The latest amendments to the VAT Act contradict the tax neutrality principle
The amendments promulgated on August 2 violate Directive 2006/112 of 28 November 2006
24 August 2016
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I. Security, administrative and penal regulations and taxable persons. Exceptions from the mechanism for provision of security in the liquid fuels trade.

The Law amending and supplementing the VAT Act was promulgated in the State Gazette, issue 60 of August 2, 2016. It introduces a new mechanism for controlling, preventing and combating tax frauds with regards to the trade with liquid fuels.
The persons engaged in trade with liquid fuels shall provide the National Revenue Agency (NRA) with a security, consisting of cash, state securities or irrevocable and unconditional bank guarantee for a one-year term. The amendments to the VAT Act enter into legal force on August 6, 2016 and in accordance with §4 of the Law amending and supplementing the VAT Act, the taxable persons who comply with the conditions of art. 176c of the act shall provide the security within a one-month term, considered from the abovementioned date. Art. 180c of the Act contains administrative and penal regulations for the persons who have failed to provide a security deposit within the required term. The pecuniary penalty for legal entities amounts to the security deposit due and in case of a repeated violation, the penalty is double the security amount. Para. 3 of art. 180c of the VAT Act introduced a reduced penalty - 25% of the security due, but not less than BGN 10 000, if the security is provided within a 7-day term from the expiration of the initial term during which the security had to be provided.
Art. 176c of the VAT Act contains an exhaustive list of the cases when security shall be provided - in cash, state securities or a bank guarantee. The latter are listed in 3 items, which are alternatively applied, i.e. the implementation of the conditions referred to in one item results into the automatic application of the mechanism for provision of a security deposit. It should be noted that upon determining the amount of the security deposit, the current period, respectively the previous one, is examined for an increase or decrease of the security deposit. The first current period is August, considered from August 6, 2016 to August 31, 2016. The security deposit shall be provided by September 6, 2016.

The cases where the taxable person is obliged to provide a security deposit under art. 176c of the VAT Act are:

1. if said person performs taxable supplies of liquid fuels with a tax rate of 20% and a total amount of their tax bases exceeding BGN 25 000, or
2. if the total amount of the tax bases in case of intra-Community acquisitions [1] of liquid fuels, which are not intended for consumption by the person who has performed the Intra-Community acquisitions, exceeds BGN 25 000, or
3. if said person receives liquid fuels, released for consumption under art. 20, para. 2, point 1 of the Excise Duty and Tax Warehouses Act, the value of which exceeds BGN 25 000, unless there are reasons for provision of security on other legal grounds.

The exception from the obligation for provision of a security deposit are specified in art. 176c, para. 8 of the VAT Act. The following persons shall not provide a security deposit for trade with liquid fuels:
1. A licensed warehousekeeper within the meaning of the Excise Duty and Tax Warehouses Act, a person who performs deliveries under art. 24, para. 1, point 1 and art. 26, para. 2 of the Excise Duty and Tax Warehouses Act;
2. A person who has complied with the requirements of art. 118, para.6 only for the supplies reported under the same provision; this means any person who supplies / sells liquid fuels from a commercial site, except for the persons carrying out supplies / sale of liquid fuels from a tax warehouse within the meaning of the Excise Duty and Tax Warehouses Act; a person who transfers data to the National Revenue Agency via a remote link, which allows for the determination of the available amount of fuels in the storage tanks in the sites for trade with liquid fuels.

In case of taxable supplies of liquid fuels, ICA or purchases below BGN 25 000, no security deposit shall be provided, since the relevant person is not subject to registration before NRA. This rule does not apply if the person has initially complied with any of the criteria specified in art. 176c of the VAT Act, after which point over the course of the one-year period the base is below BGN 25 000 (argument of art. 176c, para. 3 of the Act) [2]

II. Tax base used to determine the security deposit. Term for provision of a security deposit and amount of the security deposit. New security deposit

Pursuant to art. 176c, para. 2 of the VAT Act, the security deposit cannot be less than 20 percent of the tax base of the taxable supplies, acquisitions or the value of the received liquid fuels, released for consumption over the previous tax period, but not less than BGN 50 000 [3]. This means that all three taxes bases are cumulated in order to determine the security deposit, i.e. the tax base of the taxable supplies (those with a tax rate of 20%), ICA and fuels received. If no taxable supplies exceeding 25 thousand, ICA or fuels received of the same value have been performed over the current month, the security deposit shall be determined based on the estimate average monthly tax base of the taxable supplies or acquisitions of liquid fuels or the value of the liquid fuels released for consumption, calculated on a 12-month basis, but not less than BGN 50 000.[4]
The security deposit under art. 176c, para. 1 shall be provided within a 7-day term prior to the date of:
1. the tax event of the supply[5], the tax base of which will result in exceeding the limit of BGN 25 000, or
2. occurrence of the tax event in case of an intra-Community acquisition, the tax base of which will result in exceeding the limit of BGN 25 000, or
3. release of liquid fuels for consumption under art. 20, para. 2, point 1 of the Excise Duty and Tax Warehouses Act, the value of which results in exceeding the limit of BGN 25 000.
In case of changes in the circumstances considered upon determining the amount of the security deposit, a new security deposit shall be provided within a 7-day term prior to such change. The new security deposit is provided for the term of the already provided security under art. 176c, para. 1 and amounts to at least 20 percent of the tax base of the taxable supplies/ intra-Community acquisitions of liquid fuels or the value of the received liquid fuels, released for consumption, which result in exceeding the limit of 20 percent of the tax base of the taxable supplies, acquisitions or the value of the received liquid fuels released for consumption, for which a security deposit has already been provided. It should be noted that the taxable persons are entered in a special electronic registry of NRA. The registry includes: identification number of the persons who have provided the security, the amount of the security and its effective term, date of registration and date of deletion. The deletion from the registry and release of the security are performed pursuant to art. 176c, para. 7 of the VAT Act.[6]
Pursuant to art. 176c, para. 12 of the VAT Act the procedure for provision, release and utilization of the security deposit under this article shall be determined in a Regulation implementing the VAT Act. The latter has not been promulgated in the SG yet and may be accessed on the website of the Ministry of Finance.

Pursuant to art. 111b, para. 1 of the draft Regulation implementing the VAT Act, the provision of the security deposit shall be carried out through the submission of appendix 35, together with evidence for the security deposit under art. 111b, para. 3 of the same draft regulation. The electronic application shall be accompanied as follows: in case of a security in cash – by a payment order; in case of state securities – by an excerpt from the individual account of the person under Ordinance 5 of 2007 and in case of a bank guarantee – by the original document. Lastly, when the tax base of taxable supplies/ intra-Community acquisitions of liquid fuels or the value of the received liquid fuels released for consumption over the previous tax period exceeds the tax base of the tax base of taxable supplies/ intra-Community acquisitions of liquid fuels or the value of the received liquid fuels released for consumption for which a security deposit has already been provided, a new or an additional security deposit shall be provided. The increase or decrease of the security deposit depends on the previous tax period.

III. Contradiction between the amendments and addendums to the VAT Act and the tax neutrality principle and tax expectations under Directive 2006/112 and the ECJ case law

The VAT Directive -2006/112 introduces the procedure for deduction of tax credit and is meant to relieve the operator entirely of the burden of VAT paid or payable in the course of all his economic activities. The common system of VAT seeks to ensure complete **neutrality** of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT (judgment of 12 July 2012, EMS-Bulgaria transport OOD, C-284/11, EU:C:2012:458, p. 43 and the quoted case law)[7].

The principle of **tax neutrality** requires that the deduction of VAT paid for received supplies is allowed if the substantive requirements related to the right of deduction are fulfilled, even if the taxable person has omitted some formal requirements. Practically, I believe that the amendments to the VAT Act introduce double indirect taxation and over-security as compared to the actual VAT payable for the one-month tax period. The above conclusion is based on the fact that, on the one side, the taxable person reports the supply (sales or purchases) of goods or services, respectively the result - VAT payable or recoverable - every month. If the tax base of the taxable sales exceeds the purchases with a right to a full/ partial tax credit, the person shall pay VAT. Thus it will turn out that taxable persons trading with liquid fuels secure tax obligations which are currently paid for a 1-year term. In practice, indirect taxation is carried out twice - once through the effective payment of VAT and the second time - through a security deposit for an already fulfilled tax obligation, paid in advance - 1 year.

On the other side, the amount of the security deposit does not correspond to the result of the tax period of economic operators. The security exceeds the actual VAT payable for the relevant one-month tax period. Upon determining the result for calculation security deposit, the tax bases of taxable supplies, ICA [8] and received liquid fuels are summed up, which is not only economically incorrect, but represents an undue tax debt - financial burden for the economic operators in the form of a security deposit. The tax neutrality principle means the recognition and exercise of the right to a tax credit [9]. Pursuant to the case law of the Court, the **tax neutrality** principle inherent to the common VAT system does not allow for the taxation of the economic activities of a taxable person to lead to double taxation (see to this effect judgments Puffer, C-460/07, EU:C:2009:254, p. 45 and 46, and Club, C-153/11, EU:C:2012:163, p. 42)[10]. On the one side, there is an effective taxation carried out through the one-month period, and on the other side there is a security deposit for the same tax obligation which has already been fulfilled.

The function of the security deposit makes it similar to indirect taxes but takes into consideration the fact that it may be recovered under certain conditions. The security deposit creates an unjustified financial burden and financial risk for economic operators [11].

The mechanism of functioning of VAT is related to a specific result/ difference between taxable sales and purchases with the right to a full/ partial tax credit/ and not to a mathematical sum of sales and purchases, in which a security deposit is determined without a tax obligation after its payment.

“A national legislature may breach the principles of legal certainty and of the protection of **legitimate expectations** when it suddenly and unexpectedly adopts a new law which withdraws a right that taxable persons have enjoyed until then, without allowing them the time necessary to adjust, when the objective to be attained did not so require (see to this effect the judgment of 29 april 2004 г., Gemeente Leusden and Holin Groep, C-487/01 and C-7/02, EU:C:2004:263, p. 70)".[12]

The introduction of a security for VAT recovery, its amount and disproportion were discussed by the ECJ in its judgment of 10 July 2008 on case C-25/2007[13]. The case is similar to this one.

Upon import of liquid fuels from third parties (out of the EU), no security deposit under the VAT Act is required and in case of an intra-Community acquisition (“import” from a Member State), one is required. Thus, the principle of tax neutrality and the principle of protection of competition are violated. The provisions of art. 176c et seq. of the VAT Act create inequality between the traders of liquid fuels performing ICA, and those performing imports from third countries due to the introduced unjustified financial burden.

[1] The definition of intra-Community acquisition of goods is specified in art. 13, para. 1–3 of the VAT Act.
Pursuant to art. 13, para. 1–3 of the VAT Act, an intra-Community acquisition (ICA) of goods is:
1. acquisition of the right of ownership of goods or limited real rights on goods under art. 6, para. 1 of the VAT Act as well as the actual receipt of goods in the cases under Article 6 (2), point 2, point 3 and point 4 of the VAT Act.
2. intra-Community transfer of goods - The receipt of goods within the territory of the country by a taxable person, which will be used for the purposes of the economic activity of said person, where said goods are dispatched or transported by or for the account thereof from the territory of another Member State in which the person is registered for VAT purposes. The intra-Community acquisition within the meaning of art. 13, para. 1 of the VAT Act requires the following cumulative conditions:

1. the supplier shall be registered for VAT purposes in a Member state as at the date of the tax event for ICA;

2. the recipient of the goods shall be a taxable person or a non-taxable legal entity, a person who is either registered or not registered for VAT purposes in the Republic of Bulgaria. Upon the delivery of a new means of transport or excisable goods, the recipient does not have to be registered for VAT purposes.

3. the goods shall be dispatched or transported from the territory of a Member State to the territory of the country (the Republic of Bulgaria);

4. The supply is taxable with VAT and for consideration;

5. the supplier has transferred the title or limited real rights on the goods or has factually delivered the goods in the hypotheses of art. 6, para. 2, point 2, 3 and 4 of the VAT Act.

[2] In case of a taxable person under art. 176c, para. 1 who has not performed taxable supplies or intra-Community acquisitions or has not received liquid fuels released for consumption under art. 20, para. 2, point 1 of the Excise Duty and Tax Warehouses Act, with a total value of the supplies, acquisitions or releases exceeding BGN 25 000 over the previous tax period, the security amount shall be determined pursuant to para. 2 of art. 176c on the forecast average monthly tax base of the taxable supplies or acquisitions of liquid fuels or the value of the liquid fuels released for consumption, calculated on a 12-month basis, but shall not amount to less than BGN 50 000.

[3] In case of further supplies of liquid fuels within the territory of the country which have been the subject of an intra-community acquisition or have been secured upon their release for consumption, the person who has performed the intra-Community acquisition or has received the liquid fuels released for consumption is not required to provide security.

[4] Art. 176c, para. 3 of the VAT Act.

[5] Pursuant to art. 25, in conjunction with art. 63, para. 1, para. 2 and para. 6 and art. 51, para. 1 of the VAT ACT, the tax event arises:
- on the date on which ownership of the goods passes or a real right on the goods is established;
- on the date of actual handing over of the goods under art. 6, para. 2 of the VAT Act;
- on the date of completion of the transportation of goods subject to the condition of art. 13, para. 3 of the VAT Act;
- at the end of each calendar month, in case of supplies with constant performance under art. 13, para. 1 - 3 of the act, having a duration exceeding 1 month.

[6] The security deposit is released and the person is deleted from the registry under art. 176c, para. 10 prior to the expiration of the one-year term, if the registration of the person under this act is terminated, where the person will not perform transactions under art. 176c, para. 1 and has no outstanding obligations for value added tax.

[7] Judgment on case C-332/15 of ECJ

[8] In case of ICA, the result from the period is zero in the general case, since a reverse charging of VAT is present as a reverse tax obligation, i.e. VAT is charged by the recipient and the protocol for charging is included with the same value in the sales and purchase log books.

[9] The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures the **neutrality** of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject to VAT (judgment of 6 December 2012, Bonik, C-285/11, EU:C:2012:774, p. 27 /Judgment C 267/2015 ECJ/

[10] Judgment on case C 209/2014 of ECJ

[11] Judgment on case C 25/2007 ECJ

[12] Judgment on case C 332/2014 of ECJ

[13] "As is argued by the Commission, the **security deposit** is not proportionate either to the amount of the excess VAT to be repaid or to the economic size of the taxable person.

31 In particular, the lodging of such a **security** deposit is likely, contrary to what is required by the case-law referred to in paragraph 17 of this judgment, to entail a not inconsiderable financial risk for undertakings which have just commenced their activities and may, consequently, lack significant resources.

32 In reality, the effect of the obligation to put in place such a **security deposit**, in order to be able to take advantage of the period which ordinarily applies, is only to replace the financial burden associated with the fact that the amount of the excess VAT is tied up for a period of 180 days with the burden consequent on the amount of the security deposit being tied up. There is even less justification when, first, the latter amount may, as in the case in the main proceedings, be greater than the amount of the excess VAT at issue, and, second, the length of time over which the security deposit is tied up is greater than the period for repayment of the excess VAT laid down for new taxable persons. Under Article 97(6) of the Law on VAT, the security deposit can be released only after a period of 12 months, on condition that the taxable person has paid all of the taxes relating to that period for which he is liable to the State.

33 In those circumstances, the reply to be given to the first question is that Article 18(4) of the Sixth VAT Directive and the principle of proportionality preclude national legislation, such as that at issue in the main proceedings, which, in order to allow the investigations required to prevent tax evasion and avoidance, extends from 60 to 180 days, as from the date of submission of the taxable person's VAT return, the period available to the national tax office for repayment of excess VAT to a category of taxable persons unless those persons lodge a **security deposit** to a value of PLN 250 000."