

## Indirect Tax Newsletter

### Special edition VAT Tax Reform

This special release of the Indirect Tax Newsletter does cover the VAT regulation updates contained in the Tax Reform Project prepared by the Spanish Government for 2015.

The Tax Reform project has been published in the General Parliament Official Gazette on November 27<sup>th</sup>, 2014 and will come into force by next January 1<sup>st</sup>, 2015, except some provisions that will come into force on April 1<sup>st</sup>, 2015 and January 1<sup>st</sup>, 2016.

Some of the changes introduced in the Law 37/1992, of December 28, of the value added tax, are only for the purpose of improving or updating the wording of the legal text, and are not included in this Newsletter those which do not mean a change in the tax treatment or to affect thereof.

Hope the content of the Newsletter proves useful.

Should you wish to receive further information, please do not hesitate to contact us at [info@diligens.es](mailto:info@diligens.es)

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### Article 3. Territory

The following territories of the European Union are expressly excluded from the “Member State” definition for VAT purposes:

- The French territories referred to in the article 349 and the article 355, section 1 of the Treaty of the Functioning of the European Union.
- In United Kingdom, the Canal Islands.
- In the Finland Republic, the Aland Islands.

Furthermore, the transactions carried out with the sovereignty areas of the United Kingdom in Akrotiri, as well as the territory of Dhekelia, will have the same implications as carried out with the United Kingdom and Cyprus, respectively.

## Article 7. Non-subject provisions

### 7.1º. Transfer of going concern

The new wording seeks to soften the requirement for leaving as non-subject to VAT, in scenarios related to transfer of going concerns or business units, mentioning that the transmitting element constitutes an autonomous economic entity or is "susceptible" to constitute, also mentioning that such requirement must be met in the seat of the transferor.

Also excludes the letter a), specifically, the mere transfer of assets or rights, defining it as the transmission of elements without being accompanied by an organizational structure of human and materials factors of production.

### 7.4º Supplies of promotional items

The threshold of the cost of the supplies to the same recipient during a calendar year, in order to consider the supplies of promotional items as subject to VAT, is increased up to 200 euro.

### 7.8º Transactions with Public Administration

It seeks to clarify the definition of the bodies considered as public entities. For such purposes, it is added to the wording of the article a list of bodies that will be deemed as State Public Administration:

- The General Administration of the State, the Administration of the Autonomous Regions and the Entities who belong to the Local Administration.
- The management entities and common services of the Social Security.
- The autonomous agencies, the Public Universities and the National Agencies.
- Any Public Entity with own legal personality, depending of the above that, with independent functioning or with a special autonomy recognized by Law, have attributed regulation functions or external control over a specific sector or activity.

However, it excludes from consideration as State Public Administration the national entrepreneur public entities and similar agencies under the autonomous regions and local entities.

Moreover, the services provided by public agencies, under management commissions, which have the status of an instrument and technical service of the Civil Service, in accordance with the revised text of the Law of Contracts of Public Sector will be neither subject, as well as services provided by public sector entities to the State Public Administration to which they belong, when they have the full right of ownership.

Finally, within those cases contemplated by the Law, referred to transactions carried out by the State Public Administration, which are subject to VAT in any case, it is deemed as commercial or mercantile activity those which can generate incomes of publicity not coming from the public sector.

## **Article 8. Transactions deemed as supply of goods**

It is added a new section 8º to the transactions deemed as supply of goods covered by the Act, so that the transfer of the shares giving to the holder the property or the use or enjoyment of real property is considered specifically as a supply of real property with appropriate treatment, and not a transfer of shares.

While this assumption was already referred to in the Act within the article 20.One.18º, had not been defined as a specific case of supply of goods yet.

## **Articles 18 and 19. Importations and deemed importations**

Both, article 18 and article 19 of the VAT Act, establish the tax events originated by removing the goods linked to a suspense customs/VAT regime or to a free zone, defining those transaction as deemed importation.

With the new wording are excluded from this definition of both, import and deemed import, those cases when removing the goods from these schemes lead to a subsequent supply of goods exempted under Articles 21, 22 or 25, that is, intra-Community supplies of goods, exports or deemed exports.

According to this change, the operators under those scenarios will not be longer required to settle the import VAT through the Form 380, as done at present.

## **Article 20. Exemption in domestic transactions**

### **20.One.9º. Education services**

Will be included within the scope of this exemption the care for children in schools during school time, during the school canteen or childcare classrooms after school.

### **20.One.18º. Financial services**

It is removed the point ñ), corresponding to the intervention's services of Public Notaries, registrars of property and mercantile registrars, related to exempt financial transactions or not performed in the course of business or professional activities.

Therefore, these services are no longer VAT exempted.

## **20.One.20º. Supplies of land during the course of urbanization**

It is extended the application of VAT (exception to the exemption) to all the supplies of land during the course of urbanization, instead to formerly apply to those performed by the promoter of the urbanization.

## **20.One.21º. Supplies of land to Board Compensation**

It is completely removed. Therefore, there is no exemption for the supplies of land, performed by the owners to the Board Compensation as supply in advance, as well as the adjudication of lands performed by the Board Compensation to the owners according to their share.

## **20.Two. Waive of exemption in supply of real estate**

While it is possible to waive the exemption that applies to certain transfers of real property, one of the conditions is that the recipient is entitled to the full deduction of input tax borne. This condition is still holding, so that the new wording allows to choose the option to waive the exemption also for those cases in which the recipient is entitled to a partial deduction of VAT, provided that property acquired is aimed to be used, in whole or in part, in the conduct of transactions giving him the right to deduct.

Therefore, based on the probable aim of the property, the purchaser may deduct the input VAT if the goods are aimed to transactions that generate such a right, even if also perform other exempt transactions that limit the deductibility.

As before, the recipient of the transaction will have to communicate their taxable person status entitled to the full or partial deduction, or even the likely aim of the goods for transactions that generate such right.

## **Article 21. Exemption related to exportations**

The scope of services that are considered directly related to exports is extended, and therefore are exempt from tax, to those provided to customs representatives of those conducting exports.

## **Articles 68, 69 and 70. Place of supply rules for supply of goods and services**

### **68.Two.2º. Supplies of goods with installation**

The supplies with installation, known as "turn-key supplies", are considered to be located where the installation or assembly is completed.

This rule is an exception to the place of supply rule related to supply of goods with transport, which are deemed to be located where the transport starts, and it seeks for a simplification in those cases where the components for the installation are dispatched from other Member States or imported from non-EU territories, bound for the installation work, so if the requirements are met, the intra community movement disappear or import transaction would be exempt from VAT, treated the full supply as a single supply in the Member State where the facility is immobilized.

The Spanish VAT Act had established two conditions to apply this simplification rule:

- The cost of the installation must exceed 15% of the total consideration corresponding to the supply of the goods installed.
- The goods supplied must be immobilized with the installation.

In order to adapt the Spanish regulation to the VAT Directive it has been removed the requirement related to the cost of the installation, so as of January 2015 it will only be needed that the installation lead to the immobilization of the goods supplied.

## **69 and 70. Telecommunication, radio and television broadcasting and electronically supplied services**

- It is established the definition for radio and television broadcasting services, in line with the Community regulation.
- The place of supply rule for telecommunication services, radio and television broadcasting services and electronically supplied services, when supplied B2C, is shifted to the place where the recipient is established or has its residency or regular domicile.
- The use and enjoyment rule is extended to electronically supplied services, telecommunication services and radio and television broadcasting services.

## **Articles 78 and 79. Taxable base**

In line with the EU Case-Law a new section 4<sup>º</sup> is added in point Three of the article, in order to declare that subventions which are not related to the transaction price do not constitute part of the VAT base. In this sense, the rule clarifies that in any case it is part of the VAT base the amounts paid by a third party in consideration of such transactions.

Moreover, with regard to the special rules for determining the tax base, and particularly in those cases in which a non-monetary consideration is agreed, the tax base will not be the market price between unrelated parties, but the amount in money which should be agreed between the parties involved.

However, in cases of self-consumption of goods and services, will continue to apply the rules set out in paragraphs three and four of Article 79 in any case.

## Article 80. Amendment of taxable base

For those cases of outstanding debt, in which the recipient of the transactions is under an insolvency proceedings, the period in order for the taxpayer to amend the taxable base is extended from one month to two months, as from the publication of the insolvency proceedings in the Official Gazette.

Furthermore, for cases of bad debt where there is not an insolvency proceeding and the holder of the credit is not a large company for VAT purposes, a term of six months or a year, as from the tax point, is set in order for the taxpayer to be entitled to amend the taxable base.

At present, the Law does allow a six month term for the above-mentioned bad debt scenario and this could lead to the taxpayer to lose the chance of amending the tax base if the deadline was not met according to the proceeding, while considering the new regulation they are eligible to take, in case, the one year term.

For entities under the special VAT cash criterion scheme the deadline shall be considered as met at the special tax point date of December 31<sup>st</sup>, unless the transactions involve forward payments, in which case it is necessary to elapse the six months or one year term, as from the payment is due until the date of the tax point.

Additionally, for those entities under the special cash criterion scheme, the three months term enabled, as from the end of six months or one year term, in order to proceed with the modification of the taxable base, is deemed to start as of December 31<sup>st</sup>.

## Article 84.One.2º. New scenarios for reverse charge

New scenarios for direct reverse charge in the supply of goods are established. These provisions are set in a new section g) of the article and the goods involved are defined in the section tenth of the Annex of the Law (Nomenclature Codes):

- Silver, platinum and palladium, unwrought, powder or semi-wrought. Supplies of these metals are assimilated as a result of the completion of processing activity by the trader or professional buyer. However, these products must not be included in the special VAT scheme for used goods, works of art, antiques and collectibles
- Mobile telephones.
- Video game machines, laptop and digital tablets.

Nevertheless, for the last two cases, the reverse charge would be applicable only if the recipient is:

- A taxable person reseller of the goods, regardless the amount.

- Any taxable person when the amount of the supplies, stated in the same invoice, does exceed 10,000 euro, excluding VAT. If the sales are documented in different invoices but they refer to one single transaction, it must be considered the 10,000 euro threshold in order to apply the reverse charge.

Finally, the status of the recipient of the transaction as taxable person must be accredited reliably and previously to the transaction. Or even the condition as reseller, which will be proved by providing with a certificate issued by the Spanish Tax Authorities for such purposes.

In this sense, the VAT Regulation provides for the condition of the reseller to be communicated to the Spanish Tax Authorities at the moment of the commencement of the activity (or during November of the previous calendar year), through the corresponding census Form. When the reseller status is not meet, it must be communicated to the Tax Authorities too.

The invoice issued for these transactions must state a special serial.

The changes mentioned in this point will come into force as of April 1<sup>st</sup>, 2015.

## Article 91. Tax rates

The reduced 10% VAT rate will apply for:

- Pharmaceutical products falling under Chapter 30 of the Combined Nomenclature.
- Napkins, tampons, panty liners, condoms and other non-medical contraceptives.
- Medical, aids and other appliances equipment, as listed in the eighth paragraph of the schedule to the Act, which by its objective characteristics are designed to alleviate or treat disability, for the exclusive personal use of persons with physical, mental deficiency, intellectual or sensory.
- Flowers and ornamental plants.

On the other hand, adapting the national regulation to the EU Directive, the 21% VAT general rate will apply to equipment and accessories to meet the physical deficiencies of man or animals, such as eyeglasses, contact lenses and medical equipment to prevent devices, diagnose, treat, alleviate or cure diseases of man or animals.

## Article 93. Requirements for deduction

A new point five is added to article 93, in order to enable the deduction for taxpayers deemed as Public Administration referred to in article 7.8<sup>º</sup>, who jointly conduct business transactions subject and not subject to VAT. Accordingly, these taxpayers may deduct, on a reasonable and consistent method for allocating quotas on goods and services used for the development of the transactions subject to VAT, the input VAT borne on the acquisition of goods and services that are intended simultaneously to both transactions.

It seems that the method to be used is similar to the general pro-rata, using a provisional calculation during the year that will be regularized at the end of the year.

However, input VAT related to the acquisition of goods and services exclusively aimed to non-subject transactions contained in the article 7.8º, will not be deductible at all.

## **Article 98. Right to deduct**

A new section is added affecting to cases of VAT borne on the purchase of goods and services for trips that result in direct benefit the traveller, as set in the special TOMS scheme, but these are intended for transactions over which the scheme does not apply. In these cases, the right to deduct will arise at the time of the VAT becomes due.

## **Article 103. Special pro-rata**

It is reduced from 20% to 10% the difference between general pro-rata and special pro-rata in order to apply the latter mandatorily.

## **Article 119.bis. Refund for non-established taxable persons**

At present, only taxable persons established in a non-EU territory to which Spain has concluded a reciprocity agreement are entitled to claim for the VAT refund through the special procedure regulated under the 13th EC Directive.

Nevertheless, as from 2015, even if a reciprocity agreement is not in place, any taxable person established in a non-EU territory is enabled to apply for the VAT refund claim corresponding to the acquisition of the following goods and services:

- The provision of jigs, molds and equipment acquired or imported into the VAT territory by the not established taxable person, for putting this at the disposal of a taxable person established in its territory to be used in the manufacture of goods that will be dispatched or transported outside the Community with destination to a taxable person not established, provided the goods are transported at the end of the manufacture or destroyed.
- The services related to the access, accommodation, restaurant and transport, which are linked to the attendance of fairs, congresses and expositions of commercial or professional purposes, which take place in the Spanish VAT territory.

## **Title IX. Special schemes**

The information, regulation and comments related to the new special scheme for telecommunication, radio and television broadcasting and electronically supplied services, which will come into force on January 1<sup>st</sup>, 2015, are not included in this newsletter.



In any case, anyone interested in receiving more information about the implications of this scheme can send an e-mail to [info@diligens.es](mailto:info@diligens.es), in order to request for further information or to ask any question thereof.

## Simplified scheme

New thresholds in the yearly turnover are established in order to exclude taxpayers from the simplified scheme.

- For the aggregate of business or professional activities, except agricultural, forestry and rancher: 150,000 euro per year.
- For the aggregate of agricultural, forestry and rancher activities: 250,000 euro per year.

It is also excluded when the acquisitions and importations of goods and services for the aggregate of the business or professional activities, excluding the one related to immobilized goods, exceed the previous year 150,000 euro, excluding VAT.

These changes will come into force as of January 1st, 2016.

## Scheme for agricultural, rancher and fishing

A definition is set about what is not considered an owner of agricultural, forest and rancher activities for the VAT scheme purposes:

- The owner of lands or exploitations that lend or sharecropping those or in any other way, as well as when they cede the use of the resin of pine trees located on their farms.
- The farms engaged in rancher integrated system.

These changes will come into force as of January 1st, 2016.

## Tour Operators Margin Scheme

The application of the scheme is extended to any taxable person, even without been considered as travel agency or organizer of tours, when acting in its own name for the travellers and use the supply of goods or services rendered by other taxable person in the performance of the travel.

On the other hand, according to the doctrine of the Court of Justice of the EU, it is removed from the Act the possibility of including in the invoice, upon request from the taxable person recipient of the service, a VAT quote of 6%. However, a voluntary choice for not application of the TOMS, transaction by transaction, for those services performed and to which the recipients are taxable persons entitled to the deduction is added. This choice must be communicated to the recipient prior or simultaneous to each transaction related

to accommodation, transportation or other accessories or complementary services. In any case, this communication shall be deemed as fulfilled if it is not included in the invoice a mention of the application of TOMS as regulated in the invoicing regulation.

Finally, all the wording related to the determination of the taxable base is removed from the Act.

## VAT Grouping scheme

It is developed the concept of related parties, extending it to the financial, economic and organizational orders in the terms established by the Regulation.

Moreover, as a requirement in order to be considered as dominant entity within the group, it must have the effective control over other entities, through participation, greater than 50% in the share capital or voting rights of the rest of entities of the group. To this end, the Regulation specifies when there is financial, economic and organizational links:

- Financial: when the dominant entity has more than 50% in the share capital or voting rights.
- Economic: when the entities of the group perform the same business activity or, if different ones, those must be complementary or to contribute to the development of thereof.
- Organizational: when a common direction for the group of entities does exist.

Nevertheless, unless otherwise proved, it shall be assumed that an entity which meets the financial requirements does also meet the economic and organizational requirements.

In any case, adopting the criterion of the General Tax Directorate and National Courts, it is allowed for mercantile entities which do not act as taxable person to be deemed as dominant entity, as far as the requirements for such purposes are met.

## Article 167. Settlement of import VAT

The import VAT is cleared by the Customs Authorities, which issues the corresponding import SAD containing the tax assessment and the Form 031 or payment letter.

However, a new choice is set for those importers who settle the VAT on a monthly basis. This option will allow entrepreneurs and professionals who perform imports and fall within the monthly settlement period, to include the import VAT cleared by the Customs Authorities in the VAT return corresponding to the month when receiving the customs document attesting the assessment.

This option must be selected at the beginning of the activity (registration form) or during the month of November of the year before it takes effect, reaching to all imports that should

be included in the VAT return. The de-registration may be exercised within the same period (November) and have a minimum duration of three years.

Will be excluded from this option the taxpayers not filing the VAT return on a monthly basis.

## Articles 170 and 171. Tax infringements and penalties

There are new tax infringements and the corresponding penalties:

- Lack of communication in due time or wrong communication, by the recipients of the transactions who act as taxable persons to whom the VAT is shifted on a reverse charge basis for the cases of supplies of real estate in execution of warranty over them and in exchange for the total or partial termination of the secured debt. Penalty: 1% over the VAT due, with a minimum of 300 euro and a maximum of 10,000 euro.
- Lack of communication in due time or wrong communication, by the recipients of the transactions who act as taxable persons to whom the VAT is shifted on a reverse charge basis for the cases of execution of work aimed at the urbanization of land, construction or rehabilitation of buildings. Penalty: 1% over the VAT due, with a minimum of 300 euro and a maximum of 10,000 euro.
- Failure to declare, or incorrect or incomplete entry in the VAT return the import VAT quota to be settled by taxpayers who choose the option provided in Article 167.Two (see comments in point before). Penalty: 10% over the VAT due.

## Annex Fifth. VAT warehouse

A paragraph is added to extend subsidiary liability for the payment of the tax accrued when removing the goods from the VAT warehouse to the holders of the warehouses. This responsibility does not apply when the VAT warehouse is for goods subject to excise duty.

This change will come into force as of January 1<sup>st</sup>, 2016.

## Tax audit related to VAT on importation of goods

In line with the new voluntary choice prescribed for settlement and payment of import VAT laid down in article 167.Two of the VAT Act (see previous comments on this procedure), it is regulated the inspection process for VAT in import, which in any case shall be governed by the provisions of General Tax Law, except for the following specialties:

- The object of the inspection is to check out the correct fulfilment of the VAT liability derived from the importation by the taxpayers that do not opt for the deferment of the payment set in the point Two of the article 167 of the VAT Act (see comments above of this proceeding).

- The scope of the inspection will be limited to the VAT audit in the importations and cannot be extended.

## VAT Grouping. Transitional provision

A transitional period is established for the entities already applying the VAT grouping scheme prior this Law come into force and do not fulfil with the new linking requirements.

Those entities are allowed to continue applying the scheme until next December 31<sup>st</sup>, 2015, according to the linking requirements established prior to the Law.

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