TAXAND

Netherlands

1. State of play

Implementation of the VAT Quick Fixes in the Netherlands was presented on the annual Dutch Budget Day in September 2019. The Quick Fixes regarding consignment stock and chain transactions are included in a legislative proposal, amending the Dutch VAT Act. The Quick Fix regarding the additional conditions for applying the VAT zero rate for intracommunity supplies, will be implemented by adjusting the implementation decree of the Dutch VAT Act. The Quick Fix regarding the proof for intracommunity transport takes effect by adaption of the EU Implementing Regulation and does not require additional implementation measures. The Quick Fixes shall be applicable as of January 1, 2020.
This document provides a comprehensive outline of the implementation of the Quick Fixes in the Dutch VAT system.

2. Additional conditions for applying the VAT zero rate for intracommunity supplies

Under the current regulations, a taxable person may apply the VAT zero rate to intracommunity supplies when he -in short- can prove that the goods have been sold to a taxable person liable to the regime of intracommunity acquisitions and can demonstrate that the goods have physically left the Member State of departure in respect of their supply. The European Court of Justice (''CJEU'') has ruled several times (e.g. in Josef Plöckl, C-24/15) that tax authorities may not refuse to exempt (or zero rate) an intracommunity supply from VAT on the sole circumstance that the taxable person has not provided a VAT identification number issued by the Member State of destination, where there is no specific evidence of tax evasion, the goods have been moved to another EU Member State and the other conditions of the exemption are met.
The VAT identification number was therefore merely considered a formal requirement, not a material requirement. Under the new regulation, the use of the VAT identification number is a material requirement for applying the VAT-zero rate on intracommunity supplies. Additionally, the correct reporting of the intracommunity supply in the EC sales listing will also become a material requirement.

2.1. VAT-Identification number

The VAT zero rate for intracommunity supplies of goods follows from article 9(2)(b) jo. Table II(a)(6) Dutch VAT Act. Article 9(2)(b) allows for specific conditions to be set by a governmental decree. Such conditions are included in article 12 Implementation Decree of the Dutch VAT Act. This article already states that the VAT zero rate can only be applied if the taxable person making the supply is provided with a foreign EU VAT identification number of his client.
It follows from the explanatory memorandum that was published regarding the implementation of the Quick Fixes that a 'valid' VAT identification number, is a VAT identification number that is stated in the VIES-system. Therefore, a VAT Identification number issued only for domestic purposes, will not be sufficient for the application of the VAT zero rate. This condition will especially be relevant for taxable persons conducting business with clients in countries that issue domestic and EU VAT identification

numbers. It is expected that this requirement will be included in the yet to be announced amendments on the Implementation Decree of the Dutch VAT Act.

Additionally, please note that is was stated in Dutch parliamentary proceedings that taxable persons do have a possibility to correct an incorrect VAT identification number. We expect that this mechanism will work the same as the current correction mechanism for incorrect numbers.

2.2. EC Sales List

In addition to the sharpened requirement regarding the VAT identification number, the correct reporting of intracommunity supplies in the recapitulative statement (listing) will also become a material condition for applying the VAT zero rate on such supplies. The VAT zero rate may not be applied if the recapitulative statement is incorrect, incomplete or has not been submitted.
This is a crucial change in comparison with the current standing of the recapitulative statement, as until January 1, 2020, the recapitulative statement was not a requirement for applying the VAT zero rate. Expectations are that this new requirement will be implemented in the yet to be announced amendments to the existing the Implementation Decree of Dutch VAT Act.

3. Proof of intracommunity supply of goods

The conditions for applying the VAT zero rate on intracommunity supplies are laid down in article 9(2)(b) and Table II(a)(6) Dutch VAT Act in conjunction with article 12 Implementation Decree of the Dutch VAT Act. It follows from these articles that the VAT zero rate only applies if it can be derived from a taxable person's records that a cross-border transport took place in respect of the supply by that taxable person. As the proof for the intracommunity supplies still often leads to discussion, a practical arrangement is provided by the adaption of Implementing Regulation 282/2011. This practical arrangement aims to create a 'safe-harbor' for taxable persons and will be applicable in addition to the existing practice.
Under the new regime, a presumption of proof is created if the taxable person applying the VAT zero rate is in the possession of:

- at least two items of non-contradictory evidence;
- which were issued by two different parties;
- that are independent of each other, of the vendor and of the acquirer.

Regardless of the evidence that is required for the new regime, a taxable person may prove in other ways that a cross border transport to another EU Member State took place in respect of the supply.
The nature of the documentary evidence relates to transport-related documents, such as a signed CMR document and other documents indirectly relating to transport. In addition to the part of a CMR document signed by the supplier, there should also be a transport-related proof of a supplier's independent third party. Which documents are accepted within this scheme are appointed in article 45bis Implementing Regulation (EU). There is however no exhaustive list of transport documents.

In practice, there is a possibility this provision will cause problems. It is at least questionable if the supplier can provide two different documents which meet the demands of the Implementing Regulation (EU). Nevertheless, the Regulation unfolds direct effect towards the taxable persons. In this regard, it is debated how the term ‘independent’ is to be interpreted and how close the relationship between the entities may be.

4. Chain transactions (article 36a VAT Directive)

The EU VAT Directive did not yet provide for a specific arrangement for chain transactions. In practice it proved difficult to identify to which supply the transport should be allocated and therefore to determine which supply qualified as the intracommunity supply.
The draft legislation includes a provision regarding the attribution of transport in chain transactions. This provision will be included in the new article 5c in the Dutch Vat Act 1968 and is in line with the conditions stated in the EU VAT Directive.
The new article 5c Dutch Vat Act 1968 determines to which of the successive supplies in the chain the intracommunity transport or dispatch must be attributed. Only the supply to which the intracommunity transport can be attributed, qualifies as an intracommunity supply. The other supplies in the chain are classified as domestic supplies in either the country of dispatch or the country of destination, depending on where the goods are located at the moment of the supply. Deliveries in the chain prior to the intracommunity supply take place in the Member State of dispatch. Deliveries in the chain following the intracommunity supply take place in the Member State in which the intracommunity transport ends.
In the new regulation, one of the parties in the transaction chain is qualified as 'the intermediary operator'. The intracommunity transport is always attributed to the supply to this intermediary operator or to the supply carried out by this intermediary operator. The definition of the intermediary operator is included in the new article 5c (3) Dutch VAT Act 1968. The intermediary operator is the taxable person in the chain -not being the first supplier- that:

1. binds himself contractually with a third-party carrier for the intracommunity transport;
2. transports or dispatches the goods.

After determining which taxable person in the chain is to be regarded as the intermediary operator, two options occur:

1. the intracommunity supply takes place **to** the intermediary operator. The intermediary operator carries out an intracommunity acquisition in the Member State where the transport ends. All prior and subsequent supplies in the chain are domestic supplies (article 5c (1) Dutch VAT Act 1968).

2. the intracommunity supply takes place **by** the intermediary operator. The intermediary acquires goods in the Member State op dispatch. The next taxable person in the supply chain carries out an intracommunity acquisition in the Member State where the transport ends. All prior and subsequent supplies are domestic supplies.

The first option serves as main rule. The second option prevails over the main rule if the intermediary operator provides a valid VAT identification number issued by the Member State of dispatch to his supplier (article 5c (2) Dutch Vat Act 1968). In practice, the question arises how multiple (physical) transports or stopovers must be treated.

Generally, it should be determined whether there is a single contracted transport operation (''gecontracteerde vervoershandeling'') and whether the transport is still carried out in conjunction with the supply in the chain. If these criteria are not met, multiple intracommunity transports could be in order. The transaction should then not be regarded as one chain-transaction, but possibly as multiple transactions.

Please note that the new article 5c does not change the operation and effect of the simplified A-B-C supply, as referred to in article 37c Dutch Vat Act. This arrangement is not amended and can still be applied where three parties in three different Member States are involved and if the transport must be attributed to the transaction between the first and second party (A->B).

5. Call-off stock (article 17a Vat Directive)

The Netherlands already applies a long-standing simplification for goods entering the Netherlands upon call-off or consignment agreements ("Announcement 15"). It is expected that this simplification will be withdrawn following the new regime.

The new call-off stock regime will be included in the new article 3b Dutch VAT Act 1968. This article will be included after article 3a, which includes the deemed intracommunity supply upon the transfer of own goods to another EU Member State. The call-off stock regime is implemented as an exemption on this deemed intracommunity supply.

The application of the new call-off stock regime is mandatory if the relevant conditions are met. The conditions are included in paragraph 2 of article 3b Dutch VAT Act and are in line with the conditions stated in Directive 2006/112/EU ("EU VAT Directive). These conditions are as follows:

a. goods are dispatched or transported by a taxable person, or by a third party on his behalf, to another Member State with the aim to supply these goods in that Member State, at a later stage and after arrival, to another taxable person who is entitled to take ownership of those goods following an existing agreement between both parties.
b. the taxable person dispatching or transporting the goods has not established his business nor has a fixed establishment in the Member State to which the goods are dispatched or transported.
c. the taxable person to whom the goods are intended to be supplied is identified for VAT purposes in the Member State to which the goods are dispatched or transported. Both his identity and the VAT identification number assigned to him by that Member State must be known to the taxable person referred to in point (b) at the time when the dispatch or transport begins.
d. the taxable person dispatching or transporting the goods records the transfer of the goods in a register as stated in paragraph 2, section c, of article 34 Dutch VAT Act and includes the identity of the taxable person acquiring the goods and the VAT identification number assigned to him by the Member State to which the goods are dispatched or transported the recapitulative statement (listing) in accordance with paragraph 1, section d, of article 37a Dutch VAT Act.

It should be noted that the Dutch tax administration's IT systems required for applying the new call-off stock scheme will not be fully operational until 1 April 2020. Until then, in certain cases, taxable persons will not be able to submit recapitulative statements with respect to call-off stock.

Yet, this does not appear to stand in the way of the application of this scheme. There is no provision for transitional arrangements for stock which has been transferred before 1 January 2020. This stock shall be governed by the current rules, in force until 31 December 2019.