

VAT treatment of non-fungible tokens (2) 2/31/22



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The first article of our NFT series presented an overview of NFTs and analysed the Spanish tax authority's finding that NFT is a service supplied electronically between its creator and the customer. This article explores how to determine what national VAT should be charged on NFT supplies and where the place of supply of electronic services is.

In the case examined by the Spanish tax authority, the NFT buyer was a non-taxable person. The NFT creator is responsible for determining the place of supply because the platform receives a brokerage fee, rather than supplying the NFT in its own name and in the creator's interests (in the latter case the creator would issue a tax invoice for the supply to the platform and the platform would then invoice the supply to the customer).

Electronic services supplied to a non-taxable person are treated as supplied at that person's domicile or declared residence, or in the absence of one, at their permanent residence. To charge VAT properly, the NFT creator should determine the customer's location. The requirements and particulars to be used (e.g. the customer's address, IP address, location of their bank, and the country code in their phone number) are prescribed by article 24.a-24.f of Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (the "VAT Regulation") directly applicable across the EU. NFT creators often find it difficult to obtain the required customer details, especially if the supply involves a broker and all payments are made in cryptocurrency, which makes it impossible to obtain most of the particulars mentioned in the VAT Regulation.

Having established that the customer is in another member state, the NFT creator should charge VAT of that member state. This can be done by registering for VAT in the member state or by registering for the One Stop Shop (OSS) scheme mentioned in section 140.3 of the VAT Act, which permits a taxable person to file a single OSS return showing VAT payable on electronic services in other member states. Once that VAT has been paid to the Latvian Treasury, the State Revenue Service will transfer it to the other member states' tax authorities according to the OSS return.

If the ex-VAT amount of electronic services and distant sales in the previous or current calendar year totals up to EUR 10,000, the NFT seller may charge his home country's VAT on such cross-border supplies if the NFT creator carries on a trade only in one member state (e.g. Latvia) or – in the absence of trade – if the service provider's declared or permanent residence is only in one member state.

If the NFT buyer is outside the EU, the seller is not liable to charge EU VAT. It's important to note that the customer's non-EU country might have adopted similar rules as the EU, which the NFT creator might be liable to follow.

With NFTs often being traded through a third-party platform, we need to assess what role that platform plays – whether it receives a brokerage fee or whether it supplies services in its own name but in the NFT creator's interests. Attention should be paid not only to contractual terms but also to the VAT Regulation's article 9.a(1), which in certain cases requires a platform to supply electronic services in its own name. The

Court of Justice of the European Union is currently hearing a case (C-695/20) concerned with the validity of article 9.a. In this dispute, Fenix International, the owner of digital content platform OnlyFans, disagrees with the UK tax authority's finding that the platform should have supplied services to digital content consumers (fans) in its own name, rather than – as Fenix International believed – collecting a brokerage fee from the authors, who themselves made supplies of digital content.

If the platform were to supply services in its own name and in the NFT creator's interests, it would be liable to determine the customer's location. The NFT creator would have to determine only the platform's location. Since the platform is usually an entity that carries on a trade, the platform is likely to be responsible for paying VAT in its own country (assuming the transaction doesn't take place inland).

Finally, there is no guarantee that other countries will follow the Spanish tax authority's opinion. It's also important to note that what the Spanish tax authority examined is just one of several possible business models and types of NFT creators' income.

For more information on NFTs, you are welcome to read PwC's report on NFT legal, tax and accounting considerations, PwC's overview of VAT treatment of NFT in different countries, and PwC's Annual Global Crypto Tax Report 2021.