers are exempt small enterprises, this tax would be charged by the platforms, which would reduce the need for registration and compliance of these suppliers.

4. THE RELATIONSHIP BETWEEN THE DEEMED SUPPLIER MODEL AND OTHER RULES – IN PARTICULAR THE E-COMMERCE RULES (NOTABLY IN RESPECT OF RECORD KEEPING OBLIGATIONS)

Sales made by the platform under the deemed supplier regime will follow the normal accounting rules, and tax administrations will be able to control the deemed supplier sales via the record keeping of the platform. However, Member States will need to ensure compliance of those sales made via the platform which are <u>not</u> under the deemed supplier regime, i.e. those on which the underlying supplier is supposed to declare VAT.

Article 242a of the VAT Directive stipulates that platforms should keep records of sales it facilitates to non-taxable persons in the EU, and it would be necessary to extend this

obligation to sales it facilitates to taxable persons. However, in order to ensure that we are capturing the information required, it would be necessary to stipulate that this obligation extends only as far as those sales which are not under the deemed supplier regime.

Care should be taken in the drafting of the legislation that we are not imposing disproportionate burdens on platforms, and to this extent, it should be looked at how we could regulate the frequency of requests for information, and the means of transmission – in this instance it would be useful to look at the models in the Administrative Cooperation Regulation.

5. QUESTIONS TO THE MEMBERS

The members are invited to give their views on this analysis and share any other opinion.

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