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VAT Persons in the Sharing Economy: The Taxable, the Non-Taxable, and the In-Between – Part II

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Customer's status and capacity under EU VAT place of supply rules

Other than for attributing VAT personality to suppliers of goods or services, the concept of taxable persons is relevant for applying the place of supply rules for services laid down in Title V, Chapter 3 of the VAT Directive (Articles 43 – 59a) **[1]**. These rules rely mainly on the status of the customer as a taxable or non-taxable person, as well as on the capacity in which the service recipient acts in the relevant transaction **[2]**.

Article 18 of Implementing Regulation 282/2011 (hereinafter: 'the VAT Implementing Regulation') contains guidelines that the supplier can follow when establishing the status of its customer. According to this provision, the supplier '*may*' (i.e., has the possibility but not the obligation to) regard an EU customer as a taxable person if, inter alia, the customer has communicated his VAT ID to him **[3]**. Symmetrically, the supplier '*may*' (i.e., has the possibility but not the obligation to) regard an EU customer as a non-taxable person when the supplier can demonstrate that the customer has not communicated his VAT ID to him **[4]**.

The VAT ID essentially functions as a presumption of the VAT status of the customer, thus eliminating the need for the supplier to carry out complex inquiries regarding his customer's status **[5]**. Article 19 of the VAT Implementing Regulation also employs a similar rule to determine whether the supplier acted in his capacity as a taxable person in the relevant transaction **[6]**.

However, the possibility for the supplier to rely on the VAT ID presumptions above is limited. Notably, the supplier cannot derive any assumption regarding the status of his customer based on the (communicated or not) VAT ID if '*he has information to the contrary*' regarding his customer's status **[7]**. This provision is problematic since it requires the supplier to prove a negative **[8]**. It is also unclear which kind of evidence can be used as '*information to the contrary*' **[9]**. By its own account, the VAT Implementing Regulation does not contain practical examples of '*other proof which demonstrates that the customer is a taxable person*' **[10]**.

Article 19 of the VAT Implementing Regulation only indicates that information contrary to the customer acting in his capacity as a taxable person may be derived from '*information on the nature of the services provided*'. Indeed, there are services whose nature might suggest (only) private uses (e.g., some entertainment services). However, assessing the services' nature in other situations may

be more complex [11]. The VAT Committee issued guidelines in this regard, providing (almost unanimously) that '*it is for the Member State of the supplier to determine which information shall be required to be held*', but adding that, '*[i]n this respect, a statement by the customer in the contract or on an order form, confirming that the services are intended for his business use, or other corroborating elements already in the possession of the supplier, shall normally be regarded as sufficient*' [12].

Commenting on Article 19 of the VAT Regulation, the Italian tax authorities claimed that the taxable person's capacity of the customer must result from an overall assessment of whether the services purchased are compatible with the customer's business activity [13]. By way of example, the Italian tax authorities excluded a solo entrepreneur, established in Italy and who purchases legal advice for personal reasons such as a marriage/divorce from a foreign supplier, acts in his capacity of a taxable person in respect of that supply. On the other hand, legal advice may relate to the solo entrepreneur's business organisation, so it can be concluded that the entrepreneur acts in a taxable person's capacity in purchasing that service [14].

In-between suppliers and the special VAT scheme for SMEs

As seen, Articles 18 and 19 of the VAT Implementing Regulation employ the VAT ID as a presumption to assign taxable person status and/or capacity to the customer in the context of applying place of supply rules [15]. Although significantly reducing VAT complexity by removing the need for the supplier to obtain information to inquire into his customer's status, the reliance on the VAT ID number does have some weaknesses.

The first issue is that the customer may provide false information regarding his status to the supplier by exploiting the VAT ID of another taxable person or simply using a non-existent VAT ID [16]. In this connection, the EU Commission recently warned Member States about the potential misuse of Import One Stop-Shop (IOSS) VAT numbers by suppliers and platforms under the special VAT regime for low-value (i.e., not exceeding EUR 150) imports [17].

Another problem arises when the supplier qualifies as a taxable person for VAT based on Article 9 of the VAT Directive but does not have a VAT ID. Notably, Article 214(2) of the VAT Directive allows Member States not to allocate a VAT ID to taxable persons who carry out transactions on an occasional basis under the special VAT scheme for SMEs laid down in Title XII, Chapter 1 of the VAT Directive (Articles 281 – 294). According to a 2017 EU-commissioned study, SMEs are not required to register for VAT in 17 Member States [18]. Therefore, for such categories of persons, the supplier by definition cannot rely on the availability of a VAT ID to identify his customer's status and/or capacity.

Regrettably, this matter is not fully addressed under the new VAT regime for SMEs that will enter into force on 1 January 2025. Based on Article 292b of the VAT Directive, introduced (as of 2025) by Directive 2020/285/EU, Member States will be able to release SMEs, applying for the special VAT regime and established within their territory, from the obligation to be identified by means of a VAT ID [19]. Member States will be required to allocate a VAT ID (in which case, the VAT ID will have an 'EX' suffix) only to SMEs using the special VAT regime for transactions carried out in another Member State [20].

In-between persons – i.e., VAT persons without a VAT ID – constitute a relevant issue which increases VAT complexity and generate risks in terms of VAT collection. Providers in the sharing

economy receiving services from online platforms are a case in point. The EU Commission acknowledged that reliance on VAT ID might not be feasible for platforms to apply place of supply rules in case sharing economy providers fall under the special VAT regime for SMEs. To address this matter, the EU Commission thus proposes a second step according to which in their customers' identification process, platforms should ask a question to the sharing economy provider as to whether s/he would normally charge VAT on her/his supplies. Notably, this second step would apply in case a Member State allocates a VAT ID to exempt SMEs, and this VAT ID does not enable a platform to immediately distinguish exempt SMEs from the main body of VAT-registered enterprises **[21]**.

The recent 'VAT in the Digital Age' study sponsored by the EU Commission also discusses issues relating to the determination of the status of platform providers, such as taxable persons covered by the special VAT regime for SMEs, which may not have a VAT ID. In this connection, the study suggests that '*providers who do not communicate the VAT number to the platform should also be required to confirm that they are not a taxable person (e.g. when registering to the platform or periodically)*'. The EU-sponsored study also lays down a series of supporting measures to help platforms verify the taxable or non-taxable status and/or capacity of their customers, including assigning a unique identifier (not necessarily a VAT ID) to SMEs and cross-checking information reported by platforms under the new e-commerce VAT rules or the DAC7 that will apply from 2023 **[22]**.

Back to Booking.com

What conclusions can be drawn from the analysis above concerning the case of Booking.com in Italy? Did Booking.com apply VAT law correctly by treating owners listing their accommodation on its platform always as taxable persons, even if no VAT ID was communicated to the platform? Or, rather, the Italian tax authorities have an edge in assuming that platform providers not communicating their VAT ID to the platform cannot be treated as taxable persons, at least for place of supply purposes?

Without providing a conclusive answer on this litigated matter, the author would like to draw a few observations:

- A VAT ID is not, as VAT law stands now and contrary to other fields of VAT legislation (e.g., intra-Community transactions), determinative of the status and capacity of a taxable person **[23]**.
- The supplier, as VAT law stands now, can rely on information contrary to inferences derived from the communication or not of a VAT ID (in the case of capacity, notably based on the nature of the services supplied).
- There is no limitation in sources or evidence from where the supplier may derive information to the contrary (possibly, information obtained through reporting under DAC7 can be used).
- VAT legislation and the CJEU's case law do not exclude that the listing of accommodation on the platform might be considered an active step to exploit tangible property, thus qualifying the house rental activity as an economic activity and the platform provider as a taxable person for VAT purposes **[24]**.
- Neither the preparatory steps for the activity, nor the period of its exercise, nor the income derived therefrom are, per se, decisive. Instead, it is only the supplier's intention to obtain income regularly that needs to be verified **[25]**.
- A platform operator will more likely qualify as a taxable person if s/he performs another VAT-relevant economic activity.

Overall, the article has shown how VAT complexity can also arise from supposedly basic concepts such as 'taxable persons'. This is unpleasant news for businesses. For VAT pundits, it confirms that you never have a dull moment in VAT **[26]**!

[1] See Article 17(1) of Implementing Regulation 282/2011 (hereinafter: 'the VAT implementing Regulation'), who reads as follows: '*[i]f the place of supply of services depends on whether the customer is a taxable or non-taxable person, the status of the customer shall be determined on the basis of Articles 9 to 13 and Article 43 of Directive 2006/112/EC*'. This work has been developed within the framework of the Amsterdam Centre for Tax Law (ACTL) research project "Designing the tax system for a cashless, platform-based and technology-driven society" (CPT project). The CPT project is financed with university funding and funds provided by external stakeholders (i.e., businesses and governments) interested in supporting academic research to design fair, efficient and fraud-proof tax systems. For more information about the CPT project and its partners, please visit its website https://actl.uva.nl/cpt-project/cpt-project.html. The usual disclaimers apply.

[2] Van Doesum et al., *Fundamentals of EU VAT Law* (2nd ed., Kluwer Law International 2020), p. 201. In particular, the status of the customer is relevant for applying the general rules for B2B and B2C services under Articles 44 and 45 of the VAT Directive. For other categories of services (e.g., immovable property and transport services under Articles 47 and 48 of the VAT Directive), the status and the capacity of the customer as a taxable or non-taxable person is irrelevant since the same rule (*rectius*: proxy for consumption) applies for both B2B and B2C supplies.

[3] Article 18(1)(a) of the VAT Implementing Regulation. It should be noted that Article 55 of the VAT Implementing Regulation mandates the customer to communicate his VAT ID to the supplier when acting in the capacity of a taxable person. See also Nellen, *Information Asymmetries in EU VAT* (Kluwer Law International 2017), p. 315, considering that '*the "communication" of the VAT identification number does not necessarily require a cognitive action by the customer directed specifically towards the supplier; the disclosure of the VAT identification number can also take place passively, e.g., via mentioning it on the company website*'.

[4] Article 18(2), first indent of the VAT Implementing Regulation.

[5] Nellen, *supra* n. 3, at p. 315.

[6] Article 19, second indent of the VAT Implementing Regulation.

[7] Articles 18(1) and (2) of the VAT Implementing Regulation.

[8] See Nellen, *supra* n. 3, at p. 315, considering that '*this evidence rule … is unique in the sense that it does not require the substantiation of an event, but rather of the circumstance that an event did not take place*'.

[9] Recital 18 of the VAT Implementing Regulation stipulates that '*[i]n order to determine the customer's status as a taxable person, it is necessary to establish what the supplier should be required to obtain as evidence from his customer*'. Regrettably, the VAT Implementing Regulation does not contain provisions that fully comply with this purposive statement.

[10] See Lejeune, Cortvriend & Accorsi, *Implementing Measures Relating to EU Place-of-Supply Rules: Are Business Issues Solved and Is Certainty Provided?*, 22 International VAT Monitor 3

(2011), para. 6, considering that '*it is not clear which categories of services should give the service provider reason to ignore the fact that the customer has given his valid VAT identification number*' and therefore '*Member States may give a different interpretation to the phrase "nature of the services provided"*'.

[11] Similarly, in the CJEU's case law, see *Enkler* (C-230/94, para. 27), considering that '*if, by reason of its nature, property is capable of being used for both economic and private purposes, all the circumstances in which it is used will have to be examined in order to determine whether it is actually used for the purpose of obtaining income on a regular basis*'.

[12] VAT Committee, *Guidelines resulting from the 93rd Meeting of 1 July 2011 Document B – taxud.c.1(2012)389021 – 708*.

[13] Italian Revenue Agency, Circular Letter No. 37 of 29 July 2011, p. 14 ('*Nel caso in cui, invece, il committente sia una persona fisica non e? sufficiente che lo stesso eserciti attivita? imprenditoriale, artistica o professionale, ma e? necessario che il prestatore del servizio effettui una valutazione di compatibilita? complessiva, per verificare che il servizio medesimo sia acquistato nell'esercizio di detta attivita?*').

[14] Italian Revenue Agency, Circular Letter No. 37 of 29 July 2011, pp. 14-15. It should also be observed that a business activity, for place of supply rules, may include both economic and non-economic activities. As clarified by the CJEU in *Wellcome Trust* (C-459/19, para. 38), '*a taxable person may be acting, as such, within the meaning of Article 44 of that* [the VAT, GB] *directive, even when he is acting for the purposes of his non-economic activities*'.

[15] See also Article 43 of the VAT Directive stipulating that '*[f]or the purpose of applying the rules concerning the place of supply of services ... 2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person*'.

[16] Nellen, *supra* n. 3, at p. 316.

[17] See Group on the Future of VAT (GFV), *GFV No. 119. IOSS VAT Identification Number – Securing the IOSS Process*, taxud.c.1(2022)3455702, p. 2, considering that '*there may be a risk that IOSS VAT identification numbers could potentially be misused ... The risk of IOSS abuse manifests itself in cases where the trader is not IOSS registered, yet fraudulently uses the IOSS number of a legitimate IOSS registered trader in order to falsely benefit from the VAT exemption upon importation*'.

[18] Deloitte, *Special Scheme for Small Enterprises under the VAT Directive 2006/112/EC – Options for review, Final Report* (2017), p. 114.

[19] See Article 292b of the VAT Directive introduced by Directive 2020/285/EU, which reads as follows: '*Without prejudice to Article 284(3), Member States may release exempt small enterprises established in their territory, that avail themselves of the exemption only within that territory, from the obligation to state the beginning of their activity pursuant to Article 213 and to be identified by means of an individual number pursuant to Article 214, except where those enterprises carry out transactions covered by point (b), (d) or (e) of Article 214. Where the option referred to in the first paragraph is not exercised, Member States shall put in place a procedure for the identification of such exempt small enterprises by means of an individual number. The identification procedure*

shall not take longer than 15 working days except in specific cases where in order to prevent tax evasion or avoidance Member States may require additional time to carry out the necessary checks'.

[20] See Article 284(3) of the VAT Directive as modified by Directive 2020/285/EU, which reads as follows: '*3. Notwithstanding Article 292b, in order for a taxable person to avail itself of the exemption in a Member State in which that taxable person is not established, the taxable person shall: (a) give prior notification to the Member State of establishment; and (b) be identified for the application of the exemption by an individual number in the Member State of establishment only*'.

[21] Group on the Future of VAT (GFV), *GFV No 116. VAT and the Platform Economy – Focus on Specific Issues – Follow Up*, taxud.c.1(2022)669826, pp. 6 – 8; Group on the Future of VAT (GFV), *GFV No 122. VAT and the Platform Economy – Focus on Specific Issues – Follow Up*, taxud.c.1(2022)3461477, pp. 3-4.

[22] EU Commission, *VAT in the Digital Age. Final Report. Volume 2, The VAT Treatment of the Elatform Economy* (2022), pp. 102-103.

[23] See also Grambeck, *Online Intermediation Services – The Italian Case of Booking.com*, 33 International VAT Monitor 3 (2022), para. 4, considering that '*EU law does not provide a rule on how a supplier of services should determine and document whether or not his customer is in business. This is different for the intra-Community supply of goods (Article 138 of the VAT Directive), where zero rating is strictly linked to a valid VAT ID of the customer*'.

[24] See also VAT Committee, *Working Paper No. 878. VAT Treatment of the Sharing Economy*, taxud.c.1(2015)4370160, considering that '*an individual joining a sharing economy platform in order to offer his goods or services acts similarly to a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) of the VAT Directive and should be regarded as carrying out an economic activity*'.

[25] See also see G. Beretta, *European VAT and the Sharing Economy* (Kluwer Law International 2019), p. 88, considering that '*the "continuity" requirement cannot be understood as meaning that, in order to qualify as a taxable person, an individual must necessarily enter into a series of transactions, otherwise it would be fairly simple for a taxable person to circumvent his own obligation to pay VAT by completing all his economic activities in a single day*'.

[26] Kogels & Van Hilten, *Never a Dull Moment*, 28 International VAT Monitor 2 (2017).

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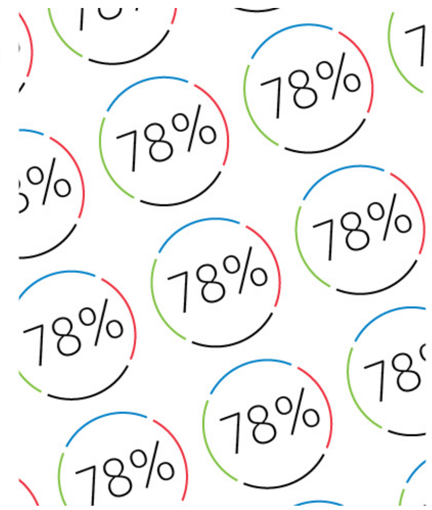

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