PRACTICAL ISSUES IN RELATION TO THE TAX BASE OF VAT

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1. Legal framework presentation

An entire chapter of the Tax Code is dedicated to the tax base of VAT, Chapter VII, art. 137 -139^1. This chapter contains applicable rules to determine the tax base for each of the following operations: supply of goods and service provision performed within the country for the intra-community acquisitions, as well as for the imports of goods. Also, the applicable rules to adjust the tax base are included, as well as the rules for using the exchange rate. These rules are developed in the paragraphs 18-22 of the GD no. 44/2004 for approving the methodological norms of implementation of the Tax Code, as amended and supplemented.

Briefly, for the supply of goods and service provision performed within the country, which equivalent value is expressed in money, the tax base is determined by applying the following rules: the price of goods or services plus any subsidies directly connected to the transaction price, as well as the taxes and charges (others than VAT) and the incidental expenses (commissions, packing costs, transport and insurance) which have not been included in the transaction price. At the same time, the tax base is reduced by the discounts (discounts, allowances, volume discount and other discounts) offered to the customers by the suppliers.

2. Inclusion of subsidies in the tax base of VAT

Given the diversity of the subsidies received by the Romanian taxpayers, especially in agriculture, a topic of interest is the one related to the inclusion of these financial aids in the tax base. Still, the difficulty lies in determining which category of subsidies is classified as subsidies directly related to price and for which, therefore, VAT is collected.

In order to analyse whether a financial aid (subsidy), no matter the financing source (state budget, local budget, community budget or state social insurance budget), is considered as a subsidy directly related to price, s as a subsidy, the cumulative requirements of two conditions must be checked: on one hand, the subsidy to be concretely determinable in the price of the goods and/or services, and, on the other hand, the buyers to benefit from the subsidy granted to the supplier/provider.

The subsidy is concretely determinable in the price of the goods and/or services if it is established per unit of measure of the supplied goods and/or provided services, in absolute amounts or percentage. The second condition requires that the price of the goods/services purchased by the buyers to be lower than the price to which the same products/services would sell/provide in the lack of subsidy.

The subsidies that are granted to achieve some quality parameters, the subsidies granted to cover some expenses or other similar situations, do not meet the above conditions and are excluded from the tax base, in accordance with the section 18 paragraph 2 of the GD no. 44/2004.

Thus, the state budget subsidies received by farmers to purchase oil or other raw materials for establishing agricultural crops (seeds, fertilizers, pesticides), the subsidy rate being calculated per hectare, does not fall into the category of the subsidies directly connected to the price of goods or services, as this type of subsidy does not depend on the volume of supplied goods and it is designated to cover certain expenses. The subsidies received by the land improvement organizations fall under the same conditions, so that to pay the suppliers and providers of goods and services necessary to carry out the specific operations, as these services do not depend on the volume of supplied goods and provided services.

We emphasize the fact that the value added tax liability for these subsidies is due on the date of their collection from the state budget, local budgets, community budget or state social insurance budget.

Also, it should be noted that, if the taxpayer receives a financial aid that is not considered as a subsidy directly related to price and for which VAT is not collected, this is not likely to affect the carrying out by the taxable person, under the art. 145 et seq. of the Tax Code, of the right to deduct the value added tax related to the acquisition of goods and services made by the taxable person.

3. Inclusion of incidental expenses in the tax base of VAT

Concerning the incidental expenses, in trying to correctly determine the collected value added tax, in practice difficulties have been emphasized in making the distinction between the re-invoiced amounts to the customer, that are classified as incidental expenses, on one hand, and the re-invoiced amounts, as a consequence of the fact that there are expenses made for the benefit of that client. This classification is of particular importance, since each of the two categories of re-invoiced amounts has a distinct legal regime, as we particularize below.

The incidental expenses are expenses required by the supplier/provider to the customer or beneficiary, which are related to the supply of goods or service provisions hereof, even if covered by a separate contract, such as: commissions, packaging costs, transport and insurance. The incidental expenses do not represent a separate transaction, but they are part of the supply/provision to which they are connected, following the same rules concerning, inter alia, the supply/provision site, rates, exemptions as well as the supply/provision to which they are connected.

If the expenses made for another person are re-invoiced, meaning when a taxpayer receives an invoice or other document on his behalf for supplies of goods/service provisions/imports made to the benefit of another person and re-invoices the equivalent value of those supplies/provisions/imports, the commission agent structure is applied. In summary, the commission agent structure includes the following: the taxable person also acting as a commission agent, receives invoices on his behalf for the expenses made for another person and, subsequently, re-invoices them to him. The commission agent is considered, in terms of the tax, the buyer and reseller of the goods (whose value is re-invoiced) or, where applicable, the beneficiary and provider of services (which value is re-invoiced). The commission agent is entitled to deduct the tax on the acquisitions of goods/services to be re-invoiced, and

shall collect the VAT on the taxable operations, or to apply any exemption, if applicable. We mention that for the re-invoiced transactions, using the commission agent structure, the event occurs on the date of issuance of the invoice by the person that re-invoices expenses made for other persons.

We illustrate below the tax regimen of the incidental expenses, meaning that of the expenses re-invoiced as a consequence of the application of the commission agent structure.

Case 1

The Company A, the Romanian taxable person registered for VAT purposes, a leasing company, concludes a leasing contract, having as object a movable good, with Company B, also a Romanian taxable person registered for VAT purposes. The contract concluded by the parties stipulated A's obligation to provide the goods, going that the insurance cost to be re-invoiced to B.

Even if the insurance transactions are exempted transactions with deduction option, A will include in the tax base the insurance cost re-invoiced to the client, as being an incidental expense of the service provided by A (the leasing transaction). Consequently, the incidental expense shall be submitted to the service provision regimen to which it is connected (leasing) and the VAT shall be collected, even if the insurance cost is included in a separate invoice. Definitely, A will not apply the commission-agent structure that would allow it to re-invoice the insurance cost under the exemption with the deduction option (VAT is not collected).

Case 2

The Company A rents a building to Company B, applying the exemption with the deduction option stipulated by the article 141, paragraph 2 letter e of the Tax Code. In the lease contract it was stipulated that the utilities (electricity, gas, telephone, and so on) are not included in the price of the rent and are re-invoiced by A to B. In order to recover the costs from B, A applies the commission agent structure, collects the VAT on each re-invoicing of the utility costs. If the utility costs would have been included in the price of the rent (in calculating the rent price, all the expenses of the owner regarding the building have been considered: the share of depreciation, insurance, utilities estimated consumption, and so on) and several positions are included in the invoice, corresponding to the calculation elements, for the re-invoicing of these costs the rule of exemption with the deduction option shall be applied, but A is not entitled to deduct the VAT included in the supplier's invoices for utilities.

In order to classify an expense as being an incidental expense or an expense for which re-invoicing the commission agent structure is applied, it is necessary to analyse the contracting clauses. Basically, considering a supply of goods, if according to the contracting clauses, that operation (transport, packaging, loading, insurance, and so on) is the responsibility of the supplier, and its equivalent value has not been included in the price of the goods, then the corresponding expense is incidental to that supply. Contrariwise, if the contract stipulates that the other contracting party (the buyer) shall perform that operation (eg. transport), and then the parties agree that the seller, on behalf and for the buyer, to contract the performance of the transport with an authorized company, in order to re-invoice the expense with the transport, the supplier will apply the commission agent structure.

The importance of this classification is more evident concerning the intra-community supplies, when, in order to ensure the accuracy of the information contained in the recapitulatory statement 390, a special attention should be given to the accurate determination of the operation tax base. Thus, considering an exempted intra-

community supply, the transport costs, packing, loading, insurance, and so on, if they are the responsibility of the supplier, then they shall be declared on the corresponding row of the exempt intra-community supplies, no matter if they are included in the same invoice with the equivalent value of the supplied goods or in a separate invoice. But if we take into account the second hypothesis and the client is liable to provide one or more of these operations (eg transport), and authorizes the supplier to contract the respective transaction, the tax base of the intra-community supply shall not include the equivalent value of the transport cost. For re-invoicing the costs, the supplier will apply the commission agent structure, turning into the beneficiary (when receiving the invoice from the transporter), respectively in the provider of the respective service (when re-invoicing the expense to his client). To apply the commission agent structure it is not necessary that the taxpayer to have registered within his activity object the achievement or the performance of the supply which is re-invoiced.

Regarding the service provision, the situations when various elements of the service price are distinctly recorded in the invoice are very common. For instance, considering the legal representation services, if the beneficiary undertakes to pay the travel and the accommodation expenses for their re-invoicing, the commission agent structure shall not apply (which would allow the re-invoicing of the accommodation service with a reduced rate of 9%), but these expenses shall be considered incidental expenses of the legal representation services, and as a consequence the same procedure regarding invoicing as well as the main service shall be applied.

4. Tax base reduction by means of discounts

It is known that allowances, discounts, volume discounts, trade discounts and other price discounts are not included in the tax base of VAT. In order not be included in the tax base, price discounts must cumulatively meet two conditions: to be granted by the supplier/provider directly to the customer's benefit upon the supply/provision date, respectively to not represent in fact the payment of a service or supply.

Thus, if the payment of a service or supply carried out by the client to the customer's benefit is made, it will not represent a discount that would entitle the supplier to reduce the tax base, but a separate operation (supply/performance) for which the customer (now the supplier) should issue the invoice.

For instance, if the goods are supplied and according to the agreement between the parties, the provider will cover any costs of possible remedies or repairs of the supplied goods taking into account that these operations are performed by the customer. The supplier will not be able to consider that the amounts needed to cover these costs are considered discounts, being in fact a payment for a service provided by the customer for the supplier.

REFERENCES

*****	Title VI of the Law no. 571/2003 on the Tax Code, published in the Official Gazette of Romania no. 927/23.12.2003, as amended and supplemented;
*****	The methodological rules issued to enforce Title VI of the Law No. 571/2003 on the Tax Code, approved by the Government Decision no. 44/22.01.2004, published in the Official Gazette of Romania no. 112/06.02.2004, as amended and supplemented.