
INDIRECT TAX

HIGHLIGHTS | January 2019

In **Indirect Tax Highlights January 2019**, we emphasise:

- the need to be prepared for the new Angolan Value Added Tax Code that should be effective on 1 July 2019
- the need to be prepared for B2G (Business-to-Government) mandatory e-invoicing that will apply across the EU as of April 2019
- the Portuguese Tax Arbitration Court judgment in Case 596/2017-T, concerning VAT on early termination payments charged by a telecommunication operator
- the CJEU judgement in Case C-165/17 (Morgan Stanley), on the determination of the deductible proportion of VAT on expenditure incurred by a branch for the transactions of its head office

Indirect Tax Highlights aims at providing an overview of the developments that may have an impact on the indirect tax management of VdA Legal Partners' Clients. It covers relevant legislation, case law and tax and customs authorities' guidance issued in the previous month. It also features important future developments and any changes for which businesses need to be prepared in the short term. This is a work in progress and as such your feedback is most welcome.

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CJEU | JUDGEMENT | DEDUCTIBLE PROPORTION – EXPENDITURE INCURRED BY THE BRANCH EXCLUSIVELY FOR THE TRANSACTIONS OF THE HEAD OFFICE – GENERAL COSTS INCURRED BOTH FOR THE BRANCH AND FOR THE HEAD OFFICE | C-165/17

On 24 January 2019, the Court of Justice of the European Union ("CJEU") issued its judgement in a case concerning the determination of the applicable deductible proportion of VAT incurred on expenditure borne by a branch registered in a Member State, which is used for transactions carried out by the principal establishment of that branch established in another Member State.

In its decision, the CJEU clarified that when determining the VAT recovery right on costs incurred by the branch, account must be taken of the taxpayer's external turnover, which includes the turnover of the foreign head office.

With regard to each category of costs, the CJEU then decided that:

- In cases where the branch incurred in expenses that were to be exclusively used for transactions carried out by the head office in the other Member State, the deductible VAT proportion would have to take into account the turnover and the supplies subject to VAT at the level of the head office (only turnover related to the costs of the branch).
- On other hand, in cases where the expenditure was used both for transactions of the fixed establishment and for transactions of the head office, the deduction method would have to include, besides the taxed transactions carried out by that branch, the supplies subject to VAT carried out by the head office.

CJEU | JUDGEMENT | DEMOLITION CONTRACT – PURCHASE CONTRACT FOR DISMANTLING | C-410/17

On 10 January, the CJEU issued its judgement in Case C-410/17, concerning the VAT treatment of a "demolition contract" in which the Company, besides having the responsibility to demolish the buildings of its client, also had the responsibility to dispose and process materials and waste generated by such demolition (the Company could resell the waste to other companies). The Company reduced the price charged for the demolition services on the estimated amount that would be gained from the sale of the waste. However, the Company did not discuss nor fix such reduction within the contract.

The CJEU ruled that the "demolition contract" included two different bilateral supplies for consideration (i.e. the supply of demolition services performed by the Company and the supply of scrap metal performed by the Client), that should be subject to VAT provided that the suppliers were taxable persons acting as such.

The CJEU, following the same rational, also ruled that the purchase of goods for dismantling and the disposal of those goods within a period fixed should not be regarded as one single supply but as two different bilateral supplies, i.e. the supply of goods to be dismantled performed by the client in which the Company would be acting as the purchaser; and the supply of dismantling services and waste disposal performed by the Company specifically meeting the needs of the seller. The consideration for the latter supply should be equal to the reduction of the purchase price of the goods to be dismantled.

CJEU | JUDGEMENT | CRIMINAL PROCEEDINGS CONCERNING VAT OFFENCES | C-310/16

CJEU ruled that a national court may apply a provision that excludes, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorization, where that authorization was given by a court that lacked jurisdiction, in a situation in which that evidence alone is capable of proving that the offences in question were committed. It is worth mentioning that in its judgement the CJEU invoked articles 51 and 52 of the Charter of Fundamental Rights of the European Union.

CJEU | OPINION AG | REFUND OF VAT – DIRECTIVE 2008/9/EC | C-133/18

Advocate General Hogan delivered his opinion on 17 January 2019, on a question concerning the interpretation of the time limit imposed by Article 20(2) of Council Directive 2008/9/EC of 12 February 2008 for replying to a request for information made by a Tax Authority in the context of a refund of VAT from a Member State in which the taxable person / applicant is not established. Advocate General Hogan proposes that Article 20(2) does not create a mandatory time limit and if the taxable person / applicant fails to comply with the one-month time limit, he may regularize its VAT refund application by adducing evidence in the context of an appeal pursuant to Article 23 of the same Directive.

CJEU | OPINION AG | ADMISSION TO EDUCATIONAL EVENT – SEMINAR REQUIRING ADVANCE REGISTRATION AND PAYMENT

Advocate General Sharpston delivered his opinion on 10 January 2019, concerning the interpretation of the expression “supplies in respect of admission to educational events” as established in Article 53 of Directive 112/2006 (VAT Directive). This was relevant to determine whether, in the event of a seminar where both the organizing and the participating parties (made up solely of taxable persons) are established in one Member State, but the event takes place in a different Member State, the place of supply shall be determined according to Article 44 of the VAT Directive (general B2B services place of supply rule) or Article 53 (admission to educational events).

Advocate General Sharpston proposes that the expression “supplies in respect of admission to educational events” be interpreted as covering a service supplied solely to taxable persons as long as the essential element consists of selling rights for individuals to be admitted to a professional educational seminar, where that seminar takes place in a specified location and its subject matter is defined in advance.

EUROPEAN COMMISSION – INFRINGEMENT REFERRALS – GERMANY – ITALY – UK

On 24 January 2019, the Commission referred three Member States to the CJEU for failure to align with EU VAT rules. The Commission referred (i) Germany for rejecting certain applications of VAT refunds for businesses in other Member States, (ii) Italy for its failure to amend its legislation that provides a reduced tax rate for Italians living abroad buying their first housing on Italian soil and (iii) the United Kingdom for extending the scope of a VAT measure which allows VAT derogations for certain commodity markets.

EUROPEAN COMMISSION – VAT COMMITTEE GUIDELINES – SYNDICATED LOANS AND VAT IDENTIFICATION NUMBER

The latest list of the guidelines, resulting from meetings of the VAT Committee up until 8 January 2019, were recently made available. This list includes Guidelines 955 and 956, both resulting from the meeting of 13 April 2018.

In Guideline 955, on the VAT treatment of certain services provided in relation to syndicated loans, the VAT Committee agreed almost unanimously that management services provided by the credit manager (one of the syndicated banks) constitute one supply of services regardless of whether the beneficiary of such services is the borrower, the syndicated banks or both and are exempt in accordance with article 135(1)(c) of the VAT Directive. The VAT Committee also agreed almost unanimously that management of the credit guarantees by the guarantees agent (one of the syndicated banks) constitutes one supply of services, regardless of whether the beneficiary of such service is the borrower and is exempt in accordance with article 135(1)(c) of the VAT Directive.

In Guideline 956, on the significance of the VAT identification number, the VAT Committee has agreed almost unanimously that, if the supplier of telecommunications, broadcasting and electronically supplied services treats a customer that has not provided his VAT identification number as a taxable person, the burden of the proof lies on him and he must hold sufficient information to substantiate the status of the customer as a taxable person.

PORTUGAL | TAX ARBITRATION COURT

EARLY TERMINATION PAYMENTS CHARGED BY TELECOMMUNICATIONS OPERATOR | CASE 596/2017-T

On 8 January 2019, the Portuguese tax arbitration Court issued its judgement in Case 596/2017-T. This case deals with the VAT treatment of amounts charged to costumers following the early termination of contracts of telecommunications services that provide for minimum commitment periods (“tie-in periods”) in return for favorable terms offered to the customers, particularly in the form of a lower basic monthly amount. In case of non-compliance with the tie-in period for a reason due to the customer, the contracts provide that the telecommunications operator is entitled to compensation corresponding to the amount of the agreed lower basic monthly amount multiplied by the number of months that would elapse between the early termination and the end of the tie-in period.

This case had been stayed by the national Court until the CJEU judgement in Case C-295/17 (in a preliminary ruling referred in another case still pending in the national tax arbitration Court), where the CJEU ruled that in the event of early termination of the contract by its customer, whenever an economic operator receives a predetermined amount, which corresponds to the amount he would have received if the contract had been carried through, that amount is an integral part of the total price paid for the services, constitutes remuneration of the supply of services and is subject to VAT.

The Court stressed that consideration of the economic and commercial criterion is a fundamental criterion for the application of the common system of VAT and that, inasmuch as the telecommunications operator has the right to payment of the same payment for services which it undertook to supply in the event the customer had not terminated his contract, the early termination of the contract by the customer does not alter the economic reality of the relationship between the telecommunications operator and its customer.

With regard to the national Court doubts on the effect on chargeability of VAT in the absence of actual recovery of early termination amounts payable, the CJEU essentially endorsed AG Kokott’s Opinion, which provided two key indications to the national court: the taxable amount is the total amount obtained or to be obtained by the supplier; according to the CJEU’s case law, established, the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him. If the final consumer does not pay the taxable person, the taxable person therefore does not substantively owe any VAT. The basis for charging VAT is not applicable because the taxable person has not ultimately provided any services for consideration. The finding that there is a sufficient degree of certainty that the early termination amounts will not be recovered falls within the exclusive jurisdiction of the national court, taking into account the fundamental rights of the taxable person and the principle of proportionality.

In its decision, which is still subject to appeal, the tax arbitration Court considered as established facts that:

- the payment due to the telecommunications operator in case of non-compliance with the tie-in period did not necessarily correspond to the same payment for services which it undertook to supply in the event the customer had complied with the tie-in period
- the early termination of the contract for a reason due to the customer altered the economic reality of the relationship between the telecommunications operator and its (former) customer
- only a reduced part of the early termination payments charged by the telecommunications operator had actually been paid by the customers.

With relation to the first established fact, in view of the described factual background, on the one hand, the monthly amounts paid by customers often exceeded the lower basic monthly amount, due to the customers' use of services which the telecommunications operator undertook to supply in the agreed contract, but which were not covered by that lower basic monthly amount (i.e. the monthly amount paid by the customers often exceeded the lower basic monthly amount on the basis of which the early termination payment were calculated). On the other hand, the duration of the contracts generally largely exceeded the tie-in period (i.e. the duration of the contract, which in average exceeded five years, does not correspond to the tie-in period).

However, the national court

- ruled that the treatment provided to early termination payments by the national legislation or by national courts and the objective to discourage customers from not observing the tie-in period are irrelevant
- ruled that in view of the judgement in case C-295/17, it is bound by the CJEU interpretation according to which the early termination payments charged by the telecommunications operator to the customers are an integral part of the total price paid for the services, constitute remuneration of the supplies of services and are subject to VAT
- dismissed the telecommunications operator's request to the annulment in entirety of the notices for payment of VAT (and compensatory interest) on the full early termination amounts charged to the customers
- dismissed the telecommunications operator's alternative request to the partial annulment of the notices for payment of VAT (and compensatory interest) so that VAT payable would be deducted from the amount actually received by the service provider from his customer, although conditional upon the Portuguese Tax and Customs Authority obligation to carry out, under the conditions determined by national law, an adjustment of the corresponding VAT, as provided in Article 90 of the VAT Directive, so that the VAT is deducted from the amount actually received by the service provider from his customer
- dismissed the telecommunications operator's request to be compensated for the costs on providing guarantee for the payment of VAT and compensatory interest

The case raises piercing questions on the VAT treatment of payments deemed as compensation, not only for the telecommunication sector, but also across many other industries. The compatibility of the national court's decision with EU VAT rules as interpreted by the CJEU may be debated too. It may also lead to an intense discussion on the proportionality of conditions determined by national law and their compliance with Article 90 of the Directive, namely, when, from a legal standpoint, the taxable person can no longer recover the amounts and the VAT from the customer). Finally, in view of the indication in AG Kokott's Opinion, it can as well be scrutinized in light of the fundamental rights of the taxable person, as laid down in the Constitution or other national laws and in the Charter of Fundamental Rights of the European Union, of which national courts are also safe guardians.

LEGISLATIVE DEVELOPMENTS

PORTUGAL | MINISTERIAL ORDER 6-A/2019 – CO₂ SURCHARGE

Sets the CO₂ surcharge rate for energy products and the value of the surcharge arising from the application of the rates to the surcharge factors for each product.

PORTUGAL | MINISTERIAL ORDER 31/2019 – SIMPLIFIED INFORMATION/ANNUAL STATEMENT AND ACCOUNTING SAFT-T(PT)

On 27 January 2019, Ministerial Order 31/2019 approved new requirements for the filing in of the Companies' Simplified Information/Annual Statement ("Informação Empresarial simplificada/Declaração Anual" – IES/DA) and the Accounting SAF-T (PT) file. The new rules are applicable from IES/DA due in 2019 and onwards

The new requirements may be summarized as follows:

- Previously to the electronic submission of the IES/DA, Companies must fill in and validate the Accounting SAF-T (PT) file;
- The Decree establishes new deadlines for filing the Accounting SAF-T (PT) by a certified accountant and penalties for the non-filing and for the replacement of the SAF-T (PT) after the established deadlines;
- The data extracted from the Accounting SAF-T (PT) files will be automatically included in annexes A and I of the IES/DA. Fields already filed with the SAF-T (PT) data are not editable and can only be amended by filing a new Accounting SAF-T (PT) file;
- The Decree approves specific rules related with the information that has to be delivered to the Portuguese Tax Authorities together with the IES/DA for entities who are obliged to have consolidated accounts, funds, collective investments vehicles, among others.

CAPE VERDE | DECREE-LAW 2/2019 – CUSTOMS CLEARANCE PROCEDURES FOR ENTITIES OPERATING IN THE CIN-CV

Decree-Law 2/2019, of 10 January 2019, sets forth the rules and approves the official form regarding responsibility statements to be used by companies carrying out customs transactions in the International Business Center of Cape Verde.

TAX AND CUSTOMS AUTHORITIES

PORTUGAL | CIRCULAR LETTER 15685/2019 – MARKETING EXPENSES AND CUSTOMS VALUE

The Portuguese Tax Authority clarifies that in the event of an import, when the total price invoiced for the imported goods is deducted from marketing expenses (the buyer-importer obtains a discount on the purchase or receives a credit for future expenses), these discounts, adjustments or reductions of the price are not considered in the customs value.

COMING SOON...

CJEU | HEARING | 7 FEBRUARY | C-692/17

Exemption applicable to the granting and negotiation of credit and the management of credit | Assignment of the position held by a taxable person in an enforcement proceeding for recovery of a debt

CJEU | OPINION AG | 12 FEBRUARY | C-568/17

Place of supply | Live interactive erotic webcam sessions

CJEU | JUDGEMENT | 14 FEBRUARY | C-531/17

Intra-community Transfers | Tax Evasion | Exemption

CJEU | OPINION AG | 27 FEBRUARY | C-26/18

Importation | Condition of entrance of goods in the economic network of the European Union

BE PREPARED...

ANGOLA | NEW VALUE ADDED TAX CODE

The Angolan National Assembly approved a bill enacting the new VAT Code, which is expected to be implemented in Angola as of July 2019.

Reportedly, VAT will replace the existing Consumption Tax and cover the great majority of products, services, commercial transactions and imports.

For more information, please [click here](#).

MOZAMBIQUE | INTELLIGENT CUSTOMS

Mozambican authorities are planning on introducing an Intelligent Customs system, which should help to reduce bureaucracies related with the importation of goods into the country.

MOZAMBIQUE | VAT RATE

Mozambican Government is evaluating the possibility to reduce the current VAT rate of 17% by at least one percentage point, while broadening the tax base through the reduction of VAT exemptions.

PORTUGAL | VOUCHERS: NEW RULES EFFECTIVE SINCE 1 JANUARY 2019

Directive 2016/1065 harmonized the rules on the VAT treatment of vouchers. With a narrower scope than the Commission's original 2012 proposal, the Directive defines single-purpose vouchers and multi-purpose vouchers and sets rules to determine, for each type of voucher, (i) the moment of chargeability of the VAT; and (ii) the taxable value of the transactions.

This Directive was transposed to Portuguese domestic legislation through the State Budget Law for 2019, with the Portuguese scheme determining that in a situation where a multi-purpose voucher is not redeemed by the final consumer during its validity period, and the consideration received for such voucher is kept by the seller, VAT is due for the supply of the voucher whenever it expires. This national rule goes beyond the EU legal framework since taxation in the event of expiry of a multi-purpose voucher is not targeted by the Directive.

The new rules are effective and apply to vouchers issued after 1 January 2019.

PORTUGAL | B2G MANDATORY E-INVOICING EFFECTIVE ON 18 APRIL 2019

Directive 2014/55/EU provides for the mandatory issuance of electronic invoices in the execution of contracts under public tender. Decree-Law 111-B/2017 added a new Article 299-B to the Portuguese Public Procurement Code ("CCP"), partially transposing Directive 2014/55/EU and referring its later regulation for future government legislation.

More recently, Decree-Law 123/2018 regulates the dates from which electronic invoicing is mandatory (18 April 2019 for the State and public institutes and 18 April 2020 for other public contractors); and the delegation, in the Shared Services Entity of Public Administration, I.P. ("ESPAP"), of the task of coordinating the implementation of electronic invoicing. A Ministerial Order that will define the complementary aspects and practical procedures regarding the electronic invoicing is still awaited.

PORTUGAL | THRESHOLD FOR TELECOMMUNICATIONS, BROADCASTING AND ELECTRONIC SERVICES | MOSS

The Portuguese State Budget Law for 2019, transposed Article 1 (1), (3) and (4) of Council Directive (EU) 2017/2455 of 5 December 2017, adding article 6-A to the Portuguese VAT Code, with effect as from 1 January 2019.

The new article 6-A of the Portuguese VAT Code provides that telecommunications, broadcasting and electronic services may be taxed in the Member-State of the supplier whenever the following conditions are met: the taxable person supplying the services is only established in one Member-State; (ii) services are supplied to non-taxable persons in another Member-State, (iii) those supplies do not exceed a threshold of € 10 000 in a year.

The purpose of this amendment is to reduce the burden for micro-businesses that do not exceed the € 10 000 threshold and are established in a Member State occasionally supplying such services to other Member States of having to comply with VAT obligations in Member States other than their Member State of establishment.

Also, the Portuguese State Budget Law for 2019, with effect as from 1 January 2019, derogates part of the Decree-Law 158/2014 (Mini One Stop Shop Scheme) by approving that taxable persons not established in the Community but having a VAT registration in a Member State, for example because they carry out occasional transactions subject to VAT in that Member State, can now register under MOSS special scheme for taxable persons not established within the Community. This derogation reduces the burden for such companies since they will no longer have to register in each Member State to where they supply such services.