

Decree-Law nr. 186/2009, of 12th August Official Portuguese Gazette Nr. 155 – I Series

In compliance with the legislative authorization granted by article 118 of the Law nr. 64-A/2008, of 31st December, this decree-law amends the Value Added Tax Code (*Código do IVA - CIVA*) and the Value Added Tax System on Intra-Community Supply of Goods (*Regime do IVA nas Transacções Intracomunitárias – RITI*), transposing to the internal legal system the Council Directive 2008/8/EC, of 12th February, and the Council Directive 2008/117/CE, of 16th December, and creating the value added tax refund regime for taxable persons not established in the Member State of refund, transposing to internal law the Council Directive 2008/9/EC, of 12th February.

The present law decree transposes to the internal legal system the article 2 of the Council Directive 2008/8/EC, and the Council Directive n.º 2008/9/EC, both from 12th February, as well as the Council Directive n.º 2008/117/EC, of 16th December, all related to the common system of value added tax (VAT), modifying as of 1st January 2010, the VAT Code, the RITI and some complementary legislation related to this tax.

In what concerns the localization rules of services rendered, the Council Directive 2008/8/EC, of 12th February, implies significant amendments to article 6 of the VAT Code, mainly in transnational services, introducing two general rules of localization. The previous general rule of localization, that defines as connection criteria the location of the main office, fixed establishment or fiscal domicile of the supplier, shall be applicable only when the recipient of the services rendered is not a VAT taxable person. In relation to services rendered to taxable persons, the general rule of localization presently regards the location of its main office, fixed establishment or fiscal domicile. For instance, in services rendered by taxable persons established in different Member States, the corresponding place of taxation, when this main rule is applied, becomes the member state where the recipient of services is established. In addition, and in what concerns this type of services considered to be transnational, the scope of the reverse charge is extended, giving the recipient of the services the obligation of charging VAT and delivering it to the State, without prejudice to the deduction they are entitled to.

However, the above general rules include several noted exceptions, applicable to certain services specifically identified, which, by their nature, justify the definition of different connecting factors from those which are the general rules for the localization of services. Some of these exceptions reject both general rules, such as, services relating to property, passenger transport services, catering services and short-term leasing of transportation. Others derogate only the general rule relating to services provided to recipients who are not taxable persons. This is the case, for example, for transportation of goods, including the respective ancillary services, tasks and expert evaluations relating to tangible personal property, as well as services that are rendered to recipients established out of the

European Community, that have been previously mentioned in number 8 of Article 6 of the VAT Code.

Another relevant aspect in the modification of the VAT legislation, introduced by this decree-law, consists in the creation of a new refund regime for taxable persons subject to VAT when acquiring goods and services, or in imports, performed in Member States where there is not a main office available, fixed establishment or fiscal domicile. The new rules to this matter define simpler refund procedures, namely through the use of an electronic system for receiving and treating refund applications. These modifications determine the necessity to revoke the Decree-Law nr. 408/87, of 31st December, acknowledging in its substitution «The Regime for VAT refund to taxable persons not established in the State of refund», published as annex to the current decree-law. The revocation of the Decree-Law nr. 408/87, of 31st December, also implies the progression of the norms concerning tax refunds to this new Regime for companies that are not established in any State of the European Community, insuring the necessary adjustments to the internal legal system of the current rules in the Council Directive 86/560/EEC, of 17th November (also known as the «Thirteenth Directive»).

Lastly, in relation to the measures in the fight against fiscal fraud and tax evasion, with particular incidence in the area of intra-community operations, the current decree-law transposes to the internal legal system the Council Directive 2008/117/EC. Following the new community rules concerning the periodicity of recapitulative returns of intra community operations, that pertain also to inter community services rendered as well as the necessity of its disengagement from the periodic tax return, the current decree-law determines the alteration of article 30 of the VAT System on Intra-community Supply of Goods (RITI) and introduces the necessary adjustments in other legal dispositions of this regime in nr. 16 of Article 29 of the VAT Code.

Therefore:

According to the use of the legislative authorization granted by Article 118 of Law 64-A/2008, of 31st December, and in the terms of points a) and b) of paragraph 1 of Article 198 of the Portuguese Constitution, the Government states the following:

ANNEX

Regime for VAT refund to taxable persons not established in the Member State of refund

CHAPTER I

Scope

Article 1

Purpose

1 – Taxable persons established in national territory wanting to obtain a refund of the value added tax (VAT) charged in importation, goods and services supplied by other taxable persons rendered in other Member States of the Community, shall comply with the procedures referred to in Chapter II.

2 – Taxable persons not established in national territory are entitled to a refund of the VAT charged in importation and goods and services supplied in it by other taxable persons, in accordance with the terms and conditions set out in Chapter III.

CHAPTER II

Refund of charged tax in other Member States to taxable persons established in national territory.

Article 2

Submission of application

1 – To obtain a VAT refund charged in business transactions in other Member States, taxable persons who have their economic activity, fixed establishment or domicile in national territory, shall address to the Directorate General of Taxation (*Direcção-Geral dos Impostos – DGC*), an electronic application, within the period referred to in article 8, in accordance with the conditions of the Member State of refund.

2 – The application shall be considered submitted only if the applicant has filled in all the information required under paragraphs 1 and 2 of Article 7.

3 – The Directorate General of Taxation shall send the applicant an electronic confirmation of receipt, indicating the date on which the application was received.

Article 3

Sending the application

After having verified the validity of the applicant's fiscal number and their condition as a taxable person subject to the normal scheme of taxation, the Directorate General for Taxation sends, within fifteen days, the application to the Member State of refund adding any other useful information.

Article 4

Refusal of application

1 – Without prejudice to what has been established in the preceding article, the Directorate General for Taxation does not send the application to the Member State of refund when, during the period to which the refund is concerned, the applicant was found in one of the following situations:

- a) The taxable person was not subject to VAT;
- b) The taxable person was subject to the exemption scheme, determined in Article 9 of the VAT code;
- c) The taxable person was subject to the special exemption scheme, determined in Article 53 or by the special exemption scheme for small retailers, determined in the Article 60 of the VAT code.

2 – Having verified the existence of any of the situations mentioned in the preceding number, the applicant is notified electronically of the decision to not send the application to the Member State of refund.

3 – Applicants who want to contest the decision mentioned in the previous paragraph, can file a complaint to the director of the Department of Tax Refund Services (*Direcção de Serviços de Reembolsos - DSR*) or can file a judicial review, in accordance with the Code of Tax Procedure and Tax Proceeding (*Código de Procedimento e de Processo Tributário - CPPT*).

CHAPTER III

Refund to taxable persons not established in national territory

SECTION 1

General provisions

Article 5

Scope

1 – Taxable persons have the right to be refunded of the VAT charged in national territory if in the refund period they meet the following conditions:

a) Have not had in national territory the seat of their economic activity, fixed establishment, from which business transactions were effected, or, if no such seat or fixed establishment existed, their domicile or habitual place of residence.

b) Have not supplied any goods or services deemed to have been supplied in national territory, with the exception of the following transactions:

i) The supply of transport services and services ancillary thereto, exempted pursuant to point f) of paragraph 1 of Article 13 or of Articles 14 and 15 of VAT Code;

ii) The supply of goods and services to a person who is liable for payment of VAT in accordance with point e), g) and h) of paragraph 1 of Article 2 of VAT Code, and paragraph 5 of Article 24 of the VAT System on Intra-Community Supply of Goods.

2 – Amounts of VAT that have been incorrectly invoiced, including those related to transactions, which are or maybe exempted, under Article 14 of VAT Code, or Article 14 of the VAT System on Intra-Community Supply of Goods, shall not be refunded.

Article 6

Transactions giving rise to a right to deduction

1 – The right to a refund relates to the VAT charged to the taxable person not established in national territory, in respect of goods or services supplied to them and in importation of goods into national territory insofar, as such goods and services are used for the purpose of transactions referred to in point a) and b) of paragraph 1 of Article 20 of the VAT Code, paragraph 2 of Article 19 of the System on Intra-Community Supply of Goods and point b) of paragraph 1 of the previous article.

2 – The VAT charged in expenses mentioned under the conditions in Article 21 of the VAT Code is not refundable.

Article 7

Submission of application

1 – The refund application must be submitted electronically in the Member State of establishment of the taxable person for the purposes of its submission to the Directorate General for Taxation, and must contain the following information:

a) The taxable person's identification, including the VAT identification number;

- b) The taxable person's / establishment full address and e-mail;
- c) The description of the applicant's business activity determined in the standard codes of the statistical classification of economic activities;
- d) The bank account details, including the international bank account number (IBAN) and bank identifier code (BIC);
- e) The refund period covered by the application;
- f) A declaration by the applicant stating their eligibility in accordance to paragraph 1 of Article 5.

2 – The refund application relatively to each importation document or invoice issued in national territory must contain the following details according to Articles 36 or 39 of the VAT Code.

- a) The full name, the taxpayer's establishment address and, except in case of importation, the supplier's tax identification number or service provider, preceded by the prefix PT;
- b) Date and number of the invoice or importation document;
- c) The taxable amount and the VAT amount, in euros;
- d) The amount of deductible VAT and where applicable, the percentage of deduction;
- e) The nature of the goods and services acquired, defined by the identification codes.

3 – The application must also contain, where necessary, the full name, address and e-mail as well as the VAT identification number of the applicant's fiscal representative.

4 – The application must be submitted in Portuguese or English.

5 – The Directorate General for Taxation notifies the applicant by sending an electronic confirmation of receipt.

Article 8

Period and deadline for submitting applications

1 – The refund period should report to the preceding calendar year, as long as the amount to be refunded is no less than EUR 50.

2 – Without prejudice to the previous number, a VAT refund may be requested during

the same calendar year, in a period of not less than three consecutive months and as long as the amount payable is no less than EUR 400.

3 – The refund application may, however, relate to a period of less than three months referred to in the previous number, as long as that period terminates on 31st of December of the previous calendar year, and the amount to be refunded is no less than EUR 50.

4 – The refund application should relate to the VAT on acquisitions of goods or services rendered invoiced during the refund period to a non resident taxable person, provided that the VAT becomes chargeable during the refund period or related to import of goods during the same period; the application may also relate to invoices or import documents not covered by previous refund applications as long as transactions are completed during the calendar year in question.

5 – In each case mentioned in the preceding paragraphs, the application must be submitted to the Member State of establishment until 30th of September of the calendar year following that in which the tax becomes due.

Article 9

Alterations to refund applications

1 – After submitting a refund application and before a decision has been made the applicant may substitute the application, which will cancel the earlier application submitted and in turn begin a new calculation of the deadline for a decision.

2 – If after submitting the refund application the deductible percentage that the applicant is entitled to in the Member State of establishment is adjusted the applicant should make a correction accordingly to the amount applied for or already refunded.

The correction shall be made in a refund application during the calendar year following the refund period in question or, if the applicant makes no refund applications during that calendar year, a separate declaration must be submitted via the electronic portal established by the Member State of establishment.

3 – The substitution of the refund application referred to in paragraph 1 and the correction referred to in paragraph 2 are only considered when submitted within the deadline referred to in paragraph 5 of Article 8 thereof.

Article 10

Requesting information

1 – When the Directorate General for Taxation considers that it does not have all the information necessary to evaluate the refund application, it may request, by electronic means, within the period referred to in paragraph 1 of Article 11., additional information

from the applicant or from the competent authorities of the Member State of establishment.

2 – The Directorate General for Taxation may also solicit additional information, by electronic means, from someone other than the applicant, or any other mean considered adequate.

3 – When there is reasonable doubt regarding the validity or accuracy of the information contained in the application, the requested information may include the original or a copy of invoices or import documents considered relevant.

4 – After the reception of the information required under paragraphs 1 to 3, and if the Directorate General for Taxation considers that it still doesn't have enough information to enable it to make a decision on the application, further information may be requested.

5 – The additional information referred to in paragraphs 1 to 4 shall be provided within one month from the date to which the application has been received by the person or entity to whom it was addressed.

6 – When original invoices or import documents are requested, the Directorate General for Taxation will return to the applicant the original documents within one month of having receiving them.

Article 11

Decision deadlines

1 – The Directorate General for Taxation shall notify the applicant of its decision to approve or refuse the refund application within four months of its receipt.

2 – When the additional information referred to in paragraph 1 to 3 of the preceding article is requested, the deadline mentioned in paragraph 1 shall be extended to six months from the date of having received the refund application.

3 – When new additional information referred to in paragraph 4 of the previous article is requested, the deadline mentioned in paragraph 1 shall be extended to eight months from the date of having received the refund application.

4 – Without prejudice to paragraph 2, the Directorate General for Taxation has two months to make a decision counting from the date of having received the information requested, or if there is no reply to this request for information, counting from the deadline established in paragraph 5 of the previous article; in any case the deadline for decision can never exceed eight months.

Article 12

Right to deduction in goods and services for mixed use

Where a taxable person not established in national territory carries out in the Member State of establishment transactions that have the right to deduction and carries out transactions that does not give that right, the tax paid in national territory shall be refunded in proportion to the use of the deductible goods or services according to the rules in the Member State of establishment.

Article 13

Tacit Refusal

In the absence of a decision on a refund application until expiry of the deadlines provided for in paragraphs 1 to 4 of Article 11, the refund is assumed to be refused for the purpose of filing a complaint or judicial review.

Article 14

Payment

1 — Refunds are payable through bank transfer at the latest within 10 working days of the expiry date referred to in paragraph 1 of Article 11 or, where additional information or further additional information has been requested, after the deadlines referred to in paragraphs 2 to 4 of Article 11.

2 — Payment is made to the bank account indicated by the applicant, provided that the relevant credit institution is situated in any Member State.

3 — Refund transfers that imply bank charges shall be deducted from the amount to be paid to the applicant.

Article 15

Indemnity interest

1 — Indemnity interest is due under Article 43 of the General Taxation Law (*Lei Geral Tributária — LGT*) when the expiry date referred to in paragraph 1 of the previous article has not been met.

2 — Without prejudice to the preceding paragraph, indemnity interest is not due in the period of time between the expiry date which the applicant has to provide additional or further additional information and when such information is actually provided.

3 — Without prejudice to the previous paragraph, interest is calculated from the day following the last day for payment of the refund pursuant to paragraph 1 of Article 14 until the day the refund is actually paid.

Article 16

Application refusal

1 — Where the refund application is refused in whole or in part, the decision and the grounds for this decision are notified to the applicant within the period referred to in paragraph 1 of Article 11 or, where additional information or further additional information has been requested, within the time period referred to in paragraphs 2 to 4 of Article 11.

2 — Applicants who want to contest the decision mentioned in the previous paragraph, can file a complaint to the director of the Department of Tax Refund Services or can file a judicial review, in accordance with the Code of Tax Procedure and Tax Proceeding.

Article 17

Undue refund

1 — In case of undue refund, the Directorate General for Taxation shall proceed directly to recover the amounts wrongly paid and any penalties and interest imposed, without prejudice to the provisions on mutual assistance for the collection of VAT.

2 — The recovery of the amounts wrongly paid in accordance with the previous paragraph can be compensated with any refund application presented and approved.

3 — Where an administrative penalty or compensatory interest has been imposed but has not been paid, any further refund to the taxable person concerned up to the unpaid amount shall be suspended, until those amounts are paid.

4 — For the purposes of the preceding paragraphs, it is considered competent the Local Tax Office Lisbon 3 (*Serviço de Finanças de Lisboa 3*).

SECTION 3

Regime for taxable persons established outside the Community

Article 18

Scope

1 — Taxable persons who are not established in the Community and are subject to a general tax on turnover in their countries are entitled to VAT refund under the terms and conditions referred to in section 1 of this chapter, provided that there is a reciprocal treatment by the States they are established in.

2 — To be eligible for refund, the taxable persons referred to in the previous paragraph shall appoint an authorised fiscal representative in Portugal, with sufficient powers of attorney, who must meet the obligations determined under this regime and will be held responsible, jointly with the represented part, for fulfilling such obligations.

Article 19

Submission of application

1 — The refund application is submitted to the Department of Tax Refund Services for the periods and within the deadlines referred to in Article 8, by the applicant's representative, according to an approved model form, which must be accompanied by the following documents:

a) Original invoices and import documents, legally issued, with legal evidence that VAT was incurred;

b) A certificate, issued by the State where the applicant is established, with legal evidence that the taxable person is subject to a general tax on turnover as well as the recognition of the right to tax refund for taxable persons established in Portugal.

2 — The recognition referred to in subparagraph (b) of the preceding number is excused where there is a reciprocal agreement signed between the Portuguese State and the State concerned.

3 — The certificate mentioned in subparagraph (b) of number 1 is valid for a period of one year from its date of issue.

4 — The Directorate General for Taxation stamps each invoice or import document, submitted with the refund application and returns them to the applicant within one month.

5 — The refund application may also be submitted electronically, along with a list, in accordance with an approved model, which states the elements of each invoice or import document referred to in paragraph 2 of Article 7.

6 — Where it is considered not having all relevant information to analyse the grounds for a refund application, the Directorate General for Taxation may request any further additional information, including, in case of electronic applications, the original documents which were listed when applying.

SECTION 3

Regime applicable to taxable persons established outside the Community

Article 20

Decision and payment

1 – The refund shall be paid until the end of the sixth month from the date that the application is submitted.

2 – The time limit referred to in paragraph 1 begins from the date when all the requested documents mentioned in paragraph 1 of the previous article are received in the Directorate General for Taxation, or if the application is electronically submitted on the date of its submission.

3 – The dispositions referred to in paragraph 3 of Article 14 and in Articles 15, 16 and 17 are applied, with the necessary adjustments, to the refund applications under this section.