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Draft Law 7/XIV, of December 5

- **VAT Quick fixes 2020 – EU cross-border supplies of goods**
  - Sales on consignment - Call-off stock
  - EU cross-border chain transactions rules
  - Intra-Community supplies: proof of transportation of the goods
  - VAT number as substantive requirement for zero rating intra-Community supplies

VAT Quick fixes 2020 - EU cross-border supplies of goods

Draft Law 7/XIV, of December 5, was recently made available to the public. The aim of such legislation is to transpose into Portuguese law the Directive (EU) 2018/1910 of December 4, amending both the VAT Code and Portuguese VAT Regime for Intra-Community Transactions ("RITI").

This Directive, together with Implementing Regulations (EU) 2018/1909, on the application of call-off stock arrangements, and 2018/1912, on certain exemptions related to intra-Community transactions, both also of December 4, form the EU legislative packed known as "*quick fixes*".

This legislative package gave rise to the following four "quick fixes":

- Sales on consignment - Call-off stock;
- EU cross-border chain transactions rules;
- Intra-Community supplies: proof of transportation of the goods;
- VAT number as substantive requirement for zero rating intra-Community supplies.

This Draft Law is still pending for approval by the Portuguese parliament, although these amendments were intended to apply as from January 1, 2020. It is not yet clear whether once approved this Draft law will apply with backed effects to January 1, 2020 or if the delay of Portugal in transposing the Directive will simply be assumed.

Be that as it may, it is urgent to warn economic operators involved in intra-Community trade of the need to prepare in a timely and appropriate manner for this new legal framework, dealing with any risks and maximizing any opportunities arising from it, particularly by simplifying processes in their logistics chain and streamlining red tape (i.e., less bureaucratic burden on tax matters).

Call-off stock arrangements

Cross-border sales on consignment or call-off stocks are transactions that entail sending goods from the Member State of origin to a previously identified consignee established in the Member State of arrival so they can be stored for subsequent use by the consignee. The power to dispose of them will only be transferred to the recipient at the time of their use or consumption (i.e., when the call-off takes place).

Current rules

Call-off stock arrangements include the following three VAT relevant transactions:

(i) a deemed to intra-Community transfer of goods exempt in the Member State of origin;
(ii) a deemed to an intra-Community acquisition of goods by the same taxable person taxable in the Member State of arrival of the goods; and
(iii) a domestic supply of goods by the supplier in the Member State of arrival.

Therefore, the supplier of the goods was obliged to register in the Member State of arrival to be able to report properly the deemed to intra-Community acquisition of goods and the subsequent domestic sale, charging local VAT. As a rule, these arrangements triggered multiple VAT registrations in the Member States where the transactions were carried out. This led to the supplier of the goods incurring high compliance costs.

New rules

With the amendment to article 17-A of the VAT Directive, transposed into the new article 7-A of the RITI, and meeting certain requirements and conditions (e.g., the supply of goods must occur in a maximum of up to 12 months), the obligation to register in the country of arrival of the goods will no longer apply.

This quick fix means these transactions only give rise to (i) an exempt intra-Community supply of goods to the Member State of destination; and (ii) a taxable intra-Community acquisition of goods by the taxable person to whom the goods are supplied, located in the Member State of arrival, with the supplier being relieved of the obligation to register (or remain registered) for VAT purposes in the Member State of arrival.

However, this simplification arrangement is not new in the EU, as several countries already had simplification mechanisms in their domestic VAT legislation for consignment sales and call-off stock arrangements (e.g., the Netherlands). This amendment is particularly important for Portugal, as it was one of the Member States that did not have a simplification mechanism in place, which will certainly impact positively the economic operators acting in Portugal.

EU cross-border chain transaction rules

The chain supplies of goods involve two or more consecutive transfers of the same goods (i.e., typically an A – B – C structure) that are subject to a single intra-Community transport from the Member State of origin directly to the final customer in the Member State of arrival of the goods.

Current rules

Neither the Sixth VAT Directive nor the VAT Directive (as it stood until December 31, 2019) contained rules on the VAT treatment of these transactions, and it fell to the European Court of Justice (the "ECJ") to develop a set of operational criteria to determine which of the transactions in the chain should be considered the intra-Community transport of goods; i.e., the exempt intra-Community transfer of goods (e.g., the ECJ's cases *EMAG, EuroTyre* or, more recently, *Toridas and Kreuzmayr*).

This uncertainty and legal instability resulting therefrom meant that the EU legislator had to introduce a coherent set of rules in the VAT system of harmonized application in the EU.

New rules

Article 36-A has been added to the VAT Directive, which establishes as a rule the allocation of the intra-Community transport of goods to the supply made to the *intermediate taxable person* (the middle man); i.e., in segment A - B of the chain, which will benefit from the VAT exemption on the intra-Community transfer. Such provision was brought into Portuguese law through article 14[1] of the RITI

However, intra-Community transport will not be assigned to transaction A - B whenever the intermediate taxable person has communicated to the supplier its VAT identification number issued by the Member State of departure of the goods. In that case, transport will be assigned to segment B – C in the chain; i.e., the transaction carried out by the intermediary taxable person, which will be the transaction eligible for that exemption.

In view of its crucial role in this new legal framework, an intermediary taxable person is understood as "a taxable person other than the first supplier in the chain who dispatches or transports the goods either itself or on its behalf"[2] from the Member State of origin.

[1] Specifically, through the new paragraphs 3 to 5 of article 14 of the RITI.

[2] Free translation of article 14 (5) RITI.

Intra-Community supplies: proof of transportation of the goods

The third quick fix relates to the proof of transportation of the goods that is required for applying the VAT exemption to the intra-Community supply of goods.

Current rules

In the absence of any regulation at an EU level, the Member States enjoyed an almost unlimited freedom to determine which elements of proof would be acceptable to demonstrate the fulfilment of the conditions required for the VAT exemption on the intra-Community supply of goods.

As the eligible means of proof differ in each Member State, this legal framework created uncertainty, as well as serious practical difficulties, when applying the VAT exemption.

New rules

To ensure the immediate and harmonized application of a set of commonly acceptable rules, article 45-A was added to the EU VAT Implementing Regulation 282/2011. Under these new rules, the goods should be considered transported out of the Member State of origin whenever the vendor is in possession of the following:

i) If the goods are transported by the vendor (or by a third party on its behalf): at least two items of non-contradictory evidence (e.g., a CMR document and an invoice issued by the carrier of the goods) issued by two different, independent parties from the vendor and the acquirer.

ii) If the goods are transported or dispatched by the acquirer (or by a third party on its behalf): a written statement issued by the acquirer detailing the main features of the underlying intra-Community transaction (e.g., identification of the goods and the Member State of destination), together with two items of non-contradictory evidence of the transport of the goods (e.g., a CMR document or bill of lading, together with an insurance policy for the dispatch or transport of the goods, or bank documents proving that the dispatch or transport of the goods has been paid for).

These new measures, although bringing greater harmonization and legal certainty at an EU level, can entail an unexpected level of red tape, meaning operators will need to be prepared in advance for their potential constraints.

VAT number as substantive requirement for zero rating intra-Community supplies

This measure results from amendments to the VAT Directive on a valid VAT number becoming a substantive requirement for applying the VAT exemption on the intra-Community supply of goods.

Current rules

Under the ECJ's case law, not including a valid VAT number for intra-Community transactions in the sales invoice would not preclude the right to zero-rate in the intra-Community supply of goods. In other words, the VAT number would be a mere formal requirement for the VAT exemption.

Therefore, if the VAT number is not reported or cannot be validated in the VAT Information Exchange System ("VIES"), but all the other legal conditions for the exemption are met (namely, proof of transport of the goods out of the Member State of origin), the tax authorities can only impose administrative penalties, but they cannot reject the application of the VAT exemption.

New rules

With the new wording of article 138 of the VAT Directive, which has been transposed into Portuguese law through a revised version of article 14 (1) (a) of the RITI, registering the VAT number in VIES and including it on the sales invoice will become substantive requirements for applying the exemption established for the intra-Community supply of goods. Therefore, the tax authorities will have the right to reject the application of the exemption if these requirements are not met.

This change will not entail major practical changes, as in most cases taxable persons are already aware of the need to validate their clients' VAT number in VIES and to include it on the sales invoices (in Portugal, it was already a legal requirement), not only as a condition for exemption, but mostly for legal certainty purposes.

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