Supplying Services to Taxable Persons Established in the EU and Taxable and Non-Taxable Persons Established Outside the EU - Explanatory Notes

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Contents

These Explanatory Notes are not legally binding. The notes do not express a formal opinion of the Malta Tax and Customs Administration ('MTCA') and the MTCA is not bound by any of the views expressed therein. The purpose of these explanatory notes is to provide an explanation of the main VAT implications connected with certain supplies of services made to customers established outside of Malta and to clarify common issues that may arise in practice.

They are not to be construed as guidelines, explanations, or instructions in terms of article 75 of the VAT Act [Chapter 406 of the laws of Malta] and shall not in any way prejudice the powers of the Commissioner for Tax and Customs in terms of the provisions of the VAT Act. These notes do not constitute professional advice and should not be relied upon as the sole basis for any decision or action. Reference should always be made to the provisions of VAT Law itself. For specific circumstances, it is always advisable to refer to the law and/or seek specialist guidance.

Simplified wording has been used for the purpose of these notes which may differ from that contained in the law in order to ease understandability for users. These Explanatory Notes are not exhaustive. This means that although they provide detailed information on a number of issues, there might be elements that are not included in this document.

These Explanatory notes are a work in progress and shall be updated from time to time as may be necessary to ensure their continued relevance. These notes are not a final product but reflect the state of play at a specific point in time in accordance with the available knowledge and experience.

Disclaimer: The purpose of this document is to provide a simplified overview of the salient provisions of the law and are not to be construed as guidelines, explanations or instructions in terms of article 75 of the VAT Act.

Purpose and Scope

The purpose of these explanatory notes is to provide an explanation of the general VAT treatment of services provided to customers established outside Malta, namely to a:

1. taxable person acting as such (i.e. services supplied to another business for the purpose of the business activities of that business); and
2. to a non-business customer established outside the European Union (EU) and consisting of:
    - transfers and assignments of copyrights, patents, licences, trademarks and similar rights;
    - advertising services;
    - the services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information;
    - obligations to refrain from pursuing or exercising, in whole or in part, a business activity or a right;
    - banking, financial and insurance transactions including reinsurance, with the exception of the hire of safes;
    - the supply of staff;
    - the hiring out of movable tangible property, with the exception of all means of transport.

These notes do not cover the below services which are governed by special rules:

a) Services to non-business customers established in the EU;
b) Services by intermediaries;
c) Services connected with immovable property;
d) Transport services;
e) Cultural, artistic, sporting, scientific, educational, entertainment and similar services, ancillary transport services and valuations of and work on movable property;
f) Restaurant and catering services;
g) Services consisting of the hiring of means of transport;
h) Restaurant and catering services for consumption on board ships, aircrafts or trains and;
i) Telecommunications, broadcasting and electronic services to non-taxable persons.

For more information on the above list of services, it would be opportune to refer to the provisions of Part Two of the Third Schedule to the VAT Act.

These notes are therefore relevant to persons whose services do not fall under any of the above categories (a) to (i).

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1. Services provided to a taxable person acting as such: The General *Place of Supply* Rule for business-to-business (B2B) Transactions

In terms of item 2(a) of Part Two of the Third Schedule[1] to the VAT Act [hereinafter referred to as the "General Rule"]:

> *"The place of supply of services to a taxable person[2] acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment[3] of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides."*

This means that services provided by a business to another business which fall under this general rule will be subject to VAT in the place where the business customer is established.

For the avoidance of doubt, where your customer is established in the EU and does not have a valid VAT identification number, your customer shall not be treated as a taxable person acting as such.

Scenario Analysis:

Scenario 1

Person A, a taxable person established in Malta and duly registered for VAT purposes in terms of article 10 of the VAT Act is supplying language translation services (which are subject to the General Rule) to Person B, a taxable person established in Germany having a valid German VAT identification number (which has been validated via the VIES VAT Number Validation website[4]).

For the purpose of this scenario analysis, it is being assumed that Person A and Person B do not maintain a fixed establishment outside their respective countries of establishment.

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[1] Transposing article 44 of Council Directive 2006/112/EC of 28 November 2006.
[2] In order to determine whether a customer shall be treated as a taxable person, reference should be made to Article 18 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011
[3] For more information on 'Fixed Establishments' please refer to Article 11 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011.
[4] VIES is the European Commission VAT number validation website and may be accessed via the following link: https://ec.europa.eu/taxation_customs/vies/#/vat-validation

In terms of the General Rule, this transaction is deemed to take place in Germany for VAT purposes, i.e. the place where the customer [Person B] is established. Therefore, such transactions fall outside the scope of Maltese VAT.

Since Person A is not established in Germany for VAT purposes, VAT shall be payable by Person B, in accordance with article 196 of Council Directive 2006/112/EC (hereinafter the "**VAT Directive**"). On this basis, Person A would have an obligation to issue a tax invoice[5] to Person B without charging Maltese VAT and quoting the verified German VAT identification number provided by Person B, also indicating the words "Reverse-charge" as well as "Article 44 and 196 of the EU VAT Directive 2006/112/EC" on the tax invoice. In addition, Person A would have an obligation to report such a supply to Person B in his recapitulative statement[6].

Assuming that the supply is subject to VAT in Germany, Person B would be liable to account for the VAT on that supply in Germany.

Scenario 2

Person C, a taxable person established in Malta and duly registered for VAT purposes in terms of article 11 of the VAT Act is supplying IT software engineering services (which are subject to the General Rule) to Person D, a taxable person established in Denmark having a valid Danish VAT identification number (which has been validated via the VIES VAT Number Validation website[7]).

For the purpose of this scenario analysis, it is being assumed that Person C and Person D do not maintain a fixed establishment outside their respective countries of establishment.

In terms of the General Rule, this transaction is deemed to take place in Denmark for VAT purposes, i.e., the place where the customer [Person D] is established. Consequently, VAT shall be payable by Person D, in accordance with article 196 of the VAT Directive. Furthermore, pursuant to article 12(3a) of the VAT Act, Person C shall, if not already registered under article 12, apply to be registered under article 12 by not later than the date on which he supplies such service.

In such a scenario, person C shall not be required to issue a tax invoice[8] and/or a fiscal receipt[9] in terms of the VAT Act. Nonetheless, person C may still wish to raise an invoice for other commercial reasons. Such invoice shall not be subject to the provisions of the VAT Act.

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[5] For more information on the format and content of such invoices, please refer to Annex 1 of the Tax Invoices and Fiscal Receipts FAQs.

[6] Article 262(1)(c) of Council Directive 2006/112/EC of 28 November 2006 as transposed in article 30(2)(c) of the Malta VAT Act.

[7] VIES is the European Commission VAT number validation website and may be accessed via the following link: https://ec.europa.eu/taxation_customs/vies/#/vat-validation

[8] In terms of article 50 of the VAT Act.

[9] In terms of Item 2B of the Thirteenth Schedule to the VAT Act.

Since Person C is not registered under article 10 of the VAT Act, the submission of a recapitulative statement shall not be required by Person C[10].

Scenario 3

Person E, an individual established in Malta and duly registered for VAT purposes in terms of article 11 of the VAT Act is supplying photography services (which are subject to the General Rule) to Person F, a company established in the United States of America ('USA') where such company has not presented a valid EU VAT identification number to Person F, however has reasonably demonstrated that it is a taxable person acting as such (i.e. engaged in a business and is procuring such services for its business needs) and Person E has sufficient and appropriate evidence to substantiate that claim[11].

For the purpose of this scenario analysis, it is being assumed that Person E and Person F do not maintain a fixed establishment outside their respective countries of establishment.

In terms of the General Rule, this transaction falls to take place in USA, i.e., the place where the customer (Person H) is established. Consequently, such supplies would be considered as falling outside scope of EU VAT[12] and accordingly no Maltese VAT is to be charged by Person E for such services.

In such a scenario, since the supply is outside the scope of Maltese VAT, person E shall not be required to issue a tax invoice and/or a fiscal receipt in terms of the VAT Act. Nonetheless, person E may still wish to raise an invoice for other commercial reasons. Such invoice shall not be subject to the provisions of the VAT Act.

In terms of the VAT Act, Person E (the supplier) would not have an obligation to apply for an article 10 VAT registration for the purpose of carrying out these supplies, however in terms of sub-articles (5) and (6) of article 10 of the VAT Act, Person E **may** apply to be registered under this article on the basis that he carries on or intends to carry on an economic activity and is likely to be entitled to claim input tax credits under the provisions of article 22 of the VAT Act. Person G may consider such a registration, in particular, for the purposes of claiming back any recoverable input VAT incurred / self-charged in Malta.

If not registered for VAT purposes in terms of article 10, Person E must also consider whether an article 12 VAT registration would be required. For more information in this respect, please click here.

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[10] In terms of Article 30(2) of the VAT Act.

[11] Reference may be made to Article 18(3) of the EU VAT Implementing Regulation to identify the instances when a supplier may regard a customer established outside the EU as a taxable person.

[12] In terms of Article 2 of Council Directive 2006/112/EC of 28 November 2006.

Scenario 4

Person G, an individual established in Malta is assessing whether he is required to register for a VAT number in Malta for the sole purpose of supplying personal security services in Malta to Person H, a company established in Switzerland, where such company has not presented a valid EU VAT identification number to Person G or any other satisfactory documentation proving its status as a taxable person acting as such[13].

For the purposes of this scenario analysis, it is being assumed that Person G and Person H do not maintain a fixed establishment outside their respective countries of establishment.

In terms of the General Rule, this transaction is deemed to take place in Malta and would be subject to Malta VAT on the basis that the supply cannot be deemed to be made to a taxable person acting as such.

2. Services provided to a non-business customer established outside the European Union (EU) and consisting of certain types of services

In terms of item 11 of Part Two of the Third Schedule to the VAT Act:

> *"The place of supply of the following services to a* ***non-taxable person*** *who is established or has his permanent address or usually resides outside the Community, shall* ***be the place where that person is established, has his permanent address or usually resides****:*
>
> *(a) transfers and assignments of copyrights, patents, licences, trademarks and similar rights;*
> *(b) advertising services;*
> *(c) the services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information;*
> *(d) obligations to refrain from pursuing or exercising, in whole or in part, a business activity or a right referred to in this item;*
> *(e) banking, financial and insurance transactions including reinsurance, with the exception of the hire of safes;*
> *(f) the supply of staff;*
> *(g) the hiring out of movable tangible property, with the exception of all means of transport;…"*

[13] Reference may be made to Article 18(3) of the EU VAT Implementing Regulation to identify the instances when a supplier may regard a customer established outside the EU as a taxable person.

Scenario 5

Person I, a Maltese taxable person, shall shortly be entering into an agreement for the provision of engineering services to an individual resident in the United Kingdom [UK], Person J. In terms of the aforementioned place of supply rule, such a supply will be deemed to take place in the UK for VAT purposes. Given that this supply would therefore fall outside scope of Maltese VAT, Person I would not charge Maltese VAT. Person I, whilst acknowledging his status as a "*taxable person*" for VAT purposes, is considering whether he requires to register for VAT purposes in Malta since the only supplies he is providing fall outside the scope of Maltese VAT.

In terms of the VAT Act, Person I would not have an obligation to register for VAT purposes in Malta for the purpose of carrying out these supplies. However, in terms of sub-articles 10(5) and 10(6) of the VAT Act, Person I **may** apply to be registered under this article on the basis that he carries on or intends to carry on an economic activity and is likely to be entitled to claim input tax credits under the provisions of article 22 of the VAT Act. Person I may consider such a registration, in particular, for the purposes of claiming back any recoverable input VAT incurred/self-charged in Malta.

If not registered for VAT purposes in terms of article 10, Person I must also consider whether an article 12 VAT registration would be required. For more information in this respect, please click here.

In such a scenario, since the supply is outside of scope of Maltese VAT, person I shall not be required to issue a tax invoice and/or a fiscal receipt in terms of the VAT Act. Nonetheless, person I may still wish to raise an invoice for other commercial reasons. Such invoice shall not be subject to the provisions of the VAT Act.

TAX & CUSTOMS ADMINISTRATION

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