

Ministry of Finance explains how not to lose eligibility for zero VAT on ICS

I. Ministry of Finance explains how to understand intra-Community supply regulations

Right before the end of the year the Ministry of Finance published its 17 December 2020 tax explanations on documenting intra-Community supplies of goods for the purposes of value added tax. The explanations focus primarily on defining the circumstances in which goods are deemed to have been dispatched or transported from the territory of a member state to another member state, which is one of the conditions for the application of the rate of 0% on an intra-Community supply of goods (ICS). Although the explanations are meant to ensure consistent application of tax laws by the tax authorities, taxable persons who apply them will enjoy protection similar to that provided by a tax interpretation, which means that compliance with the explanations cannot be harmful to taxable persons.

The minister of finance has issued extensive tax explanations on how to apply the deemed supply of goods from one to another EU member state to be able to use a tax exemption (rate of 0%) on intra-Community supplies of goods (ICS).

II. Application of 0% preferential rate is not always possible

Under currently binding regulations, ICS is subject to taxation with the rate of 0% when three conditions are met. Firstly, when the taxable person has made a supply to a buyer with an appropriate and valid identification number for intra-Community transactions, assigned by the member state relevant to the buyer and containing the two-letter code used for value added tax provided by the buyer to the taxable person. Secondly, when prior to the deadline for the filing of a tax return for the given reporting period the taxable person holds evidence that the goods subject to ICS have been transported from the territory of the state and delivered to a buyer in the territory of another member state. Thirdly, when the taxable person is registered as a VAT EU taxable person while submitting the tax return in which the supply of goods is declared.

III. EU regulations provide for deemed supply of goods to the buyer

EU Regulation 282/2011 introduced a presumption that one of the conditions for the application of an exemption (rate of 0%) for an intra-Community supply of goods, consisting of the goods being dispatched or transported from a member state to their destination outside the territory of that state but in the territory of the EU - is deemed met in cases when the taxable person holds appropriate documents listed in the provisions of the Regulation. As, however, indicated by the minister of finance, a taxable person's use of the presumption provided for in Regulation 282/2011 does not mean that a supply will automatically be exempt (taxed at the rate of 0%). In order to apply the exemption (rate of 0%), the other conditions must also be met.

IV. Instead of on documents, the presumption may be based on the VAT Act

To use the exemption (rate of 0%) on ICS, taxable persons are not absolutely required to gather all the documents as indicated in Regulation 282/2011. To apply the exemption (rate of 0%) to ICS a taxable person may prove, in accordance with the provisions of the VAT Act, that the goods subject to an intra-Community supply have been transported from the territory of Poland and delivered to a buyer in the territory of a member state other than Poland in accordance with the principles and based on evidence indicated in the provisions of the VAT Act.

V. Two groups of documents for deemed supply

An extensive section of the explanations is dedicated to the principles of applying the deemed supply arising out of the EU regulation. Among others, they remind that for its purposes, two groups of documents are acceptable as proof of dispatch or transport. Group A: documents pertaining to the dispatch or transport of goods, such as a signed CMR waybill, bill of lading, invoice for air cargo transport or invoice from a cargo shipper. Group B: insurance policy for a dispatch or transport of goods or banking documents confirming payment for a dispatch or transport of goods; official documents issued by a public authority organ, such as a notary public, confirming the arrival of goods in the destination member state; acknowledgement of receipt issued by the keeper of the warehouse in the destination member state, confirming storage of the goods in that member state.

VI. At least two non-contradictory documents are needed

Where goods have been dispatched or transported by the seller or a third party acting on the seller's behalf, the seller benefits from deemed supply if he holds at least two documents from Group A, providing that these documents: do not contradict each other and have been issued by two different parties that are independent of each other, the seller and the buyer. The seller will also benefit if he has any single document from group A as well as any single document from Group B, where the documents: do not contradict each other and have been issued by two different parties that are independent of each other, the seller and the buyer.

VII. For goods transported by the buyer, the seller must receive statement of dispatch

Where goods have been dispatched or transported by the buyer or a third party acting on the buyer's behalf, the seller benefits from deemed supply if he holds: the buyer's written statement confirming that the goods have been dispatched or transported by the buyer or a third party acting on the buyer's behalf, and indicating the destination member state; at least two documents from Group A, where the documents do not contradict each other and have been issued by two different parties that are independent of each other, the seller and the buyer; any single document from Group A and any single document from Group B, where the documents do not contradict each other and have been issued by two different parties that are independent of each other, the seller and the buyer.



VIII. Documents must be in possession prior to filing SAF_VAT

Regulation 282/2011 provides that the buyer delivers to the seller a written statement by the tenth day of the month following the month of supply. As indicated in the explanations, this deadline is only instructional in nature. If therefore a taxable person receives the buyer's statement after the tenth day of the month following the month of supply, but prior to the deadline for the filing of the tax return (SAF_VAT) for that period, he will be able to benefit from deemed supply and the resulting rate of 0% on the ICS. This of course on the proviso of meeting the remaining conditions for exemption (application of the rate of 0%).

IX. No exemption available if parties are not independent of each other

The explanations also clarify that two parties are not considered "independent" if they have the same legal personality, and that parties with "family or other close personal, organizational, ownership, membership, financial or legal ties" cannot be considered independent of each other. Where the documents held by the taxable person have not been issued by two independent parties and the taxable person is not eligible to benefit from the presumption arising out of Regulation 282/2011, then in order to apply the rate of 0% to an ICS the seller should prove in accordance with the principles and based on the documents specified in the VAT Act that the goods covered by the intra-Community supply have been transported from the territory of Poland and delivered to the buyer in the territory of a member state other than Poland.

X. Tax authorities may rebut deemed supply

The tax authorities may rebut the presumption that the goods have been dispatched or transported from a member state to their destination outside the member state, but in the territory of the EU. The presumption is rebutted when while the essential premises exist the tax authorities are able to demonstrate that the goods have not in reality been dispatched or transported from a member state to their destination outside the member state, but in the territory of the EU. This may occur when, for example, during an inspection the tax authorities find that the goods are still present in the supplier's warehouse, or find out about an incident that occurred during transport, as a result of which the goods were destroyed prior to leaving the territory of Poland. The tax authorities may rebut the deemed supply by presenting evidence demonstrating that the goods have not in reality been dispatched or transported.





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XI. Questioned document may be replaced with another without defects

The explanations point out that a “rebuttal of presumption” should be differentiated from a situation where the tax authorities are able to show that a document presented as evidence contains incorrect information or its authenticity is questionable. In such cases, to use the exemption (rate of 0%) the seller could still provide other documents specified in Regulation 282/2011, which would allow him to benefit from the presumption (unless the tax authorities once again determine that the documents are incorrect or, for example, not authentic), or provide appropriate documents as per the VAT Act.

XII. The VAT Act requires a waybill and packing list

It should be remembered that under the VAT Act, the following may be considered as evidence of transport of goods, if together they confirm the delivery of goods subject to ICS to a buyer located in the territory of a member state other than Poland: shipping documents received from the carrier (shipper) handling the transport of the goods from the territory of Poland, clearly showing that the goods have been delivered to their destination in the territory of a member state other than Poland - if transport is commissioned to a carrier (shipper); shipment packing list. Such a shipping document would generally be a waybill setting out the terms of the contract for the transport of goods. A packing list is a type of specification of the items in the shipment, which the taxable person may prepare in either the form of a separate document or as part of the issued invoice, where in each case it is key to achieve the objective of being able to identify the goods that are the subject of the intra-Community supply.

The information presented herein does not constitute comprehensive information or opinion. Consult your adviser before making any decisions.

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