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The Spanish Tax Administration clarifies the VAT treatment of the supply of NFTs

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On 10 March 2022, the Spanish Tax Administration issued a ruling concerning the VAT treatment of the transfer, through an online internet auction, of NFTs (Non-Fungible Tokens) that grant their purchasers certain rights of use (hereinafter: 'the Ruling').[1]

The Spanish Tax Administration provides through this ruling a comprehensive analysis of the taxation for VAT of the transfer of NFTs, establishing the guidelines for determining the taxable status of the supplier, the qualification of the transaction as electronically supplied services, the place of supply and the formal reporting obligations under the new OSS schemes.

The question raised to which the Spanish Tax Administration gives its reply concerns a natural person who sells photoshop-transformed illustrations. This person transforms photographs to produce unique pieces that will then be auctioned on the Internet. The auctions are organized and managed by digital platforms that are not authorized to provide the real identity of the buyers since the purchase is made through nicknames that the buyers adopt in order to carry out the transactions.

A note of caution. The object of the sale is not the artwork itself but only its digital representation on the blockchain, i.e., the NFT. Such an NFT grants its purchaser certain rights of use. In no case is the ownership of the underlying asset transferred.

1. **The Ruling**

In its reply, the Spanish Tax Administration carries out a detailed and comprehensive analysis of the VAT taxation of the questions raised covering several crucial aspects of VAT as follows:

1.1 Taxable status of the supplier of the NFTs

The Ruling starts analyzing certain general provisions of Spanish VAT to determine the taxable status of the transferor of the NFTs.

According to the Spanish Tax Administration, any natural or legal person would be carrying out an economic activity when it orders for its own account material and human resources of production,

with the purpose of intervening in the production and/or distribution of goods or services. In such a case and if carried out independently, the person should be considered, as a general rule, a taxable person for VAT.

It is also pointed out that the frequency or regularity with which the service is provided is not definitive insofar as there is the concurrence of the organization of means of production that imply the will to intervene in the market, albeit occasionally.

Following the above, **the Spanish Tax Administration concludes that, under the described circumstances, the supplier of NFTs should be considered a taxable person for VAT**.

1.2 Qualification of the transaction for VAT

As a next step, it is necessary to determine the nature of the transaction consisting of the transfer of NFTs, notably, whether it should be considered a supply of goods or a supply of services for VAT purposes.

In this sense, the Ruling highlights that the NFTs are digital certificates of authenticity associated with a single digital file. Therefore, the NFTs act as unique digital assets that cannot be exchanged with each other. Once again, it is important to emphasize that it is the NFT and not the underlying asset that is transferred through the relevant online auction platforms.

In line with the above, the Spanish Tax Administration notes that **it would not be correct to characterize the transfer of the NFTs as a supply of goods as the NFTs do not entitle their holder to the purchase of any tangible property**. The object of the transaction appears to be the digital certificate of authenticity itself, which represents the NFT, without the physical delivery of the image file associated with it.

In light of this evidence, **the Spanish Tax Administration concludes that NFTs transactions concern a supply of services**.

Furthermore, the Spanish Tax Administration carries out an overview of the circumstances that must be accomplished for a service to be an electronically supplied service. These services are those that, by their nature, are mainly automated and require minimal human intervention and are not feasible without information technology.

In accordance with the above, **the Ruling concluded that the transfer of the NFTs qualifies, for VAT purposes, as an electronically supplied service**.

1.3 Place of supply of the transfer of NFTs

The Spanish Tax Administration carries out a detailed analysis of the rules determining the place of supply of electronically supplied services like the transfer of NFTs.

When these services are supplied to private customers, the service supplier is responsible for charging and paying the VAT associated with the service. As these are B2C services, it is impossible to establish a reverse charge mechanism.

The Administration determines the rules governing the place of supply of NFTs as follows:

– When the purchaser of the NFT is a final consumer (B2C service), **the supply will be subject to VAT in the Member State of consumption** (where the recipient of the service is domiciled), and the supplier of the service must charge to his customers the VAT rate applicable in that Member State. For this purpose, the supplier may use the OSS VAT return.

– **A threshold of EUR 10,000 applies, which, if not exceeded, will determine that the place where the taxable event takes place will be Spain, considering that the supplier is domiciled in the Spanish territory**. In such a case, the supply of the NFT service will be subject to Spanish VAT regardless of where the purchaser is domiciled unless the option to tax the supply at destination has been exercised.

– **When the purchaser of the NFTs is a VAT taxable person, the standard rules (B2B transactions) apply**.

Next, the Spanish Tax Administration analyses a quite controversial issue, i.e., the rule of **"use and enjoyment"**. According to the Spanish VAT regulations, **this rule applies to electronically supplied services when their recipient is domiciled in a non-EU country or territory and somehow used or exploited in Spain**.

This is a controversial and complex rule, which must be applied after carrying out a case-by-case analysis according to the criterion of the Spanish Tax Administration.

It **is a rule that can be certainly applied to electronically supplied services like the supply of NFTs** being the supplier obliged, under certain circumstances, to charge VAT to his non-EU customers.

1.4 Determination of the domicile of the recipient of the services

Another issue raised in the Ruling relates to the complexity of determining where the buyers of the NFTs are domiciled. In the case of B2C supplies of services, this determination has always been a complicated task. Still, in **this particular case, it is even more complex as the identity of the acquirers of the NFTs is unknown to the supplier**.

In this regard, the Ruling refers to the VAT Implementing Regulation[2], which contains several guidelines for determining the location of customers of electronically supplied services such as the supplies of NFTs.

Article 24f of the VAT Implementing Regulation provides that the customer shall be presumed to be established or have his domicile or habitual residence in the place determined by the service provider based on two non-contradictory pieces of evidence. These elements include, among others, the billing address, the address of the IP used or any other commercially relevant information.

However, where the value of the services provided does not exceed EUR 100.000, the provider may determine the place of domicile of his customer based on one single piece of evidence.

Therefore, the Ruling provides no meaningful guidance other than that already laid down in the EU VAT legislation.

Indeed, the Spanish Tax Administration highlights that **it is the responsibility of the supplier to**

count on the necessary means of proof to be able to determine the place of domicile of the purchaser of the NFTs and thus to charge VAT accordingly. There is no guidance within the Spanish (VAT) legislation on how a supplier can prove the place of domicile of the recipient of electronically supplied services. Therefore, in this regard, Spanish VAT only relies on the provisions of the VAT Implementing Regulation.

1.5 Declaration and payment of the VAT due in different Member States

Once the VAT treatment of the supplies of NFTs has been analyzed throughout the text of the Ruling, concluding that the supply of NFTs is an electronically supplied service and therefore is subject to VAT wherever their (mostly) private purchasers are domiciled, the Ruling describes the way in which the VAT due on the supplies can be declared and paid when the buyers of NFTs are final consumers.

To this end, **the supplier may avail themselves of the special OSS schemes**. Considering that the supplier is a Spanish taxable person, he must file the special OSS return with the Spanish Tax Authorities and pay the VAT on all his sales in the EU territory. The Spanish Tax Administration is then responsible for distributing the revenue among the other EU administrations.

Under these circumstances, being a Spanish taxpayer, the supplier must register under the so-called Union scheme. Instead, in the cases where the taxable event takes place in Spain and, therefore, the transaction is subject to VAT therein, the transaction will be declared through the standard Spanish VAT return and not via the special OSS procedure.

2. Conclusion

According to the Ruling issued by the Spanish Tax Administration, **the supply of NFTs** does not grant any legal entitlement over an underlying (digital) asset. Therefore, **the supply of NFTs shall be considered an electronically supplied service for VAT purposes**. This is assumed because the supply is carried out in an automated way, using technology and with minimal human intervention. In this respect, it has been commonly understood that for the assessment of the notion of “minimal human intervention” it is the involvement on the side of the supplier which is relevant and not that on the side of the customer.[3]

More than minimal human intervention should be assumed to exist, among others, in the following cases: where there are elements of interaction between the service provider and its customer, or where the possibility of such interaction is included; where services are tailored to a customer’s individual needs; or where services are provided to the customer by sending information by electronic format in a non-automated way. None of this appears to be the case in the case analyzed by the Spanish Tax Administration, which is the subject of the ruling.

The place of supply of these services, when they are made to final consumers, **is the place where the recipient of the services is domiciled**. **The supplier may use the OSS VAT return** to declare and pay the VAT due in different Member States. It is the responsibility of the service provider to determine where the purchasers of the NFTs are domiciled to apply the corresponding VAT rates.

It is also relevant to mention that **these services are subject to the so-called “use and**

enjoyment" rule in Spain, for which Spanish VAT may be charged when the recipient is domiciled in a non-EU country or territory, and the latter will somehow use the service in the Spanish territory. Thus, in addition to the difficulty of determining the place of domicile of the recipient of the service, an additional hindrance relates to whether the service is used in Spain if the recipient is domiciled in a third country (e.g., Switzerland or the UK).

Finally, the Ruling clarifies that the supplier must prove that the service is or is not exploited in some way in Spain. There **is no clear guidance from the Spanish Tax Administration on how this can be proved** which makes the application of the rule controversial and much dependent on the factual circumstances of each particular case.

[1] Binding ruling V0482-22, of March 10, 2022, issued by the Spanish General Directorate of Taxes (*Dirección General de Tributos*).

[2] 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.

[3] EU VAT Committee Working Paper No 919. 28 February 2017.

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