CONFEDERATION FISCALE EUROPEENNE

Opinion Statement FC 01/2017

VAT GROUPINGS AND RELATED ISSUES CONCERNED WITH FIXED ESTABLISHMENTS AND THE COST SHARING EXEMPTION

Submitted to the European Institutions on 8 November 2017

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 Jeremy Woolf Chair of the CFE Indirect Taxes Committee, or Mary Dineen Advisor to the Fiscal Committee at CFE, at brusselsoffice@cfe-eutax.org.

Problem with the current law & practice

1 VAT groups are permitted under the law of some member states. The pressures on member states to implement VAT grouping rules are likely to be increased by the recent decisions of the Court of Justice in C-326/15 *DNB Banka AS v Valsts ieņēmumu dienests*, C-605/15 *Minister Finansów v Aviva* and C-616/15 *Commission v Germany*. The Court in those cases considered that the exemption in article 132(1)(f) of Directive 2006/112/EC, for supplies of services by independent groups of persons for their members, does not extend to the financial and insurance sectors. Since this exemption has previously been viewed as a way of avoiding disproportionate VAT liabilities arising in an exempt supply chain in the financial and insurance sectors, unless the Directive is changed, those sectors are likely to want VAT groupings to be introduced as an alternative way of avoiding disproportionate VAT liabilities.

2 However, particularly in the light of the judgment of the Court in C-7/13 *Skandia America Corp (USA), filial Sverige v Skatteverket*, one issue that has been causing problems for tax authorities and taxable persons is cross-border supplies involving VAT groups. Problems currently arise:

(i) in identifying whether a company is a member of a VAT group. These problems arise because VAT registrations do not indicate that they relate to a group. The registrations will frequently be in the name of a different group company. The VIES system also does not always contain information that a registration relates to a group and who the members of the group are. The invoicing rules relating to VAT groups also differ from country to country. Particularly in relation to cross-border transactions, this can make it very difficult for traders to know if their customer or supplier is properly registered for VAT. This issue is of importance, since it impacts on who is liable to account for VAT on cross-border transactions. Tax authorities also require this information to be able to determine whether VAT has been correctly accounted on transactions. Indeed, it will become even more important if the Commissions' proposal, announced on 4 October 2017, to amend article 138 of the Directive so that it becomes a substantive condition to identify the VAT status of the customer, is adopted;

(ii) in determining who should be accounting for tax or recovering input tax on transactions. This is because different member states adopt different approaches to the recognition of VAT groups. Some member states recognise the existence of VAT groupings in other member states while others do not. This can cause problems for taxable persons to know on what basis and capacity they should be making claims to

recover input tax or accounting for output tax. It can also cause problems in determining who the supply should be treated as being made by and to.

Substantive changes to the scope of the grouping provisions and the exemption in article 132(1)(f) of Directive 2006/112/EC

3 The CFE considers that one long-term solution to many of the problems would be the creation of EU wide VAT groups subject to harmonised rules. The CFE appreciates that there has previously not been a sufficient consensus between member states to make this development likely in the medium term. If it increases the numbers of countries adopting VAT grouping provisions, the recent decisions of the Court of Justice in C-326/15 *DNB Banka AS v Valsts ieņēmumu dienests*, C-605/15 *Minister Finansów v Aviva* and C-616/15 *Commission v Germany* may make states more sympathetic to reforms.

4 Especially if the creation of EU wide VAT Groups is not a possibility, the CFE considers that it would be desirable to amend article 132(1)(f) of Directive 2006/112/EC to make it clear that this exemption can be utilised by financial and insurance companies that are members of a grouping. Such an approach accords with the Commission's submissions in C-616/15 *Commission v Germany* and also the Commissions' Proposals to amend the Directive in Com 2007 747. Assuming such groupings are to be permitted within the EU on a cross-border basis, we can see that the rule will probably need to make it clear that the supplies made by the members must be exempt under the rules of the country where the grouping is established and where the members make their supplies (an approach which is similar to that adopted in in C-136/99 *Ministre du Budget and Another v Société Monte Dei Paschi Di Siena* [2000] ECR I-6109).

Other possible reforms relating to article 11 VAT groupings

5 Even if there is no consensus for the changes outlined above, the CFE considers that there would be merit in adopting the following changes in relation to article 11 of the 2006 Directive VAT groupings:

(i) having a special prefix or suffix for VAT registrations relating to VAT groups, so it is easier for tax authorities and traders to appreciate that a person is a member of a VAT grouping. On a more general note, we also consider that it would be desirable to have separate VAT registrations for established and non-established traders, as is applied in Spain;

(ii) altering the VIES system so that it more clearly indicates that a registration relates to a VAT grouping and also states who the members of the group are;

(iii) standardising the rules relating to invoicing of transactions concerning VAT groups. We consider that the invoice should clearly identify the actual supplier and customer and the VAT grouping;

(iv) standardising the rules and/or practices about the recognition or non-recognition of VAT groupings in other member states. Because it better accords with the current wording of the Directive and reduces the number of capacities in which a company will have dealings with any one tax authority, the CFE considers that there would be considerable merit in having a rule that member states should not recognise VAT groupings in other states. This should have the benefit of limiting the number of capacities in which a taxable person has to deal with any tax authority to two. The contrary approach of recognising VAT groupings in other member states as separate taxable persons means that a company may have dealings with a tax authority in a vast multitude of different capacities, which is clearly likely to complicate the system. This is an issue that we consider further in the Annex below;

(v) having an explicit recognition that invoices can be issued on transactions between fixed establishments in different countries or members of a VAT grouping even though the transaction is not a taxable transaction for VAT purposes in that state;

We can also see that the increasing digitalisation of the economy may require changes to what should be considered a fixed establishment for VAT purposes. In particular, it may be questioned whether the existing case law, with its focus on "human and technical resources", remains appropriate given global digitalisation. Businesses do not need a physical presence anymore in a country to transact business.

The conditions for article 11 VAT grouping

6 The European Commission have also prepared a paper for the VAT Expert Group (VEG No 63) and a Working Paper 918 on the issue of the meaning of "financial economic and organisational links" for the purposes of the VAT grouping rules in article 11. Whilst we agree with much of the paper, there are some comments that possibly suggest that an unduly

restrictive approach might be proposed. In particular, at the end of paragraph 3.6.1, the Working Paper observes that:

> "Certain situations could be seen as failing to pass the economic link test. For instance, it seems difficult to see how this could be met in a scenario involving companies operating in different economic sectors or where the activity of such entities is completely unrelated."

7 It is not uncommon for corporate groups to undertake a range of often distinct activities in different sectors. It would be very unfortunate if such groups could not be eligible for a single group registration. Although different members of the group may undertake distinct activities, there will invariably be management and related services provided to all the members of the group by at least one member of the corporate group. There is also no reason why the same facts should not support the existence of both a financial, economic and organisational linkage. An example is provided by a franchise agreement. The guidance at the beginning of paragraph 3.6.1 of the Working Paper would appear to accept that an economic link does exist if one group company provides services to the other group companies. It states that an economic link can exist if "one member carries out activities which are wholly or substantially to the benefit of other members". The CFE endorses these comments which support a broader approach than is suggested by the passage quoted above at the end of the paragraph. Especially if new criteria are being devised, even in cases where the group conducts distinct and independent activities, it would be unfortunate if VAT grouping cannot exist in a case where one member of the corporate group renders services to all the members of the VAT group. A broader construction of the provisions is also more consistent with the decision of the Court of Justice in C-85/11 *Commission v Ireland*. As is correctly recognised in the Working Paper, in that case the Court considered that a company that was not a taxable person could be a member of a VAT group. However, if a restrictive approach is adopted in relation to the requirement for economic links, it is difficult to see how this requirement could ever be satisfied in relation to such companies. The Court at paragraph 40 considered that there was no justification for giving the provision a restrictive interpretation.

8 Another issue raised in the Working Paper is whether account can be taken of relations with members of a corporate group that are not members of the VAT group because they have no establishment in the relevant state: see scenario 3 at paragraph 3.5.2.1. This scenario gives an example of a non-established parent company with two subsidiaries that are established in the same state. It would again be unsatisfactory if those two subsidiaries could not form a VAT

group, even though the parent cannot be a member, because it is not established in the state in question. There is nothing explicit in the wording of article 11 that prevents the subsidiaries' relationship with their parent from resulting in the necessary financial, economic and organisational links even though the parent is not eligible to join the grouping because it is not established in the country.

ANNEX

1 The question, of what recognition should be given to VAT groupings in other states, is not only significant when assessing procedural requirements. It also has potential substantive implications. For example, it may impact on whether a transaction should be considered to be purely internal, with the consequence that it should not be considered to be a taxable supply in the light of the judgment of the Court in C-204/210 *Ministero dell'Economia e delle Finanze and another v FCE Bank plc.*

2 One issue that may make it more difficult for Member States to come to a consensus on the correct approach to the recognition of VAT groupings in other Member States is the different approaches that Member States adopt when determining which fixed establishments can be considered to form part of a VAT grouping. Some Member States limit the entitlement to establishments in its territory. The Court of Justice clearly considered that such an approach was open to a Member States to adopt in C-7/13 *Skandia America Corp (USA), filial Sverige v Skatteverket.* Other Member States consider that all the establishments of a member or the representative member can be regarded as forming part of the single taxable person, on the basis that it is the entire taxable person that is admitted to the VAT grouping. The attraction of this broader approach is that it enables VAT groupings to be treated in the same way as a single taxable person. It thereby minimises distortions between companies that operate using a branch network and companies that have a corporate grouping structure. Particularly in the exempt sector, the more restrictive approach has significant disadvantages for a company joining a VAT grouping or that is compelled to join a group if it receives services from fixed establishments in other member states or third countries. This is because such supplies will be subjected to a VAT liability which would not have arisen on supplies between two of its establishments if the company was not a member of a VAT group, as a result of the judgment of the Court in C-204/210 *Ministero dell'Economia e delle Finanze and another v FCE Bank plc*[1].

---

[1] It is accepted that this decision may encourage some businesses to provide internal services in jurisdictions which enable it to minimise the amount of irrecoverable input tax that is incurred. However, this can be countered by the adoption of anti-avoidance provisions similar to those introduced in the United Kingdom: see s 43(2A)-(2E) VATA 1994.

3 One suggested objection to the wider rule is that it is extra-territorial. However, it is important to appreciate that a Member State that takes the broader view is not seeking to obtain any extraterritorial taxing powers. It is the place of supply rules that determine where supplies should be taxed, and therefore which countries' rules a supply should be subject to. Provided Member States are not required to recognise the VAT groupings in another Member State, the broader view should therefore have no impact on other Member States' taxing rights. Having a common rule that Member States are not required to recognise a VAT grouping in another Member State should therefore have no impact on other Member States' taxing rights[2].

4 With Member States that do not recognise VAT groupings or which adopt the approach of treating all the fixed establishments of a member as part of the grouping, the approach of not recognising VAT groupings in other states, also has the benefit of making administration simpler for both taxpayers and tax authorities. This is because it has the consequence that the relevant company or person will just have dealings with the tax authority as a free-standing company, if groupings are not recognised in the country, or as a member of the grouping, if the grouping is recognised in the country. Even in counties, such as Sweden, which just treat fixed establishments within its country as being part of the grouping, it means that a company that is a member of a grouping will just have dealings with a tax authority in two capacities, since its establishments within the grouping will be regarded as forming part of one taxable person while all the other establishments will be regarded as another entity.

5 The contrary approach, of recognising a company as being part of a separate taxable person in each jurisdiction in the European Union where it is a member of a VAT group, means that a company may have to undertake dealings with a tax authority in large number of different capacities, since it will be treated as forming part of a separate taxable person in each country where it is a member of a VAT group. It will inevitably be simpler for a company and the tax authorities to just have dealings with a tax authority in one or two capacities, rather than a large multitude of capacities. This is another major benefit of having uniform rules that do not require Member States to recognise VAT groupings in other member states. It also better

---

[2] It also possibly receives some support from the decisions of the Court of Justice in C240/05 *Administration de l'enregistrement et des domaines v Eurodental Sàrl* [2006] ECR I-11479, where the Court at paragraph 54 considered that a Member State was not required or entitled to allow a right to deduct VAT because another Member State has exercised a transitional option to tax the supplies, and in C-136/99 *Ministre du Budget and Another v Société Monte Dei Paschi Di Siena* [2000] ECR I-6109, where the Court considered that a trader was only entitled to make an 8th Directive claim if the supply is taxable in the country of refund as well as in the country where the business was established.

accords with one of the objectives of the VAT grouping rules, which is to simplify administration.