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VAT alert
Belgium

New VAT regime for Cost Sharing Associations: circular letter published

As announced in the 1 April 2016 VAT alert, the VAT exemption applicable to services rendered by independent groups or cost sharing associations (article 44, §2bis of the Belgian VAT Code) was significantly changed from 1 July 2016. At that point, the VAT authorities announced upcoming guidance through a Circular Letter, which would also contain a transition period until 31 December 2016. This Circular Letter, with clarifications on the new conditions and formalities, has been published on the Belgian tax authorities' website on 21 December 2016 (Dutch | French). It confirms that the new rules are mandatory, without any further transition period, as of 1 January 2017. This will require rapid action for taxpayers working under this regime to ensure they continue to benefit from the exemption in 2017.

Background

The Belgian VAT code provides for a specific exemption for independent groups, also called cost-sharing associations (CSAs), enabling groups of entities that have VAT exempt or outside scope activities to pool common resources and services without any additional VAT cost. This exemption is subject to strict rules. Until recently, these rules were outlined in Royal Decree n° 43 and in an administrative circular of May 1996.

Following an inquiry by the European Commission regarding the compatibility of the Belgian VAT exemption with the European VAT Directive, the Belgian government took the initiative to redraft the exemption article, with a 1 July 2016 entry into force.

The new Circular Letter contains clarifications on how the new legislation should be applied in practice. The most important points are summarised below.

Legal Structure of the CSA

The new rules only allow two types of CSAs: (1) the CSA acting as an association with a distinct legal personality or (2) acting as an association without legal personality but under its own name. The VAT exemption can be applied regardless of the CSA's legal form, meaning that a CSA can also take the form of a commercial company

If the CSA is an association without legal personality, a cooperation agreement between the members must be concluded, containing a detailed description of CSA activities. The previously existing possibility to set up a CSA as a (contractual) association, which is only known to its members, has been formally abolished.

The legal structure will have an impact on how common personnel is attributed to the CSA. A CSA with legal personality is allowed to hire personnel in order to carry out its activities, the common personnel should therefore be on its own payroll. A CSA without legal personality may not be able to hire personnel. It is therefore possible for common personnel to be hired by one member but on behalf of all CSA members (both for new and existing employees). The member employing the personnel can then re-invoice the personnel cost (clearly defined in the Circular Letter) without VAT to the CSA, but only to the extent that the personnel is deployed for VAT exempt transactions.

Activities of CSA members

The type of activities allowed for CSA members has been made more flexible. It is no longer a requirement that members should be part of the same financial, economic social or professional group. Furthermore, in contrast to the old rules, members are no longer required to have an activity that is fully VAT-exempt or outside scope (under the old rules there was a tolerance of 10%). It is enough for the members' main activity to be VAT-exempt or outside scope, meaning that the VAT taxable turnover of each member must be less than 50% of their total annual turnover. The Circular Letter contains a detailed calculation method in order to determine this threshold, as well as a tolerance should members accidentally exceed the threshold, up to 60% maximum, in a particular calendar year.

Under the new exemption regime, non-members may also benefit from CSA services, but such services are subject to normal VAT rules.

VAT regime of the CSA

The CSA must predominantly provide services to its members, meaning that within the "services activity", the CSA's turnover must be generated by more than 50% of services to members (with a certain tolerance if the threshold is not met in a given year). Turnover regarding the supply of goods (see below) is excluded from that calculation.

The invoicing of fees charged to non-members should follow the same methodology as with fees charged to members, which means they should equally be based on the costs incurred, without margin. If these conditions are not met, the CSA's entire activity will not be entitled to VAT exemption.

The VAT exemption for the CSA only covers services to its members using these services for their VAT exempt activity. If the CSA renders services to a member using these services for both VAT taxable and VAT exempt activities, the CSA cannot apply the VAT exemption, unless the invoice clearly indicates the split.

VAT exemption only applies for services that are 'strictly' necessary for the members' VAT-exempt or outside scope activities. The only services that are not strictly necessary for those activities are catering for personnel and other services rendered for members' private use.

However, VAT exemption is not applicable if the services result in an effective or potential distortion of competition. Any market participant can lodge an anonymous complaint with the central VAT authorities if a CSA distorts competition.

Next to supplying services, the CSA can also supply goods, which is considered as a distinct activity. These supplies are therefore subject to the normal VAT rules and do not need to meet the requirements for being charged at cost, nor do they impact the turnover ratio for the CSA to qualify for VAT exemption on its services.

As the new CSA rules mean that CSAs have both VAT exempt and VAT taxable activities, they can become mixed taxpayers who can partially recover input VAT and adjust VAT recovery for past investments. The Circular Letter contains detailed rules on the VAT recovery method to be applied by CSAs and on the transition of an existing VAT exempt CSA towards a mixed VAT payer status.

Entry into force - transitional regime

The new VAT exemption article entered into force on 1 July 2016, and so the rules laid down in the Circular Letter can also be applied as of that date. As the Circular Letter provides details on a large number of formalities to be performed by CSAs under the new regime, it foresees a deadline of 31 January 2017 to complete these formalities for CSAs who have been functioning under the new legislation already during 2016.

CSAs that were already active before 1 July 2016 can benefit from a transition period that will expire on 31 December 2016;

until then, such CSAs may apply the old rules. The CSAs opting for the application of the transitional regime must communicate the start of an activity when the CSA chooses to no longer apply the transitional regime, doing so by 31 January 2017 at the latest.

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