CONFEDERATION FISCALE EUROPEENNE

Opinion Statement FC 5/2016

on the VAT liability of directors

Prepared by the CFE Fiscal Committee

Submitted to the European Commission in May 2016

The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries with more than 200,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

The CFE is registered in the EU Transparency Register (no. 3543183647-05).

We will be pleased to answer any questions you may have concerning CFE comments. For further information, please contact Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, CFE Tax Policy Manager, at brusselsoffice@cfe-eutax.org.

Introduction

Following its 100th meeting on 25 February 2014, the European Commission´s VAT Committee issued working paper No 786 on Services provided to companies by their shareholders[1], dealing with the question in which situations such services should be subject to VAT or considered services rendered by employees which are excluded from VAT. The guidance contained in the working paper is not legally binding.

CFE Comments

In its working paper No 786 to the VAT Committee, the European Commission correctly accepts that an employee shareholder may be providing dependent services that are not subject to VAT. However, the paper also suggests that where a professional is already a taxable person then he may be acting as a taxable person when he provides services to a company even if those services are provided under a contract of employment. The paper also suggests that ad hoc appointments to a board may constitute taxable activity as a result of the decision in case C-62/12, *Kostov*[2]**.**

Similar approaches have been taken by a number of tax authorities. For example:

(i) in Belgium, Swedish and French the view is taken that corporate directors are providing independent service;

(ii) the Luxemburg the tax authorities have expressed the view that both individual and corporate directors may be rendering independent services that are subject to VAT. The German authorities evidently take a similar view[3];

(iii) in the United Kingdom, s 94(4) Value Added Taxes Act 1994 states that a person is acting as a taxable person when he is appointed to an office in the furtherance of a trade profession or vocation. This is despite the fact that the directors' remuneration is taxable as employment income for direct tax purposes; and

(iv) Irish guidance suggests that solicitors are not liable for VAT on directors fees[4].

The CFE accepts that there may be cases where an employee or director may be rendering different services in different capacities. For example, he may be rendering some services as an employee or director and some services in the course of his professional consultancy business. In such cases, the professional services will be independent and therefore taxable.

However, the CFE considers that it is wrong to suggest that services rendered by an individual as an employee can be taxable just because he can be said to be carrying on a wider trade or business. Such an approach is inconsistent with article 10 of the Directive 2006/112/EU on a common VAT system, which expressly states that a person subject to an employer/employee relationship is not acting

[1] VAT Committee Working Paper No.786 on Services provided to companies by their shareholders – ES – Art. 9 and 10, dated 28 January 2014; European Commission reference: taxud.c.1(2014)201835 (download link).

[2] Judgment of 13 June 2013, http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=C-62/12.

[3] Regional Finance Office (OFD) Frankfurt, administrative order of 4 October 2013, reference S 7100 A-287-St 110.

[4] http://www.revenue.ie/en/tax/vat/leaflets/solicitors.html#section6

"independently" for the purposes of that Directive. The fact that the services are rendered under a contract of employment means that they are by their very nature dependent and therefore not taxable.

In this regard the CFE observes that there was no suggestion that there was an employment relationship in the *Kostov* decision and no consideration was therefore given to article 10 in that case. That decision therefore does not support the conclusion that a person acting as an employee can be considered to be acting independently because he conducts some wider business.

Support for this analysis is also provided by the judgment in case C-355/06, *van der Steen*[5], where the Court accepted that a director who also had a contract of employment was acting dependently.

Even in the absence of a contract of employment, it is considered that the services rendered by a director in his capacity as a director should be considered to be dependent. A director owes fiduciary duties to the company and has a different relationship and responsibilities to a normal contractor. This was correctly recognised by Advocate General Van Gerven in case C-60/90, *Polysar Investments*[6], where he observed that:

> *"A director or officer of the company does not act on his own behalf but only binds the (subsidiary) company whose instrument he is; in other words, where he acts in the exercise of his duties under the company instruments, there is no question of his acting 'independently'. In that regard, his actions must be equated with those of an employee who, as art 4(4) of the Sixth Directive expressly states, does not act 'independently'".*

Even if the director has some wider trade profession or business, his relationship with the company therefore differs from that of a normal contractor and should not be subject to VAT. Like an employee, a director acts on behalf of the company and as a representative of the company and owes it fiduciary duties. Like an employee, in discharging these responsibilities a director is not bearing any business risk, instead he depends on the company for his remuneration. This should be the position whether the payment is made directly to the director or to a third party, for example his more general employer. The fact that it is agreed that the payment should be made to a third party, such as an employer, does not alter the fact the payment is being made on account of a dependent relationship and therefore does not have the qualities of consideration for a supply. It is also difficult to see why the position should be any different with a corporate director, since the substance of their legal relationship with the company is the same. For these reasons it is considered that both the Commission and member states are wrong to be suggesting that such payments should be subject to VAT.

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[5] Judgment of 18 October 2007, [2007] ECR I-8863, http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=C-355/06.

[6] Judgment of 20 June 1992, http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=C-60/90, [1991] ECR I-3111, p. 3126 (para 6).