

NEWS ON VAT REGIME APPLICABLE TO INTRA-COMMUNITY SERVICES

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1. Foreword

Until January 01st, 2010, for determining the place of the services, and therefore of settling the place of taxation of a service in terms of VAT, one general rule applies, that the place of the service is considered to be the place where the supplier is established. From this rule, there were regularized a number of exceptions, settling the place of the services, in relation to the type of service, either the place where the headquarters of the beneficiary was located, or the place where the services were actually rendered, and so on.

2. Intra-community providing services

Intra-community providing services are the services for which the provisions of the art. 133 paragraph (2) of the Tax Code apply, which are provided by providers established in Romania to beneficiaries taxable persons, who are established within the Community.

According to the art. 133 paragraph (2), the place of the service is the place where the beneficiary taxable person has established his business/where the taxable person has a fixed headquarters where it receives the services (consumer site).

This implies that, if the provider is from Romania and the service is provided to a beneficiary established in the Community / a fixed headquarters of the Community, the place of the service is not in Romania, therefore it will not be taxed from the point of view of the VAT in Romania.

But if the provider is from the Community and the service is provided to a taxable person established in Romania, and therefore, it will be a taxable transaction in Romania, which may be exempted or taxable. If the transaction is taxable, the tax payment will be made by deduction.

The provisions of the art. 133 paragraph (2) represent the general rule for the situation in which the provider and the beneficiary are taxable persons. Basically, if both parties are taxable persons established within the Community, this category includes all types of providing services, except those covered by the art. 133 paragraph (4) which contains special rules for determining the place of the services. The excepted services are:

- a) the services provided in connection with the immovable property, including the services provided by experts and estate agents, of accommodation in the hotelier area or in areas with similar function, such as holiday camps or site improved for camping, of granting the right of user of the immovable property, for training and coordination services of construction works, such as the services provided by architects and by the companies providing the on-site supervision;
- b) the passenger transport services;
- c) the main and auxiliary services related to cultural, artistic, sporting, scientific, educational, entertainment activities or similar activities such as fairs and exhibitions, including the services

provided by the organizers of these activities;

d) the restaurant and catering services, except for those physically carried out on board ships, on aircraft or trains during a part of a passenger transport operation performed within the Community;

e) the short-term rental of a means of transport. Short-term means the continuous possession or use of the means of transport for a period of maximum 30 days and, for the marine craft, for a period of maximum 90 days;

f) the restaurant and catering services actually provided on board ships, on aircraft or trains during a part of a passenger transport operation performed within the Community;

Therefore, in a non-exhaustive list, the services for which the place shall be determined according to the art. 133 paragraph (2) are: intangible services, freight services, services consisting of the works executed on movable property, long-term rental and leasing of means of transport, and so on.

3. Special conditions for the application of the provisions of the art. 133 paragraph 2 of the Tax Code

A. For those services provided by taxable persons established in Romania, when the beneficiary is a taxable person established in another Member State, and the service is provided to the headquarters of his business or a fixed headquarters, located in a Member State other than Romania, the provider must prove that the beneficiary is a taxable person and that it is established within the Community.

It is considered that this condition is met when the beneficiary notifies the provider of one of his business address, or, where appropriate, of a fixed headquarters, of the Community, as well as a valid VAT code assigned by the tax authorities of another Member State, including for the non-taxable legal

persons who are registered for VAT purposes.

It is considered that the provider has acted in good faith in determining the fact that his beneficiary is a taxable person, when it obtained the confirmation of the validity of the tax code assigned to his beneficiary by the tax authorities of another Member State through the security procedures existing within the Community.

If the beneficiary, who is established in another Member State, other than Romania, does not communicate a valid tax code, and / or the provider does not obtain the confirmation of the validity of his client's tax code, it will be considered that the provision of services is performed by a non-taxable person, applying the other rules provisioned by the 133, depending on the type of service.

If subsequent to the issuance of the invoice by the provider, the beneficiary shall provide a valid tax code assigned by the tax authorities of another Member State, the provider will apply the provisions of the art. 133 paragraph (2) of the Tax Code, respectively that will consider that the transaction is not taxable in Romania, being taxable to the place where the beneficiary is established, if the beneficiary can prove that he had the capacity of taxable person when the tax became chargeable. The proof consists of a formal confirmation of the tax authority of the Member State in which the beneficiary is established. Regarding the reconsideration of the place of providing services, the provider applies the provisions of the Art. 159 of the Tax Code (concerning the correction of the invoices by cancellation)¹.

B. If a provider established in Romania provides services covered by the art. 133 paragraph (2) of the Tax Code by:

¹ Item 13 paragraph (9) of the G.D. 44/2004;

a) a taxable person who has his business place outside Romania, but he is established in Romania by fixed headquarters/locations, it will be considered that the place of providing services is the place where the beneficiary has established his business or, where appropriate, a fixed headquarters located situated in another state, if the beneficiary may present sufficient evidence to the provider to demonstrate that these services were provided to his business place, or to a fixed headquarters established in another state, and not to the fixed headquarters/locations in Romania;

b) a taxpayer who has his business place in Romania, but it is established outside Romania by fixed headquarters/locations, it will be considered that the place of providing services is the fixed headquarters to which the services are provided, if the beneficiary can present sufficient evidence to the provider to demonstrate that these services were not provided to his business place in Romania, but to the fixed headquarters/locations outside Romania.

The evidences that the beneficiary can submit to demonstrate that the services are actually provided to his business place or to a fixed headquarters may include: the contract and / or the order form which identifies the headquarters receiving the services, the fact that the respective headquarters is the entity that pays for those services or the service cost is actually borne by the respective entity, the nature of the services allows to identify, in particular, of the headquarters/locations to which the service is provided, any other relevant information for determining the place of provision².

C. For the services for which the provisions of the art. 133 paragraph (2) of the Tax Code apply, provided by a

taxable person established in Romania to a beneficiary, taxable person, established in another Member State who provided to the provider a valid tax code, to determine whether the provided services are used for personal purposes or for personal use of the taxable person's employees, the provider will consider the nature of rendered services. Only when due to the nature of the provided services it is assumed that they could be used for private purposes, the provider will require a statement from the customer or for the purpose for which the services will be used. If from this statement arises that the beneficiary will not use these services for private or personal use of the employees, it is considered that the provider acted in good faith regarding the determination of the place of providing services and he is exempted from any further liability to pay the tax. When the service is to be used by the beneficiary partly for personal purposes or for personal use of the taxable person's employees and partly for the purpose of the economic activity, or wholly for private purposes or for personal use of the taxable person's employees, the provision of that service shall be treated as being made in relation to a non-taxable person. Concerning the use of each service to determine the place of providing services, there will be taken into account only the circumstances prevailing at the time of the service provision. Any subsequent amendment of the use of that service by the beneficiary for the purposes of this paragraph, will not have consequences for determining the place of provision, unless they can prove the abuse of law³.

The intra-community procurements of services are procurements of services for which the taxable person is liable to pay the tax in terms of the art. 150 paragraph (2) of the Tax Code, which are provided by taxable

² pct. 13 alin. (4) din H.G. 44/2004;

³Item 13 paragraph (10) of the G.D. 44/2004.

persons established within the Community.

4. Determination rules of the tax exigibility for the intra-community service provision/intra-community procurements of services

Unlike the exempted intra-community deliveries and the intra-community procurements, which have special rules for determining the tax exigibility, for the intra-community service provision there are not regulated specific rules, but there are applied the rules established for the exigibility of the internal service provision, respectively the art. 134 ind. 1 and the art. 134 ind. 2 of the Tax Code.

Thus, as a general rule, the tax is exigible on the date when the generative event occurs. By exception, the tax is exigible on the date of issuing an invoice, before the date on which the generative event occurs or on the date on which the advance payment is received, for the advance payments made before the date on which the generative event occurs.

Regarding the generative event, it occurs on the date of the service provision, except for certain services for which the generative event occurs at another time.

The service provisions leading to successive deductions or payments, such as construction and assembly services, consultancy, research, expertise and other similar services, are considered as being performed on the date when work situations are issued, work reports and other similar documents, on which ground there are established the performed services or, where appropriate, according to the contractual provisions, on the date of their acceptance by the beneficiaries. However, the deduction period may not exceed one year.

The service provision continuously performed, other than those mentioned above, such as: telephone services and other similar services, it is

considered that the provision is made on the dates specified in the contract for the payment of the provisioned services or on the date of issuing an invoice, but the deduction period may not exceed one year.

For the operations of rental, leasing, granting and lease of goods, the service shall be deemed to be made at each time specified in the contract for the payment's execution.

For the service provisions for which the tax is due by the beneficiary of the services in accordance with the art. 150 paragraph (2), which are carried out continuously for more than a year and which do not determine deductions or payments during that period, there shall be deemed of being made at the end of each calendar year, as long as the service provision did not terminate.

5. The exchange rate used to determine the taxable base if the transaction is in a foreign currency

It is applied the general rule, respectively the latest exchange rate reported by the National Bank of Romania of the date when it occurs the exigibility of the tax for the transaction hereof, namely the exchange rate reported by the respective bank in the previous day and which is valid for the transactions that take place in next day.

If advance payments are received before the service provision, the exchange rate used to determine the taxable base of VAT collection on the date of receiving the advance payments will remain unchanged on the completion of the transaction, respectively when there are made the adjustments of the received advance payments.

6. Documents to be drafted for these services

According to the art. 155 ind. 1 of the Tax Code, for the intra-community procurements of services, the beneficiary being liable to pay tax, shall:

1. self-invoice the respective transactions no later than the 15th day of the month following the occurrence of the generative event, if he is not in possession of the invoice issued by the provider.

2. self-invoice the amount of the advance payments paid in connection with the respective transactions no later than the 15th day of the month following that when he paid the advances, if he is not in possession of the invoice issued by the provider. Exception: when the event which generated the tax occurred in the same month, case in which the provisions of section 1 apply.

Upon the receipt of the invoice regarding the transactions referred to in section 1 and 2, the beneficiary marks down on the invoice a reference to self-invoicing, a reference to the invoice.

A first observation that must be done, is that the transactions entered into

the self-invoices will be included in the deduction and the recapitulative declaration for the month preceding the issuance of the self-invoice, as that month occurred the tax exigibility.

Also, a second observation concerns the exchange rate used to draft the self-invoice, which will not be the exchange rate on the date of the self-invoice, but the exchange rate from the date of the tax exigibility.

7. Conclusions

Therefore, the new legal provisions are designed to simplify the taxation of providing services from a VAT perspective. But we must recognize that although each EU member state will be subject to the same community legislation, the approaches and interpretations of each EU member state may differ.

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