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

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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 1070

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Denmark**
REFERENCES:	**Articles 2(1) and 9(1)**
SUBJECT:	**VAT treatment of sales of skins in the secondary market**

1. INTRODUCTION

Questions regarding the VAT treatment of transactions related to online video games have been raised to the VAT Committee by Denmark. The submission of these questions comes after the VAT Committee at its 122nd meeting had a first occasion to discuss various issues thrown up by the growth in trade volume involving non-fungible tokens (NFTs)[1].

The Danish submission is attached in annex.

2. SUBJECT MATTER

2.1. Facts

The request of Denmark concerns platform-based trading of virtual products by private individuals[2].

The virtual products under consideration are digital designs called "skin(s)". Skins are functioning within a video game to customize the characters, for example it can be the uniform of a player character, extra lives, weapons etc.

Denmark explains that the skins are assigned to boxes ("loot boxes"[3]) that are injected into the game by the host platform. Players get hold of the loot boxes without knowing what they will get upon opening them and need to purchase a key to open them.

The skins can then be traded between players. Those transactions take place within certain platforms that are not necessarily the one where the video game is hosted. The platforms hosting the trade are in most cases remunerated by a percentage share from each transaction.

In the case submitted by Denmark, a non-professional private person, hereafter "X", plays an online video game, 'Counter-Strike', using a profile/player-account in a certain platform (platform 1).

X is awarded loot boxes containing weapon arsenals, including skins. He also purchases other skins in another platform (platform 2).

X uses the skins acquired during the video game before selling some of them via platform 2 with a profit margin ranging between 10% and 20%. He also onsells some of the skins acquired in platform 2. The trade is usually relying on a digital method of payment called "MobilePay".

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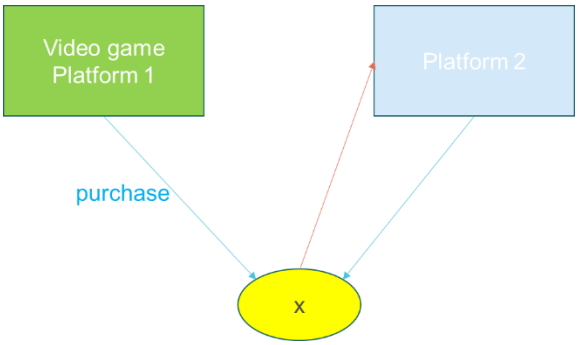
1 Working paper No 1060 *Initial VAT reflections on non-fungible tokens*.

2 See also in that context a priority question for written answer raised by the European Parliament to the Commission: https://www.europarl.europa.eu/doceo/document/P-9-2023-000377_EN.html.

3 "Loot boxes is the collective term for one or more game elements incorporated into a video game, in which the player acquires game items in a seemingly random manner, which may or may not involve a cost. These items can be very diverse in nature, ranging from characters or objects to emotions or special characteristics." What are loot boxes? | Gaming Commission (last access 1/9/23).



X traded skins for 1½ years at an average of three trades per week with prices varying from EUR 15 to EUR 2 500. A typical transaction value is between EUR 400 and EUR 500, but a single transaction may also have a value of as much as EUR 1 500. On an annual basis, the trade volume of X is estimated to amount to approx. EUR 65 000.

2.2. Question

The question is whether the above-mentioned scenarios with a trade of digital services related to computer games, "cryptoart", non-fungible tokens etc., may be regarded as supplies of services for consideration by taxable persons acting as such, cf. Articles 2(1)(a) and 9(1) of the VAT Directive[4].

2.3. Danish analysis

The Danish Tax Assessment Council indicated that X's trading in skins qualifies as an independently carried out economic activity for VAT purposes as the numerous and important transactions with numerous private customers aimed at obtaining an income. Therefore, it concluded that a skin seller such as X qualifies as a taxable person for VAT and must be registered for VAT when his yearly turnover exceeds the Danish registration threshold of DKK 50 000.

The Danish Tax Assessment Council indicated that there are no applicable special schemes which can reduce the VAT burden tiggered by the trading of "used" digital services or items such as skins. In particular, the special scheme for second-hand goods laid down in Title XII, Chapter 4, of the VAT Directive is not applicable and none of the VAT exemptions of financial transactions are applicable to the trading of skins.

Denmark is bringing the matter to the VAT Committee as the qualification as VAT taxable persons requires the seller, like X, to register for, and to charge, VAT. However, in practice, this position has proven to create problems due to the difficulties for the persons concerned to comply with normal VAT requirements such as invoicing.

3. THE COMMISSION SERVICES' OPINION

The gaming sector and the ecosystem that has developed around it are at the centre of the Danish request. The market for digital designs such as skins is part of that ecosystem and is growing dynamically. It is therefore timely to examine the VAT treatment of related

[4] 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).

transactions and to launch a reflection on the appropriateness of said VAT treatment within the current VAT framework.

Moreover, this reflection should take place in parallel to that of the VAT treatment of NFTs as NFTs are being used as an option – not envisaged here[5] – to collect and trade such digital designs.

3.1. Introductory remarks

The Commission services note that, although Member States may submit to the VAT Committee questions arising from concrete cases, the VAT Committee is not the appropriate forum for those. Any discussion performed at this level should indeed aim at providing some guidance towards a harmonised interpretation of the VAT Directive.

Although the matter here at stake comes from a concrete case raised by the Danish delegation, the condition beforementioned is met as the concrete case only serves as a backdrop to, and illustration of, the issues triggered by the new reality of online video games where players can trade virtual in-game items that need a harmonised interpretation.

In this regard, the views of the Commission services and the opinion of the VAT Committee should be seen as aiming to provide general guidance on the application of VAT rules through a concrete case, rather than adjudicating on the case as presented.

3.2. Trade of skins

The question that calls for the VAT Committee's intervention is whether the sale of skins by individuals in the secondary market falls within the scope of VAT. The answer to this question must concentrate on the VAT Directive's requirements which are whether the sale of skins constitutes a supply for consideration made by a taxable person acting as such[6].

3.2.1. A supply for consideration

To be within the scope of VAT, the VAT Directive requires a transaction to be realised for consideration[7] and guidance as to when a transaction can be seen as being made for 'consideration' has been provided by the Court of Justice of the European Union (CJEU).

A supply is made for 'consideration' if there is a direct link between the goods or services provided and the consideration received[8]. Such a direct link exists only if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods

5 Working paper No 1060 *Initial VAT reflections on non-fungible tokens*.
6 Articles 2(1)(a) and 9(1) of the VAT Directive.
7 Article 2(1)(a) of the VAT Directive.
8 See a.o. CJEU, judgments of 5 February 1981, *Coöperatieve Aardappelenbewaarplaats*, C-154/80, EU:C:1981:38, paragraph 12, and of 18 January 2017 *SAWP*, C-37/16, EU:C:2017:22, paragraph 25.

or services supplied[9]. The CJEU has also held that the consideration is the value actually received and that it had to be capable of being expressed in monetary terms[10].

When an individual sells skins to other players via an online trading platform and receives payments in euros (or capable of being expressed in euros) of an amount agreed between the parties thereby confirming the existence of a legal relationship, it seems that such supplies are effected for consideration within the meaning of Article 2(1)(c) of the VAT Directive.

3.2.2. A supply made by a taxable person acting as such

The answer to the question whether the sale of skins in the secondary market falls within the scope of VAT also requires to determine whether the sales are made by a taxable person acting as such. This implies a two steps analysis:

- first, that those sales are made by a 'taxable person', and
- second, that the taxable person makes those sales as part of a business activity so acts as such.

3.2.2.1 A taxable person

The first step concerns the notion of 'taxable person'. The VAT Directive gives a broad definition of that notion as a result of which (i) any person, (ii) which satisfies the criteria of independence and (iii) that of the pursuit of an economic activity, qualifies[11].

(i) Any person

According to Article 9 of the VAT Directive, a 'taxable person' can be any person satisfying the criteria. The CJEU has provided inputs regarding the meaning of this provision indicating that it can capture all persons, natural or legal, both public and private, and entities devoid of legal personality[12].

As per the above, the young age of many of the players involved in the sale of skins in the secondary market should not be given any consideration and the fact that they have not yet the legal age should therefore not in itself bear any consequences on the possible qualification as a VAT taxable person as long as the other conditions are met.

(ii) The independence criteria

An activity is done independently when the one doing it is not bound to an employer by a contract of employment or by any other legal ties creating a similar relationship[13]. The case law makes it clear that in order to establish that an economic activity is being carried

9 E.g. CJEU, judgment of 3 March 1994 in case C-16/93, *Tolsma* (EU:C:1994:80), paragraph 14.

10 E.g. *Coöperatieve Aardappelenbewaarplaats*, paragraph 13; judgments of 23 November 1988, *Naturally Yours*, C-230/87, EU:C:1988:411, paragraph 16 and 3 July 1997, *Goldsmiths*, Case C-330/95, EU:C:1997:339, paragraph 23.

11 Article 9(1) of the VAT Directive.

12 E.g. CJEU, judgments of 16 February 2023, *DGRFP Cluj*, C-519/21, EU:C:2023:106, paragraph 69; of 12 October 2016, *Nigl and Others*, C-340/15, EU:C:2016:764, paragraph 27; and of 29 September 2015, *Gmina Wrocław*, C-276/14, EU:C:2015:635, paragraph 28.

13 Article 10 of the VAT Directive.

out in an independent manner, it is necessary to examine whether the person concerned performs its activities in its own name, on its own behalf and under its own responsibility, and whether it bears the economic risk associated with the carrying-out of those activities[14].

As per our understanding, a skin seller like X is not bound by a contract of employment with the platform concerned.

However, the question of independence of X towards the platform is worth being further explored. The VAT Committee mentioned in the context of transport services supplied in the sharing economy that *"the user's perception of who actually is the provider of the service is important. It seems that the users link the service with the platform itself and not with individual drivers"*[15]. The same could be true in the case of skins sold in the secondary market as, per our understanding, the skins are organically attached to a specific platform (such as Steam). The possible reserve regarding the independence towards the platform would probably be even greater where, contrary to the Danish situation, in which the sales are effected on a different platform than the one of the video game where the skins were acquired, the skins are locked to the game and the sales in the secondary market cannot be realised outside of that ecosystem as per the game's terms of service[16]. This line of questioning is further reinforced by the observation of the Advocate General in the case *Uber Systems Spain* that when an activity exists solely because of a platform, without which it would have no sense[17], there might be VAT consequences.

With these questions in mind, the conditions under which the prices are fixed and who bears the risk in case a skin is malfunctioning or if a payment is not effected should be ascertained to carry on the evaluation of the seller's independence.

(iii) The pursuit of an economic activity

Article 9(1) of the VAT Directive defines 'taxable person' by reference to the term 'economic activity' so that it is the existence of such an activity which establishes the status of 'taxable person'[18].

An 'economic activity', as per the VAT Directive[19], is any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis is in particular to be regarded as an economic activity.

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14 E.g. *Nigl*, paragraph 28, *Gmima Wroclaw*, paragraph 34; and judgment of 18 October 2007, *van der Steen*, C-355/06, EU:C:2007:615, paragraph 23.

15 VAT Committee, Working paper No 947, question 4, page 13.

16 The Danish submission indicates that X uses Facebook for its sales. However, it seems players got banned and skins were made unusable after being acquired on other third-party marketplaces https://decrypt.co/146773/steam-bans-csgo-accounts-with-2-million-worth-of-skins-do-nfts-fix-this last access 25 September 2023.

17 CJEU, opinion of the Advocate General Szpunar delivered on 11 May 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:36, paragraphs 56 and 61.

18 CJEU, judgment of 3 March 2005, *Fini H*, C-32/03, EU:C:2005:128, paragraph 19.

19 Second subparagraph of Article 9(1) of the VAT Directive.

The term 'economic activity' is objective in character[20]. The existence of an "economic activity" is thus to be assessed "per se" without regard to the purpose or result of the activity. These characteristics give a wide meaning to the term economic activity which is in line with the purpose of VAT to be broad-based. The case law of the CJEU follows the same approach[21].

However, this broad meaning does not equate to an all-encompassing provision. Notably, the wording of Article 9(1) of the VAT Directive should not be misconstrued in a way that the activity of producers, traders or persons supplying services are always deemed economic.

While it can be observed that the first sentence of the second subparagraph of Article 9(1) defines 'economic activity' without laying down any other criteria, and that the second sentence defines an 'economic activity' only where a tangible or intangible property is used for a particular purpose, namely 'obtaining income therefrom on a continuing basis', one should not rush to conclusions. In fact, even if a particular activity has the characteristics of one of the activities specified in the first sentence, i.e. activity of producers, traders or persons supplying services, it cannot automatically be regarded as being an 'economic'. This is notably the case of such an activity performed on an occasional basis. Then it will only qualify as economic if the Member State of localisation of the supply has exercised the option provided by the Article 12(1) of the VAT Directive. This is confirmed by the case law of the CJEU which has not restricted the criteria relating to the permanent nature of the activity and the income which is obtained from it, to the exploitation of property, but has considered it applicable to all of the activities referred to in Article 9(1) of the VAT Directive. An activity is thus, generally, categorised as economic where it is permanent and is carried out in return for a remuneration which is received by the person carrying out the activity[22].

The criteria for an activity to qualify as economic being laid down, they should be checked against the situation where an individual is trading skins online.

The sale of a digital asset such as a skin from a VAT standpoint corresponds to a supply of an electronically supplied service as per the definition in Article 7(1) of the VAT Implementing Regulation[23]: '*Electronically supplied services' include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology*.'.

A person supplying such digital assets is thus providing services as per the VAT Directive.

To be categorised as economic, this activity will need to be lasting and a consideration would have to be received for it.

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20 CJEU, judgment of 21 February 2006, *University of Huddersfield*, C-223/03, EU:C:2006:124, paragraphs 47 and 48 and the case-law cited.

21 As mentioned for e.g. in CJEU, judgment of 16 September 2008, *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505**,** paragraph 28.

22 CJEU, judgment of 13 December 2007, *Götz*, C-408/06, EU:C:2007:789, paragraph 18.

23 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 (recast) (OJ L 77, 23.3.2011, p. 1).

When an individual is selling skins for consideration (reference is made to what is said above on the consideration for there to exist a remuneration) regularly over an extended period of time, it seems that this individual should be seen as performing an economic activity.

However, there are situations when an activity which would otherwise qualify as economic escapes the VAT scope because it is in fact considered to be the management of personal property.

The case law in that context focuses on the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis[24]. The driving idea in the case law is that when a property can either be used for economic or private purposes, it is necessary to determine whether it is actually being used for the purpose of obtaining income on a continuing basis[25]. To do so the case law indicates that attention should be put on the resources mobilised and whether they exceed those belonging to a private operator[26]. On the other hand, the fact that a property has been acquired to meet private needs does not preclude its subsequent use for the purposes of the exercise of an 'economic activity'[27].

Regarding applicability, the case law cited above is focusing on the exploitation of tangible or intangible property rather than on the supply of services. It could be argued that this case law is applicable to transactions involving digital assets such as skins. Indeed, even though such transactions qualify as services, the object per se of the supply is an intangible asset. Moreover, as indicated by Advocate General Cosmas in his conclusions to the case *Enkler*[28], the mention of the exploitation of tangible or intangible property is a "particular embodiment" of activities that shall be regarded as 'economic activity'. Therefore, it is here contented that a supply of services might also escape the scope of VAT when it amounts to the mere management of private property which entails that the case law should be applicable.

The determination of whether the activity of an online skin seller qualifies as economic in view of the criteria derived from the above-mentioned case law, requires consideration of the steps taken for his participation to the secondary market and whether those amount to mobilising resources similar to those deployed by a producer, a trader or a person supplying services.

The situation should be compared and, for neutrality purposes treated similarly, either to a private individual selling occasionally for a few Euros at flea markets saddle pads won at interclub jumping shows - not economic - or to that of a gamer who turns its favourite game into a job - economic.

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24 E.g. CJEU, judgments of 19 July 2012, *Rēdlihs*, C-263/11, EU:C:2012:497; of 15 September 2011, *Słaby and Jeziorska-Kuć*, C-180/10 and C-181/10 EU:C:2011:589; *Enkler*, C-230/94, EU:C:1996:352; and of 4 October 1995, *Finanzamt Uelzen*, C-291/92, EU:C:1995:304.

25 E.g. *Rēdlihs*, paragraph 34; *Enkler*, paragraph 27.

26 E.g. *Słaby and Jeziorska-Kuć*, paragraph 39. *Rēdlihs*, paragraph 36. For a discussion on the mobilisation of ressources in the context of the sharing economy see Giorgio G. Beretta, European VAT and the Sharing Economy, Kluwer Law International – EUCOTAX Series on European Taxation No. 65, 2019, p. 88.

27 *Rēdlihs*, paragraph 39.

28 CJEU, opinion of the Advocate General Cosmas, 28 March 1996, *Enkler*, C-230/94, EU:C:1996:145, point 14.

The skins are acquired while playing an online video game, Counter Strike for example, which seems at first sight to equate to the pursuit of a hobby, that is a non-economic activity of the player. The on-selling of the used skins could be an accessory to that non-business activity whereby the seller would merely be managing its assets provided that the sales are occasional and reasonable in scope in the same manner that a hobby is and provided that they do not mobilise business resources. The use of the proceeds could also participate to that analysis[29]. Where the seller reinjects all of its proceeds into the video game (assuming gaming is a non-economic activity), the sales could be an accessory to the hobby and thus be out of the scope of VAT. Where the proceeds are used for other purposes, it could demonstrate that the gaming activity has been turned into an activity seeking to obtain income, thereby turning the sales into an economic activity.

In the overall assessment, the length of the use of the skins between their acquisition and their further sale could be an indicator of the absence, or presence, of a business intent.

While considering all of the above, the economic reality should be kept in mind and a skin trading activity should not artificially be extracted from the scope of VAT. Therefore, the possibility referred supra for the trading of skins to be considered as the management of personal property should be relied on with parsimony.

3.2.2.2 Person acting as such

The second step concerns the context within which the sales are made, that is whether the operator is acting in its private capacity or as an economic operator. The question is of utmost relevance as the same activity is treated differently depending on whether it is performed by a taxable person acting as such or not[30].

In reference to the requirement that the taxable person be "acting as such"[31], the determination is made based on whether the activity in question is carried out for the purposes of its economic activity[32]. The case law provides some pointers to determine if the activity is performed as a taxable person or not. For example, the scale of sales is not a criterion[33]. This means that a single sale made at a high price will not automatically imply that the operator is acting as a taxable person but it also means that the low value of sales may not be an argument either against the recognition that an operator is acting as a taxable person.

When an individual is trading skins, the assessment of whether that individual is acting in its private capacity or as an economic operator depends on whether the sale of the skins is an economic activity (no other activity participates to the assessment).

In the light of the foregoing, the decision as to whether the activity of supplying skins qualifies as an economic activity will need to be taken on a case-by-case basis.

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29 E.g. CJEU, judgment of 8 November 2018, *C&D Foods Acquisition*, C-502/17, EU:C:2018:888 in which the allocation of the proceeds of a share disposal transaction where considered determinative of whether the transaction would come within the scope of VAT or not.

30 CJEU, judgment of 11 July 1996, *Régie dauphinoise*, C-306/94, EU:C:1996:290, paragraph 18.

31 Article 2(1)(c) of the VAT Directive.

32 E.g. CJEU, judgments of 22 March 2012, *Klub OOD*, C-153/11, EU:C:2012:163, paragraph 40; *Finanzamt Uelzen*, paragraph 18; *Régie dauphinoise*, paragraph 15.

33 *Słaby and Jeziorska-Kuć*, paragraph 37 and case law cited.

3.3. Conclusions

From the above considerations, it can be concluded that the VAT treatment of sales of in-game virtual assets like skins does not differ from that of any other type of assets. A difference perhaps rather lies in evolving ecosystems that enable private individuals to expand their activities. In any case, consideration to the economic reality should obviously be given priority in assessing whether the sales fall within the scope of VAT or not so that an individual selling skins for consideration regularly over an extended period of time is recognised as a taxable person and the sales fall within the scope of VAT.

In particular, it should be noted that the young age of the market participants is irrelevant to the assessment of their VAT status.

The relevance of the criteria under the VAT Directive to assess the independence of an individual trading skins in a platform, especially when such sales cannot be realised outside of a certain ecosystem, should be reviewed in order to either confirm them or update them.

4. DELEGATIONS' OPINION

The delegations are requested to give their opinion on the issues raised and, in particular on the suggested principles for the VAT treatment of sales of skins in the secondary market.

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ANNEX

Question from Denmark

VAT issues concerning the trading of various digital services related to computer games, "cryptoart" and non-fungible tokens

During the recent years, the market for trading various digital services has evolved rapidly, especially due to the speed of the technological development. As in many other cases, the correct VAT treatment of these types of online supplies depend upon how the transactions are seen according to the nature of the digital supplies whether or not they for instance are exempted financial services or taxable electronic services or some other kind of services. The VAT status of the supplier is also of importance, e.g., whether the VAT taxable transactions are under or over the national registration threshold and in addition the VAT status of the buyer can be important for the VAT payment according to the place of supply rules.

Recently and following the *Hedqvist*-judgment, analyses have been carried out regarding the VAT treatment of supplies related to different types of crypto-assets and payment tokens, cf. the VAT Committees Working Paper No 1037 concerning the VAT treatment of crypto-assets. The working paper is mainly focused on crypto-assets such as those linked to currencies.

Following the 120th meeting of the VAT Committee, several Member States have raised the need for a further investigation and analysis of other types of digital supplies and tokens, such as non-fungible tokens (NFTs).

According to the minutes of the 120th meeting, the Commission services noted that when it comes to other types of tokens not being covered by the Working Paper No 1037, these would have to be addressed in a separate paper although a partial analysis had previously been made (e.g. on utility tokens in the working paper on vouchers).

Background

In Denmark, we experience some uncertainties related to the VAT treatment of various digital supplies including NFTs and digital supplies related to computer games (such as the trading of "skins" as part of the computer game *Counter Strike*) and other "digital items" that can be used and resold mainly by individuals playing the same type of computer games. The fact is that some of these digital items are sold for considerable amounts by individuals who meet the criteria for taxable persons and economic activities with a following obligation for a VAT registration as a consequence.

Participants in a game are often from different countries and many of the players are relatively young. The players normally see themselves as "private persons" and not as doing business even if they buy and sell for quite large amounts yearly and above the registration threshold. This creates problems since it is the Danish point of view that sales of skins etc. is an electronic service and hence a taxable supply and the seller must be registered for VAT when the yearly turnover exceeds 50.000 DKK, which is the Danish registration threshold.

Part of the discussion in Denmark relates to the obligation for VAT registration, due to the fact, that the players suddenly find themselves being comprised by the limits for VAT registration. Furthermore, it seems to be difficult for this segment of VAT taxable persons to comply with normal VAT requirements such as invoicing and VAT deduction. Currently there are no applicable special schemes which can reduce the VAT burden of the trading of "used" digital services or items. Thus, the special scheme for second-hand goods, cf. article 311 of the VAT directive, does not apply to "used" digital items or services. In Denmark the players wish to use the special scheme.

"Cryptoart"

Furthermore, we also see a development in other areas such as "cryptoart". "Cryptoart" is digital images which are minted into an NFT. Due to the nature of the art, the art cannot be seen as a tangible good under the current rules. Hence, "cryptoart" must be seen as a service. This also means that traditional art and "cryptoart" can be treated in different ways from a VAT point of view. E.g. the "cryptoart" cannot be covered by reduced rates or a lower VAT base, cf. Annex III, nr. 26, cf. annex IX part A of the VAT directive or be included in the special scheme for second-hand goods, cf. article 311, cf. annex IX part A of the VAT directive.

Questions

Referring to the above description of the VAT related issues, we kindly ask for the VAT Committees answer to the following questions.

1) Shall the above-mentioned scenarios with the trade of digital services related to computer games, "cryptoart", non-fungible tokens etc., be regarded as supplies of services for consideration by taxable persons acting as such, cf. article 2 (1)(a) and 9 (1) of the VAT directive?
2) If yes, is it correctly understood that the above-mentioned supplies cannot be comprised of the special VAT scheme for second-hand goods, since the supplies involve digital services and not tangible goods, cf. article 311 of the VAT directive?
3) Can "cryptoart" be seen as a VAT exempt supply of services made by artists, cf. the derogation in article 371, cf. Annex X, part B (2) of the VAT directive?

Finally, we fully support a working paper dedicated to the VAT treatment of other digital services which are not covered by Working paper No 1037 such as NFTs, "cryptoart", but also suggest that the issues in relation to skins and NFTs etc. are examined as fast as possible, and a solution is considered for instance where the supplies are included in the special scheme for second-hand goods.

Factual description of transactions

Background

The intention of this paper is to elaborate on our consultation of the VAT Committee dated 10 February 2023 concerning the VAT treatment of transactions related to online video games, crypto art/non-fungible tokens (NFTs).

We have specifically looked further into a more detailed description of the transactions related to online video games and crypto art.

The following descriptions are based upon the facts given in three specific Danish administrative case rulings, i.e., cases that have been litigated recently at the Danish Tax Assessment Council.

Online video games

In the specific case, the transaction consisted of the sale of "skins" from a non-professional private player to other private players. The seller in question, plays the online video game "Counter-Strike" which is an online game, using a profile/player-account via a platform called "Steam". Steam is a platform developed with the purpose of organizing several online video games including serving as a network platform for players.

Steam-platform

Although the online video game Counter-Strike in itself is for free, the players are able to deposit money on their individual Steam-accounts which can be used for buying up-grades, improving arsenal of weapons (weapon cases) and accessories such as so-called skins etc.

Loot boxes

As a part of the game, the players are rewarded with weapon cases – so-called "loot boxes" – which are only released if the players pay a certain amount of money for a "key" which can unlock the arsenal of weapons. The content of the weapon cases/loot boxes is unknown to the players until they have paid to unlock them.

Trade in skins

Skins can be described as virtual decorative items which can be more or less desirable or attractive for the players to achieve. The skins can consist of decoration of weapons, uniforms for the character of the player, weapons, extra lives etc. Due to the fact, that the skins are only obtainable through the players level advancing and ability to achieve awards and benefits in the game, skins become both desirable and tradable items.

The skins are typically traded through the platform Facebook using a Danish digital method of payment called "MobilePay", i.e., the entire trade set-up is digital and with no physical elements.

The player in the specific case has reached a very high level in the game which awards him with weapon arsenals, including skins. These skins are usually used by himself for a certain amount of time before some of them are sold via Facebook with a profit margin of between 10 and 20%. The player also buys skins via Facebook for his own use or for trading purposes.

The extent and marketing of the trading

The player in question, has traded skins for a period of 1 ½ years with about three trades per week with prices varying from 15 Euro to 2.500 Euro. A typical transaction value is between 400 and 500 Euro, but a single transaction may also have a value of 1.500 Euro.

On an annual basis, the player's own estimation of a trade value sums up to approx. 65.000 Euro.

The ruling

The Danish Tax Assessment Council reached the conclusion that the player should be seen as a taxable person for VAT purposes since the trading of skins is an independently carried out economic activity covered by the VAT rules.

The conclusion of the Council was based upon the fact that the intention of the player was to obtain income, that the acquired income was rather intense, that there were multiple private customers, and the transactions were both numerous and of a certain volume.

Furthermore, the Council found that neither the special scheme for second-hand goods nor any of the VAT exemptions of financial transactions were relevant regarding the activities and transactions in question.

Crypto art

The Danish Tax Assessment Council was asked in two cases to assess how to qualify the creation and trade with crypto art, which is a non-fungible token, for VAT purposes.

The trade of crypto art

The sale of the works of art is facilitated via digital crypto art-platforms where the artist sells a certificate of ownership (the NFT) of a specific work of art. In many ways, the sale of crypto art resembles the sale of physical prints of art sold via traditional sale channels, except the fact that the trade is handled through a digital crypto-blockchain.

When trading via the crypto art-platforms, the artist has an account linked to a so-called crypto-wallet. From this account, the artist is able to upload his works of art that are then transferred uniquely into the blockchain, i.e., the process called "minting". During the minting it is possible to define whether the work of art shall exist in one unique or more editions of the work of art in question.

The artist in the specific case creates between 1 and 1.000 versions of his digital works of art and each version is unique since the pixels of the works of art varies for each work of art.

When the works of art are created, they are either sold via the crypto art-platform or directly to private customers. When selling via the crypto art-platform, the work of art will be transferred to the buyer's digital wallet and the sales price (in a crypto-currency) is transferred to the digital wallet of the artist.

The trading of crypto art can only be traded in crypto-currencies such as Bitcoin, Etherum etc.

If the work of art is resold by the buyer at a later stage, the artist will automatically receive a certain amount of the sales price as a kind of royalty. Royalties are transferred to the digital wallet of the artist, as long as the work of art exists.

The rulings

The Danish Tax Assessment Council was in case SKM2022.602.SR asked whether the trading of the crypto art in question could be seen as a financial transaction, i.e., transactions regarding currencies, cf. article 135(1) of the VAT Directive, or the special scheme for sale of works of art on a reduced VAT base was applicable, cf. article 81, cf., annex III, nr. 26, cf. annex IX, part A., of the VAT Directive.

The artist in question, creates digital works of art, which are sold as crypto art.

The Danish Tax Assessment Council found that the crypto art could not be seen as a financial transaction. The Danish Tax Assessment Council has in this connection taken into account, that the crypto art provided by the seller could not be used solely as a means of payment. Crypto art can have other purposes, such as displaying the work using digital aids. The crypto art was considered a service and hence not applicable for a reduced VAT-base, cf. article 81, cf., annex III, nr. 26m cf. annex IX, part A.

Furthermore, The Danish Tax Assessment Council was in another case (not yet published) asked whether crypto art was an artistic service and therefore exempt from VAT, cf. article 371, cf. annex X, part B, nr. 2 of the VAT Directive.

The Danish Tax Assessment Council found that the supply was an artistic service and therefor exempt from VAT.

The Council, noted, the fact that crypto art is created as a result of an intellectual achievement, that the taxable person’s other works have been included in an exhibition dealing with crypto art and that, on the basis of the presented Appendix 1-2, the taxable person’s crypto art must be regarded as having comparable artistic qualities as other services exempt from VAT under the provision.

As regards to the royalties, it was found that the royalties referred to and the payment thereof form part of the agreement between the artist and the buyer. When the buyer resells the crypto art to buyer 2 and when buyer 2 transfers the crypto art to buyer 3, the obligation to pay royalties to the artist continuously follows from the initial agreement between the artist and buyer 1. Hence, it is the opinion of The Danish Tax Assessment Council that the subsequent payments of royalties also constitute consideration within the meaning of the VAT Directive. This ruling is yet to be published.