

July 2020

## Allocation of transport – impact on application of VAT rules relevant for distance selling of goods

*As can be seen from more detailed explanation that follows, it is obvious that VAT provisions related to transport allocation applicable in 2020 are not sufficiently precise, so the ECJ judgement that is mentioned below should be taken into account, while in 2021 new provisions will come into effect regulating this aspect more precisely. However, in case of both periods prior to the start of the application of the mentioned new provisions and periods after that date, the important conclusion is substantially the same, that is:*

- *when considering allocation of transport for the purpose of determining whether VAT rules for distance sale of goods are applicable, it is not sufficient just to take into account who has concluded a contract with a person who transports the goods and in whose name that contract is concluded, but it is necessary to analyse more details (e.g. does the supplier of goods promote transport service provided by a third party, does the supplier of goods participate in communication between a customer who acquires goods and a person engaged by the customer for a service of goods transportation, etc.).*

In 2020 VAT rules related to distance selling of goods are in the focus of tax experts and taxpayers, due to expected start of the application of new VAT rules for distance selling (the new rules should have been applicable as of 1 January 2021, but the start of the application will be postponed to 1 July 2021). Regardless of tax reasons, distance selling of goods in 2020 is more in focus due to extraordinary circumstances caused by COVID 19.

According to currently applicable rule (in 2020) from Art 33 paragraph 1 of EU VAT Directive 2006/112 the following is applicable:

*“1. By way of derogation from Article 32, the place of supply of goods **dispatched or transported by or on behalf of the supplier** from a Member State other than that in which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when*

srpanj 2020.

## Alokacija prijevoza – učinak na primjenu PDV pravila koja se odnose na isporuku robe na daljinu

*Kako se može vidjeti iz detaljnijeg objašnjenja u nastavku, očito je kako odredbe PDV propisa vezane za alokaciju prijevoza koje su u 2020. na snazi nisu dovoljno detaljne, pa stoga u obzir treba uzeti spomenutu presudu Europskog suda koja se spominje u nastavku teksta, dok će u 2021. stupiti na snagu odredbe koje ovo područje reguliraju ipak nešto detaljnije. No, i u slučaju razdoblja prije stupanja na snagu tih odredbi i u slučaju razdoblja nakon stupanja na snagu tih odredbi, bitan zaključak je u suštini isti, odnosno:*

- *prilikom razmatranja alokacije transporta za potrebe određivanja jesu li primjenjiva PDV pravila koja se odnose na prodaju robe na daljinu, nije dovoljno uzeti u obzir samo to tko je sklopio ugovor s osobom koja prevozi robu i u čije ime je taj ugovor o prijevozu sklopljen, već treba ući u analizu veće razine detalja (npr. promiče li dobavljač robe na neki način usluge dostave koje obavlja netko treći, sudjeluje li dobavljač robe na neki način u kontaktiranju između kupca robe i osobe koju će kupac robe angažirati da mu pruži uslugu transporta robe, itd.).*

U 2020. su PDV pravila koja se odnose na prodaju robe na daljinu u fokusu poreznih stručnjaka i porezni obveznika, a razlog je u tome što se očekuje početak primjene novih PDV pravila vezanih za prodaju robe na daljinu (koja su se trebala započeti primjenjivati 1. siječnja 2021., ali će početak primjene biti prolongiran na 1. srpnja 2021). Neovisno od poreznih razloga, prodaja robe na daljinu je u 2020. godini dodatno u fokusu i zbog izvanrednih okolnosti uzrokovanih COVID-om 19.

Sukladno trenutno primjenjivom pravilu (u 2020.) iz čl. 33. stavka 1. EU PDV Direktive 2006/112 primjenjivo je sljedeće:

*„1. Iznimno od odredaba članka 32., mjestom isporuke robe čiju **otpremu ili prijevoz izvršava dobavljač ili netko drugi u njegovo ime** iz države članice koja nije ona u kojoj otprema ili prijevoz robe završava, smatra se mjesto gdje je roba smještena u vrijeme kad otprema*

*dispatch or transport of the goods to the customer ends, where the following conditions are met:*

- (a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;*
- (b) the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier."*

As of 1 July 2021 the new definition (Art 14 paragraph 4 item 1 of EU VAT Directive 2006/112) shall be applicable, stating as follows:

*„'intra-Community distance sales of goods' means supplies of goods **dispatched or transported by or on behalf of the supplier, including where the supplier intervenes indirectly in the transport or dispatch of the goods**, from a Member State other than that in which dispatch or transport of the goods to the customer ends, where the following conditions are met:*

- (a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;*
- (b) the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier;"*

At the same time, as of 1 July 2021 the new provision from Art 33 item (a) shall become applicable instead of the provision from Art 33 paragraph (a), where the new provision reads as follows:

*„By way of derogation from Article 32:*

- (a) the place of supply of intra-Community distance sales of goods shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends;"*

Certain interpretations in this respect are included the Council Implementing Regulation (EU) 2019/2026 of 21 November 2019 amending Implementing Regulation (EU) No 282/2011 stating as follows in preamble part:

*"(3) The definitions of 'intra-Community distance sales of goods' and 'distance sales of goods imported from third territories or third countries' in Directive 2006/112/EC also cover supplies of goods where **the supplier intervenes indirectly** in their dispatch or transport to the customer. Therefore, to ensure the correct and uniform application of those definitions*

*ili prijevoz robe kupcu završava, ukoliko su ispunjeni sljedeći uvjeti:*

- (a) isporuka robe obavlja se za poreznog obveznika ili za pravnu osobu koja nije porezni obveznik a čije stjecanje robe u Zajednici ne podliježe plaćanju PDV-a u skladu s člankom 3. stavkom 1., ili za bilo koju drugu osobu koja nije porezni obveznik;*
- (b) isporučena roba nije niti novo prijevozno sredstvo niti roba koju isporučuje dobavljač ili se isporučuje u ime dobavljača, nakon montaže ili instalacije, s ili bez pokusnog rada."*

Od 1. srpnja 2021. godine bit će primjenjiva nova definicija (čl. 14. stavak 4. točka 1. EU PDV Direktive 2006/112) koja glasi kao što slijedi:

*„**prodaja robe na daljinu unutar Zajednice'** znači isporuka robe koju **otprema ili prevozi dobavljač ili netko drugi za njegov račun, među ostalim kada dobavljač neizravno sudjeluje u prijevozu ili otpremi robe**, iz države članice koja nije ona u kojoj otprema ili prijevoz robe kupcu završava, ako su ispunjeni sljedeći uvjeti:*

- (a) isporuka robe obavlja se poreznom obvezniku ili pravnoj osobi koja nije porezni obveznik, a čije stjecanje robe unutar Zajednice ne podliježe plaćanju PDV-a u skladu s člankom 3. stavkom 1., ili bilo kojoj drugoj osobi koja nije porezni obveznik;*
- (b) isporučena roba nije ni novo prijevozno sredstvo ni roba koju isporučuje dobavljač ili netko drugi za njegov račun, nakon montaže ili instalacije, s pokusnim radom ili bez njega;*

Istodobno, umjesto odredbe iz čl. 33. st. 1. EU PDV Direktive 2006/112 od 1. srpnja 2021. će postati primjenjiva i nova odredba iz čl. 33. točka (a) EU PDV Direktive 2006/112, koja glasi:

*„Odstupajući od članka 32.:*

- (a) Mjestom isporuke za prodaju robe na daljinu unutar Zajednice smatra se mjesto gdje se roba nalazi u trenutku u kojem otprema ili prijevoz robe kupcu završava;"*

Određena tumačenja u tom kontekstu su uključena u Provedbenu uredbu Vijeća (EU) 2019/2026 od 21. studenoga 2019. o izmjeni Provedbene uredbe (EU) br. 282/2011 gdje se u dijelu preambule navodi:

*„(3) Definicijama „**prodaja robe na daljinu unutar Zajednice**” i „**prodaja na daljinu robe uvezene iz trećih područja ili trećih zemalja**” iz Direktive 2006/112/EZ obuhvaćaju se i isporuke robe u slučajevima **kad dobavljač neizravno sudjeluje u njihovoj isporuci ili prijevozu kupcu**. Stoga je, kako bi se osigurala ispravna i jedinstvena primjena tih definicija u*

*across Member States and to enhance legal certainty for both economic operators and tax administrations, it is necessary to clarify and define the meaning of the term ‘indirectly’ in this context.”*

In order to have this more precisely defined, new Art 5.a (which will start to be effective as of 1 July 2021) has been added in the Implementing regulation 2011/282, which provides for as follows:

*‘For the application of Article 14(4) of Directive 2006/112/EZ, goods shall be considered to have been dispatched or transported by or on behalf of the supplier, including where the supplier intervenes indirectly in the dispatch or transport of the goods, in particular in the following cases:*

- (a) where the dispatch or transport of the goods is subcontracted by the supplier to a third party who delivers the goods to the customer;*
- (b) where the dispatch or transport of the goods is provided by a third party but the supplier bears either the total or partial responsibility for the delivery of the goods to the customer;*
- (c) where the supplier invoices and collects the transport fees from the customer and further remits them to a third party who will arrange the dispatch or transport of the goods;*
- (d) where the supplier promotes by any means the delivery services of a third party to the customer, puts the customer and a third party in contact or otherwise provides to a third party the information needed for the delivery of the goods to the consumer.*

*However, goods shall not be considered to have been dispatched or transported by or on behalf of the supplier where the customer transports the goods himself or where the customer arranges the delivery of the goods with a third person and the supplier does not intervene directly or indirectly to provide or to help organise the dispatch or transport of those goods.”*

As above stated provisions are provisions with effect as of 1 July 2021, it is interesting to note that in June 2020 the ECJ brought a judgement in case **C-276/18** in which has concluded as follows:

*„Article 33 of Directive 2006/112 must be interpreted as meaning that, when goods sold by a supplier established in one Member State to purchasers residing in another Member State **are delivered to those purchasers by a company recommended by that supplier, but with which the purchasers are free to enter into a contract for the purpose of that delivery, those goods must be regarded as dispatched or transported ‘by or on behalf of the supplier’ where the role of that supplier is predominant in terms of initiating and organising the essential stages of the dispatch or transport of those goods, which it is for the referring court to ascertain, taking account of all the facts***

*državama članicama i unaprijedila pravna sigurnost i za gospodarske subjekte i za porezne uprave, potrebno pojasniti i definirati značenje pojma „neizravno” u tom kontekstu.“*

Kako bi se to preciznije definiralo, u Provedbenu uredbu 2011/282 je uvedena odredba sadržana u čl. 5.a. (čija primjena treba započeti tek 1. srpnja 2021. godini) koja propisuje kao što slijedi:

*„Za potrebe primjene članka 14. stavka 4. Direktive 2006/112/EZ smatra se da je robu otpremio ili prevezao dobavljač ili da je to obavljeno u njegovo ime, među ostalim i ako dobavljač neizravno sudjeluje u otpremi ili prijevozu robe, osobito u sljedećim slučajevima:*

- (a) ako dobavljač otpremu ili prijevoz robe daje u podugovor trećoj strani koja robu dostavlja kupcu;*
- (b) ako otpremu ili prijevoz robe obavlja treća strana, ali dobavljač snosi potpunu ili djelomičnu odgovornost za dostavu robe kupcu;*
- (c) ako dobavljač izdaje račun i naplaćuje naknade za prijevoz od kupca i zatim ih uplaćuje trećoj strani koja će organizirati otpremu ili prijevoz robe;*
- (d) ako dobavljač na bilo koji način kupcu promiče usluge dostave koje pruža treća strana, uspostavlja kontakt između kupca i treće strane ili na drugi način trećoj strani pruža informacije potrebne za dostavu robe potrošaču.*

*Međutim, ne smatra se da je robu otpremio ili prevezao dobavljač ili da je to obavljeno u njegovo ime ako kupac sam prevozi robu ili ako kupac organizira dostavu robe s trećom stranom, a dobavljač ne sudjeluje izravno ili neizravno u obavljanju otpreme ili prijevoza te robe odnosno u pomoći s organizacijom.”*

Kako prethodno navedene odredbe stupaju na snagu tek 1. srpnja 2021., interesantno je da je u lipnju 2020. Europski sud donio presudu u predmetu **C-276/18** u kojoj je zaključio sljedeće:

*„Članak 33. Direktive 2006/112 treba tumačiti na način da – u slučaju kad robu koju dobavljač koji ima poslovni nastan u državi članici prodaje kupcima koji imaju prebivalište u drugoj državi članici i koju potonjima doprema društvo koje je predložio taj dobavljač, ali s kojim su kupci slobodni sklopiti ugovor za potrebe tog dopremanja – za tu robu treba smatrati da otpremu ili prijevoz izvršava „dobavljač ili netko drugi u njegovo ime” ako je uloga navedenog dobavljača odlučujuća u pogledu inicijative kao i organizacije ključnih etapa otpreme ili prijevoza navedene robe, a što je na sudu koji je uputio zahtjev da provjeri uzimajući u obzir sve elemente glavnog postupka.”*

*Prema tome, kada se za PDV potrebe u kontekstu prodaje robe na daljinu određuje tko je ili za koga je obavljen prijevoz robe, bitan zaključak je u suštini isti bez obzira*

*of the dispute in the main proceedings.”*

***Therefore, when determining for VAT purposes in the context of distance selling by which person or on behalf of which person goods are transported, the important conclusion is substantially the same no matter whether this is considered for the period prior to the start of the application of the mentioned new provisions which shall start to apply as of 1 July 2021 or the period after that date, even though at first sight it may seem as the new provisions are in this respect substantially different in comparison with the current provisions. However, the mentioned judgement of ECJ leads to the conclusion that actually there is no significant difference in this respect.***

***radi li se o razdoblju prije stupanja na snagu spomenutih novih odredbi čija će primjena započeti od 1. srpnja 2021. ili o razdoblju prije tog datuma, iako bi se na prvi pogled moglo činiti da su nove odredbe upravo u tom dijelu bitno drugačije u odnosu na postojeće odredbe propisa. Međutim, iz prethodno spomenute presude Europskog suda proizlazi da u tom dijelu bitne razlike zapravo i nema.***

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Amruševa 8, 10000 Zagreb  
Phone: +385 1 4699 555  
[www.sigmacbc.eu](http://www.sigmacbc.eu)  
[info@sigmacbc.eu](mailto:info@sigmacbc.eu)