

WTS Value Added Tax Newsletter

Editorial

Dear Reader,

On the one hand, the year-end can be a time to reflect on all the events during the year and spend time with our friends and loved ones.

Then again, in professional terms, the year-end is also the time to look ahead and to prepare for the global developments in terms of VAT and GST – some of which we would like to share with you in our fourth edition of the WTS Global VAT Newsletter 2022.

For **Italy** the year-end is also a crucial time in view of reporting and deducting input VAT. **Poland** undertakes a reassessment of the preconditions for a fixed establishment. **Romania** modifies the VAT rates for specific activities.

Beyond Europe, the tax burden for services imported into **Brazil** will be reduced. **China** proceeds with the roll-out of its e-invoicing regime and, last but not least, **Switzerland** is planning various changes to its VAT system not only as of 1 January 2023, but also indicating amendments for 2024.

Our experts will be happy to answer any questions you may have.

Yours sincerely,

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WTS Global VAT Team

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Italy



I. EU Member-States

VAT deduction and year-end peculiarities

VAT deduction rules are different during the year and at the end of the year, so particular attention must be paid in order to properly detect the initial and the final terms for VAT deduction.

These rules apply both to VAT-taxable persons established in Italy, respectively Italian permanent/fixed establishments, and to non-resident entities who have a mere VAT registration in Italy (by way of direct VAT registration or appointment of a fiscal representative in Italy).

Initial term of the right of deduction: Italian VAT may be deducted starting from the time when the following 2 main requirements are *jointly* met:

- › the VAT becomes chargeable, i.e. the underlying transaction is deemed to be performed for VAT purposes (that represents, generally, the deadline by which the related invoice should be issued) and
- › the recipient has received and holds the related proper, supporting invoice.

Final term of the right of deduction: Italian VAT may be deducted, at the latest, within the same year when the initial term of the right of deduction started.

Consistently, focusing on the related **booking in the VAT ledger**, incoming invoices or customs bills must be booked before the periodical VAT computation where the VAT right of deduction is exercised and in any case within the filing term (nowadays 30.04.n+1) of the VAT return referred to in the year when the invoice was received and with respect to the same year.

Operatively:

- › **during the year:** if incoming invoices are received and booked by the 15th day of the month following the month when the underlying transaction was performed, it is possible to deduct the related input VAT by the 16th of the month following the month when the VAT became chargeable; *for example:* if the goods have been delivered on 28 November 2022 and the invoice is received on 30 November 2022 but it is booked on 3 December 2022, the related input VAT can be included in the VAT computation referring to November, to be settled by 16 December 2022 or (alternatively) it can be deducted in the VAT computation referring to December and in any case it must be deducted, at the latest, in the annual VAT return referring to 2022 to be filed by 30 April 2023; conversely,
- › **at the year-end:** VAT can be deducted, at the latest, within the same year when the right of deduction arose; *for example:* if the goods have been delivered on 28 December 2022 and the invoice is received on 31 December 2022 but it is booked on 3 January 2023, the related input VAT must be included in the VAT computation for the month of December or, at the latest, in the annual VAT return for the calendar year 2022 to be filed by 30 April 2023; such an invoice must be booked separately (e.g. it cannot be booked together with the other input invoices received in January, but it must be booked separately, for instance, in a separate VAT purchase ledger referring to the former year).

Particular attention shall be then paid to the date of receipt of purchase invoices and related proof:

- › in the case of e-invoices transmitted via SDI, the date of receipt is officially stated by the SDI (i.e. the exchange data system of the Italian tax authorities);
- › in the case of paper invoices, depending on the underlying circumstances, it shall be assessed as to how the related receipt is proved; for instance, let's consider "paper" invoices documenting an intra-community acquisitions of goods, which imply (among others) the application of the reverse charge mechanism with both output and input VAT to be booked.

When drafting the annual VAT return for 2022, to be filed by 30 April 2023, the above rules shall be kept clearly in mind so as to have adequate cross-checks on invoices received and booking and to avoid mistakes in the VAT deduction rules, with associated possible penalties (from 90% to 180% of the additional VAT in the case of an incorrect VAT return).

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Poland



Recent developments regarding the fixed establishment in Poland

The lack of a uniform approach to the definition of a fixed establishment (FE) in Poland generates plenty of concern both among Polish service providers as well as foreign entities providing or purchasing services in Poland.

For many years, the term "fixed establishment" has received a very broad construal from the Polish tax authorities. It started after the judgement of the ECJ on 16 October 2014 (C-605/12; *Welmory*), when the Polish tax authorities began to consider any cooperation between Polish and foreign entities, which had the signs of stability, as an FE. Such understanding of an FE was significantly broader than the one presented in other EU member states.

However, this approach appears to have been changing lately. In the latest tax rulings issued by the Director of National Tax Information, it has indicated that the mere continuity of a business is not enough to create an FE for VAT purposes. To have an FE in Poland, it is necessary to possess own personnel and technical resources located in Poland or to use someone else's resources in Poland while maintaining a control typically exercised by an entity over its employees or technical resources.

Such a standpoint has also been supported by the Supreme Administrative Court (SAC) in its judgement No. I FSK 396/21 issued on 11 October 2022. Here, the SAC stated that having a contract for logistics services with a Polish company does not create an FE for the foreign entity which does not have its own warehouses in Poland. In the oral justification, the SAC's judge rightly pointed out that accepting that the requirement of "human and technical resources" is fulfilled, even in the case of a lack of supervision/control, this would effectively mean that the foreign entity will have a fixed establishment in the service provider's country whenever that entity buys services supplied in a different country than the one in which it has established its business. Such an interpretation is not acceptable. To determinate whether an FE is created for a foreign entity,

the extent of its power to manage the Polish supplier's personnel or to exercise control over it must be verified.

It is also worth mentioning that the FE issue is attracting increasing attention from the European Union. June 2022 saw a much-welcomed opinion issued by the VAT Expert Group in which similar conclusions were presented. The VAT Expert Group puts pressure on the EU countries to ensure that clear conditions are met in order to have an FE in another country.

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The interpretation of an FE presented by the Polish tax authorities is increasingly closer to how this definition is interpreted in the ECJ's case law. However, a lack of regulations in this respect in Poland still cast a cloud of uncertainty on when an FE is created, and therefore each cooperation within which services are provided to or by a foreign entity must be analysed in detail – preferably before such a cooperation commences.

Romania



Changes to Romanian fiscal code as of 1 January 2023

The Romanian fiscal code was amended through Ordinance no. 16/2022, published in the Official Gazette no. 716/15 July 2022. We present below the significant changes from a VAT perspective.

With effect from 1 January 2023, amongst the goods subject to 9% VAT rate, the list of food products/other similar goods as well as of the products used in agriculture has been modified.

Also, from 1 January 2023, the VAT rate increases to 9% (from 5%) for hotel accommodation, restaurant and catering services (with certain exceptions).

Similarly, from 1 January 2023, the delivery of homes to individuals with a VAT rate of 5% applies to homes with a usable area of up to 120 sqm, excluding household annexes, whose value, including the land on which they are built, does not exceed the amount of RON 600,000 (about EUR 121,930), excluding VAT. Therefore, as of 1 January 2023, any natural person can purchase, either individually or jointly with another natural person/ other natural persons, a single home, the value of which does not exceed the amount of RON 600,000, excluding VAT, with a reduced rate of 5% (there are transitional measures for 2022).

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II. Additional countries

Brazil



Federal government reduces tax burden on the import of services

The import of services into Brazil is subject to several taxes, and a significant part of the tax burden arises from the social contributions on the imports of goods and services (PIS/COFINS-Import), calculated at a total 9.25% over the total amount paid, credited or remitted abroad as compensation for the provision of services, plus the municipal service tax (ISS) amounts and the contributions themselves.

Several controversies regarding the taxable basis of such contributions have arisen because the Brazilian federal constitution provides that social contributions on imports that have an *ad valorem* tax rate should be calculated based solely on the customs value.

To this end, although the customs value concept arises from the GATT customs valuation code and applies to goods, the Federal Supreme Court (FSC) understood that its general concept must also apply to services. Accordingly, as the customs valuation is primarily based on the transaction value, without the inclusion of domestic taxes levied on the import, the ISS and the contributions themselves could not be added to the service price for the calculation of the PIS/COFINS-Import taxable basis.

Such understanding has arisen from a leading case of the FSC in which the constitutionality of the taxable basis of the PIS/COFINS-Import on the import of goods was evaluated. Here, the taxable basis was legally defined as the customs value plus the state VAT (ICMS) amounts and the contributions themselves; as a result, the FSC understood that, as the GATT customs valuation code did not provide for the inclusion of local taxes in the customs value, the inclusion of the ICMS and the contributions amount would surpass the provisions of the federal constitution.

Based on this, the FSC has applied the same understanding on the import of services; thus, the inclusion of the ISS and contributions amounts in the PIS/COFINS-Import taxable basis is unconstitutional.

Therefore, based on the FSC's understandings, the Brazilian government, by means of the National Treasury Attorney-General's Office (PGFN), issued a legal ruling on 25 August 2022 recognising the taxpayers' right to not include the ISS in the taxable basis of the contribution on the import of services and to include this understanding on PGFN's waiver list – meaning that, from this date forward, tax authorities should neither contest ongoing proceedings nor issue new tax assessment notices regarding this matter.

Although such a stance is well received by taxpayers, it should be noted that the PGFN did not mention the non-inclusion of the amount of the PIS/COFINS-Import in their own taxable basis, even though the grounds for such are the same with regard to the ISS.

In view of the above, although the PGFN took an important step in preventing further controversies, some discussions might still take place. In the end, an opportunity was missed to reduce the tax burden on the import of services.

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China



National VAT e-invoicing targeted this year

China sets to escalate its VAT e-invoicing practice to a nationwide scale by the end of 2022, after wide-ranging trials in Shanghai, Guangdong and Inner Mongolia provinces early this year.

To cope with the new practice, the official online VAT system (called the “*Golden Tax System*”), is launching its phase-VI version by the end of this year; set to become accessible to all taxpayers and industries by 2025. The whole VAT e-invoicing programme will progress in two stages: issuance and receipt.

E-invoice issuance (in three pilot areas)

VAT taxpayers in three pilot locations, i.e. Shanghai, Guangdong and Inner Mongolia, can now issue VAT e-invoices to their customers in China as long as they have access to the online VAT invoicing function in the *Golden Tax System*.

› Online format

Companies in most industries in the aforementioned three areas can now issue electronic VAT invoices – with the same legal effect as their paper version.

Moreover, specially formatted e-invoices are also available online for transactions in some scarce sectors like the sales of rare earth, cigarettes, construction or transportation services, real estate sales and leasing services, agricultural product acquisition, photovoltaic acquisition, collection of vehicle and vessel taxes and sales of self-produced agricultural products etc.

For the time being, an exception still applies to the sales of automobiles (new or second-hand) and the collection of highway tolls. Until the online system is available, these business operators must still continue issuing paper versions of VAT invoices.

› Invoice quota

In principle, the same invoice quota still applies to the electronic version. The aggregate value of invoices issued per month, in paper or electronic formats, should not exceed the monthly limit set by the tax authorities for each company. However, there is no ceiling set on the maximum value of a single e-invoice, as opposed to paper invoices which have a pre-set par value. For e-invoicing, upward quota adjustments will be made easier for those taxpayers who have good credibility.

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E-invoice receiving (nationwide)

Customers, no matter where they are in China, can now receive VAT e-invoices issued by companies based in Shanghai, Guangdong and Inner Mongolia, and process them as input VAT. They can also verify the validity and the data of an e-invoice by quoting its twenty-digit number online.

Switzerland



Changes to the Swiss VAT landscape as of 1 January 2023

Increase of the turnover threshold for non-profit sports and cultural associations and charities

Under the current legislation, voluntarily-run non-profit sports and cultural associations and charities are exempt from VAT if they generate a worldwide turnover of less than CHF 150,000 (EUR 151,900) per year from services that are not exempt from VAT. To reduce the tax and administrative burden for these organisations, the Swiss Parliament decided to raise the turnover threshold for the Swiss VAT obligation to CHF 250,000 (EUR 253,200) as of 1 January 2023.

Organisations that are no longer liable for VAT purposes can deregister at the end of the tax period. To do so, the written deregistration must be submitted to the Federal Tax Administration within 60 days of the end of the tax period, i.e. February 2023.

Outlook: expected changes in the Swiss VAT landscape **Increase of Swiss VAT rates**

The revision of the Swiss pension system requires an increase of the Swiss VAT rates. It is intended to increase the standard rate of 7.7% to 8.1%, the reduced rate (for e.g. medicine, newspapers, books, plants, etc.) from 2.5% to 2.6% and the special rate (for accommodation services) from 3.7% to 3.8%. The increased VAT rates are planned to come into force on 1 January 2024.

Mandatory electronic VAT procedures

It is planned that as of 1 January 2024 the registration and submission of Swiss VAT returns must be carried out electronically. The underlying fact is the entering into force of Article 65a of the Swiss VAT Act, which stipulates that the federal council may prescribe the electronic execution of procedures and regulate their modalities. Registration as a taxable person and submission of the Swiss VAT returns as well as subsequent corrections of the Swiss VAT returns are to be carried out exclusively electronically via the portal provided for this purpose as of the entry into force of the implementing provisions of the Swiss VAT Ordinance.

Partial revision of the VAT legislation

Another partial revision of the Swiss VAT Act is currently ongoing and is intended to take effect as of 2024. The intention is to adapt the VAT legislation to the global digital economy, relieve smaller businesses of administrative tasks and implement measures to safeguard taxes.

a) Taxation of electronic platforms

The distance seller rule ("Versandhandelsregelung") applies to businesses that achieve a turnover of at least CHF 100,000 (EUR 101,300) through the import of small consignments (tax amount of CHF 5/EUR 5 or less) within one tax year. This regulation has proven to be only partly successful in ensuring a comprehensive taxation of imported goods into Switzerland.

In the future, the operators of electronic platforms are to be qualified as suppliers of all sales facilitated by their platforms. Tax collection is thereby thought to become more efficient, since only the platforms will be registered as taxable persons instead of numerous, individual mail-order operators.

b) Fiscal representative for non-Swiss established businesses

Under the current legislation, taxpayers with a residence or place of business abroad must appoint a fiscal representative in Switzerland to fulfil their procedural obligations. The reaction to a proposed exception allowing the Federal Tax Administration to waive the requirements of such fiscal representation under certain conditions was rather reluctant in parliament. Therefore, the current rule will likely remain in place.

Federal Tax Administration practice on non-cash contributions

The Federal Tax Administration is currently working on its renewed practice regarding the VAT treatment of non-cash contributions and it is expected that this practice will enter into force. Non-cash contributions (e.g. trademark) are to be qualified as a VATable event, taxable if the place of supply is in Switzerland, unless the transfer is exempt from VAT. The issuance of participation rights shall have no VAT implications and the notification procedure will have to be applied compulsorily for non-cash contributions if the legal requirements are met. For example, in group-internal cross-border events, the review of such contributions remains highly recommended.

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