CONFEDERATION FISCALE EUROPEENNE

Opinion Statement FC 05/2017

VAT exemption of services provided by an independent group of persons (Article 132 (1) (f) of Directive 2006/112/EC)

Prepared by the CFE Fiscal Committee

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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.
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We will be pleased to answer any questions you may have concerning CFE comments. For further information, please contact Jeremy Woolf Chair of the CFE Indirect Taxes Committee, or Mary Dineen Advisor to the Fiscal Committee at CFE, at brusselsoffice@cfe-eutax.org.

1. Introduction

In four pending cases, the Court of Justice of the European Union will bring some clarification to the scope of the VAT exemption in Article 132 (1) (f) of Directive 2006/112/EC (The "VAT Directive"), commonly referred to as the "cost sharing associations exemption". Opinions have already been delivered by the Advocate General in cases C-274/15 *Commission vs Luxembourg,* C-326/16 *Aviva* and C-605/15 *DNB Banka*. An Opinion has also been delivered by Advocate General Wathelet in Case C-615/*15 European Commission v Germany*.

Due to the significance of this VAT exemption for many economic operators, the CFE considers that it is important to make a few technical comments on the position adopted by Advocate General Juliane Kokott in the Case C-605/15 *Minister Finansów v. Aviva Towarzystwo Ubezpieczeń na Życie S.A. w Warszawie*[1] *(the "Opinion")*

2. CFE Technical Comments

According to the conclusions of the Advocate General Juliane Kokott in the Opinion, an independent group of persons (Article 132(1)(f) of the VAT Directive) may supply exempt services only to those of its members which are subject to the same legal system as itself.

Advocate General Kokott bases her opinion on the grounds set out below. The following are CFE's comments on those grounds.

2.1 *The "historical logic" of the exemption scheme.*

In the Directive 77/388/EEC, this provision was governed by Article 13 of the Sixth Directive, which the Advocate General considered applied only to '*exemptions within the territory of the country*' (para. 42 of the Opinion).

However, in 1963, the European Parliament suggested that the Commission should allow Member States to either tax, exempt or leave out of the scope of VAT activities having at that time no impact on the internal market. At the time, the European Parliament feared that the proposal of the Commission for a First VAT Directive to introduce a VAT system in two phases was not ambitious enough and that consequently Member States would never be prepared to adopt a tax system that secured neutrality on intracommunity transactions[2]. This is the historical origin and motivation of the current VAT exemptions. Interestingly, at that time, immovable property and financial services were not included in the list of the operations left to the choice of the Member States. Article 13 of the Sixth VAT Directive also later included banking, insurance, gambling, postal service etc. which can hardly be considered as exclusively rendered "within the territory of a country".

2.2 *The Advocate General observes that cross-border services are explicitly dealt with in Chapter 7 of the Directive 2006/112/EC (para. 44 of the Opinion).*

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[1] Opinion of Advocate General Kokott delivered on 1 March 2017.

[2] (Report of the Committee for the internal market on the Proposal of the Commission to the Council (Doc 121, 1962-1963) concerning a Directive on the harmonization of the legislations of the Member States on turnover taxes ("Deringer Report") European Parliament, Documents of Session 1963-1964, 20 August 1963, Document 56 page. 45).

It is very true that some cross-border services are explicitly dealt with in Chapter 7 of the VAT Directive, but only in so far as they are related to the intra-EU movement of goods. Chapter 7 of the VAT Directive does not include all possible cross-border services, but only a few services connected with the international trade in goods. Such exemptions are those which permit a credit of the related input VAT, while chapters 2 and 3 relate to exemption with no right to deduct the related input VAT;

2.3 *The Advocate General observes that a broad interpretation of Article 132(1)(f) of the VAT Directive would give rise to an inconsistency with Article 11 of the VAT Directive. This allows Member States to regard as a single taxable person 'persons established in the territory of that Member State' who are 'closely bound to one another' in some way by a group (para. 46 of the Opinion).*

It should firstly be observed that it does not follow from this that article 11 is just directed at purely internal transactions. Although other member states are not required to adopt similar groupings, some member states (such as the United Kingdom and the Netherlands) take the view that the entirety of a taxable person including its establishments in other states becomes part of any VAT grouping. The CFE also observe that article 11 expressly makes it optional for states whether to recognise such groupings. This reflects the fact that the Community system of VAT is going through a process of gradual harmonisation of national laws: see Articles 99 and 100 of the EC Treaty (now Articles 93 EC and 94 EC). As the Court has repeatedly stated, this harmonisation, as brought about by successive directives and in particular by the Sixth Directive, is still only partial (see Case C-36/99, *Ideal Tourisme* para. 37; C-165/88 *ORO Amsterdam Beheer and Concerto v Inspecteur der Omzetbelasting* para. 21). However, article 132(1)(f) is a more tightly focused provision which is not similarly expressed as being optional, and is clearly intended to have a harmonised application;

2.4 *The Advocate General also takes the view that article 11 and 132 (1) f) are underpinned by the same rationale.*

However, this does not imply, as suggested by the Advocate General, that the applications of those exemptions should be subject to the same conditions or should be interpreted in the same way. If article 132 (1) (f) was just intended to have an impact on the VAT charged within a Member State, the wording of the exemption could have been restricted in the same manner to article 11.

The administrative cooperation instruments should also mitigate the practical difficulties that the Advocate General refers to, when ascertaining whether the conditions for the VAT exemption to apply in different jurisdictions. As with cross-border input tax claims, states can also require taxable persons to provide information: note C-73/06 *Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern* at para 35.

2.5 The Advocate General observes that "*the fact that the exemption provided for in Article 132(1)(f) of the VAT Directive, as the wording of that provision makes clear, must not give rise to a distortion of competition, also indicates that the exemption should be confined to a single Member State*" (para. 50 of the Opinion).

However, the CFE observes that according to the case law, the special measures that member states may retain, in order to prevent certain types of tax evasion or avoidance may not exceed the limits strictly necessary for achieving that aim. In particular, such measures cannot have a

general nature (see Case 324/82, *Commission v. Belgium*, para.29), such as the prohibition of cross-border activities. In accordance with the EU principle of proportionality, measures imposing financial charges on economic operators are only lawful if the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued (Case 265/87, *Schäder*, para. 21). It would be unfortunate if a different approach were adopted in this context, so that the exemption is prevented from applying in cross-border context even though there is no distortion of competition.

2.6 *The Advocate General observes that that a restriction on the freedom to provide services that may be present is also justified by the need to guarantee the effectiveness of fiscal supervision (Para. 58 of the Opinion).*

As has already pointed out, the CFE believes that this can be satisfactorily ensured by existing legal instruments such as the Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax and the fact that the onus is on a taxpayer to prove his entitlement to rely on an exemption.

2.7 *The Advocate General also observes that a broader construction will allow tax optimisation models that are very easy to set up, particularly for groups of companies that operate globally. "The latter simply have to form with those of their affiliates that operate in Europe a group, established in a third State where there is no VAT (such as the United States, for example), to purchase all the services, subject to VAT, that they had previously purchased from Europe from third parties, an arrangement which cannot be described as artificial" (para. 62 of the Opinion).*

Even if this is correct, it is important to appreciate that exactly the same point can be made in relation to the other VAT exemptions listed under article 135(1) a to l of the VAT Directive. There is nothing to prevent companies being setup outside the EU, for example in the US, or even in the EU, to render services into the EU with similar benefits. To date, neither the Court of Justice, nor the Member States have ever argued that the VAT exemption on such services should be limited to a purely local supplies.

2.8 Finally*, the Advocate General is of the opinion that based on the schematic position of Article 132(1)(f) of the VAT Directive, the VAT exemption could not apply to the banking and insurance sectors but should be restricted to the exemptions related to the public interests (such as cost sharing associations of doctors).*

This issue has also been recently considered by Advocate General Wathelet in his Opinion in Case C-615/15 *European Commission v Germany* who at paragraphs 86 and 94-111 considered that the exemption should extend to those in the banking and insurance sector. [3] The CFE agrees with this view expressed by Advocate General Wathelet for the reasons expressed in that Opinion. It also observes that when discussing the adoption of the Sixth VAT directive and the scope of that

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3 Advocate General Wathelet at paragraph 77 refers to the United Kingdom's non-adoption of the exemption in article 132(1)(f). The exemption has recently been introduced into UK law as Group 16 of Schedule 9 of the Value Added Tax Act 1994.

exemption in 1976, the Member States were at that time considering either a narrow interpretation or a broader one. In the end, it was the French broader position that prevailed and Article 13(A) (1) f) of the Sixth directive (which preceded article 132 (1) f) of the VAT Directive was not restricted to any particular sector. Advocate General Kokott refers to the 2007 working documents on the banking and insurance VAT exemptions. However, no reference is made by her to the statements made at the time by the Presidency of the Council[4], which clearly stated that article 132(1) f) of the VAT Directive already applies to the banking and insurance sectors and that it therefore not necessary for the Council to extend the scope of that provision.

3. Conclusion

For these aforementioned reasons, and with due respect, the CFE considers that it would be unfortunate if the Court adopts a similarly restrictive approach to the exemption to that adopted by Advocate General Kokott.

[4] Document FISC 139 of 8th November 2010