

INTERNATIONAL TAX NEWS



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International VAT issues

Six EU aspects of how to safely implement the new VAT Package as discussed during the International VAT Meeting 2010 in Düsseldorf

eVAT Check-ID

How a WTS software tool supports companies in issuing correct invoices to EU recipients

„It is essential for any taxpayer to be aware of the changes of the VAT Package to put everything on the right track for compliance reasons.“

Joachim Strehle,
Head of Service Line VAT, WTS



New WTS Alliance Association, new International Tax News Design

The World Tax Service WTS celebrates its tenth anniversary. Back in 2000, five tax experts took the chance to open a tax consultancy dedicated to serve two carve outs of Siemens, the technology brands Infineon and Epcos. Today, WTS has 450 employees worldwide and serves a multitude of large multinational corporations and mid-sized companies in their international activities.

One of the main decisions of WTS was the foundation of WTS Alliance in 2003. As of today, 26 members of this Alliance form a strong network of tax expertise around the globe. Recently, tax offices from Ukraine, Malta, and Liberia joined WTS Alliance. In the upcoming weeks, the foundation of a WTS Alliance Association will take place, as a clear statement of taking the common efforts to the next level. The first General Meeting of our association will take place end of August at Lake Maggiore, Italy, prior to the Congress of the International Fiscal Association IFA 2010 in Rome.

This first edition of our International Tax News has a completely new design. We are interested to read and listen to your feedback on it.

In this edition, we focus on advice for the practical implementation of the so called VAT Package, paralleling the International VAT Meeting on March 4, 2010, in Düsseldorf. On the guest list of this conference: 10 EU member states plus Switzerland, describing problems and the implementation in their respective countries.

Yours,
Richard Tigges

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International VAT Meeting 2010: Implementation of New Services Directive varies significantly within the EU

The implementation of the new services Directive varying from one EU member state to another is causing concern to many businesses in Germany. This was pointed out by the World Tax Service WTS. Germany, 4 March 2010: the "International VAT Meeting 2010" with VAT experts from eleven European countries at Düsseldorf airport and about 100 participants.



As a result of the VAT Package valid throughout the EU, the German VAT law has experienced its most radical reform since the introduction of the European single market in 1993. From now on the following significant changes have to be observed:

- In the B2B sector the place of supply of services should as a general rule be based on the place of business of the customer (and generally no longer on the country-of-origin principle).
- The reverse charge mechanism was extended. This means that in the B2B sector the VAT liability is transferred to the customer. Thus the customer has to pay the VAT due and can at the same time deduct input tax which are then balanced against each other, whereby VAT fraud and loss of revenue due to insolvency should be controlled.
- For services a recapitulative statement is to be submitted.

Specifically with the determination of the place of supply the new services Directives aims at a simplification. Nevertheless there has been considerable legal uncertainty among many companies doing business throughout Europe since the directive came into effect on 1 January 2010. This is sometimes due to the fact the Directive leaves substantial scope of interpretation in its transposition at national level. This goes for example for the issue of providing evidence of the entrepreneurial status of a customer. The Federal Ministry of Finance responded to these issues and released a communication of as many as 50 pages which governs a lot of details but still leaves many questions in dispute unanswered.

"The country-specific interpretations of the services directive unfortunately vary considerably from one member state to another", explains Joachim Strehle, Head of the WTS VAT Service Line. "The EU Member States do not only have very specific docu-

mentation requirements but also the penalties and fines for non-compliance with these rules and regulations differ widely."

In case of doubt German businesses must reckon on a large share of their documents not meeting the strict requirements with respect to the entrepreneurial status when reviewed in future tax audits. As a consequence significant additional payments might become due amounting to the VAT payable for the transaction plus interest. Therefore WTS has developed a consulting tool for this specific situation that offers protection of legitimate expectations for the verification of value added tax identification numbers. Thus a qualified proof is obtained for the entire customer database of a company on the basis of this software.

One of the tricky issues of the VAT package is the distinction between headquarters and permanent establishment. If a German company receives an order from abroad but provides the service at the permanent establishment of its foreign customer in Germany, the question arises where this transaction is taxable. But also the proper declaration of a transaction with respect to time is rather difficult to achieve. If a French entrepreneur supplies a service to a German entrepreneur in February 2010, the customer in Germany has to include this transaction (already) in the monthly VAT return for February 2010 even though the respective invoice of the French contractual partner is not received e.g. before April 2010 and the exact amount of invoice is not known. The WTS Meeting offered businesses and investors the opportunity to discuss local issues and difficulties regarding cross-border services with outstanding VAT specialists, with focus on concrete real-life cases such as local registration obligations, the design of invoices for cross-border services or the use of VAT identification numbers.

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Practical issues concerning the VAT package in France

The French legislator has transposed the EU directives related to the VAT-Package in time as of January 1st, 2010. Please find hereafter some practical points which might be interesting for foreign taxpayers.

1. DEFINITION OF „FIXED ESTABLISHMENT“

The reversed-charge procedure applies from a French perspective if a foreign taxable person provides services to a French taxable person (B2B). Both, the service provider or the service recipient, may be French fixed establishments of taxable persons located outside France. The French tax authorities precise in a recent instruction (Inst. 04.01.2010 – 3 A-1-10) that a fixed establishment in VAT matters requires a certain structure which makes it possible for the fixed establishment to deliver or to receive and use services. Therefore, we have now two definitions of fixed establishments, one for the services providing and one for the service receiving establishment. The latter is in particular interesting for fixed places of businesses who provide only services to their headquarter. Such fixed places of business – whose services provided are outside the scope of VAT – may nevertheless be regarded as taxable persons receiving services in order to determine the place of supply of services in the frame of Art. 44 EC directive 2006/112/EC under the condition that it has a sufficient structure enabling it to receive and utilize the services received.

2. DOCUMENTATION DUTIES

The definition of the place of services in the frame of Article 44 EC Directive 2006/11/EC applies also in relation with countries outside the EU. Therefore French service providers need to determine if the services are provided to a „taxable person“ or not and to document this fact. French tax authorities give in their cited instruction a list of non exhaustive examples of elements appropriate to document this issue: tax identification number used by the foreign country, information from the internet site of the concerned service recipient showing an economic activity, certificate of the foreign tax authorities, commercial documents showing the registration number with a commercial register.

3. DETERMINATION OF THE ESTABLISHMENT OF THE SERVICE PROVIDER

The reverse-charge procedure applies only if the service provider is established in another Member State than the service recipient. A service provider who has a fixed establishment within the Member State where the tax is due shall nevertheless be regarded as not established in that Member State if the fixed establishment does

not intervene in the supply of services. So, from a French point of view, a foreign established service provider will only be regarded as established outside France – and the reverse-charge procedure will apply – if his French fixed establishment is not involved in the supply of services. According to the French tax authorities, to be involved in the supply of services it is sufficient that the fixed establishment will intervene in future e.g. in application of guarantee clauses or after sales service agreements. The utilization of a French individual VAT identification number by the service provider generates an assumption that the fixed establishment intervenes in the supply of services.

4. MODIFICATION OF THE CHARGEABILITY

In application of the derogation foreseen in Article 66 EC Directive 2006/11/EC, French VAT on services becomes chargeable at the time payment is received. In order to permit the Member States to reconcile information perceived from the new recapitulative statements, for services provided under the reverse-charge procedure, France had to come back to the general rule stating that VAT becomes chargeable when the services are supplied. So, French tax payers receiving services to which the reverse-charge procedure applies have to declare this tax in the tax return referring to the period where the services are received.

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Reporting intra-community transactions – issues arising from the VAT package

According to the new VAT Package, starting in January 2010, most taxable persons will have to file their EC Sales Lists monthly. The new monthly filing requirement may impose a serious administrative burden on persons taxable for Polish VAT as they are likely to have to make numerous corrections to their monthly EC Sales Lists. This issue affects equally Polish entities and foreign entities registered for Polish VAT purposes, such as those that have consignment stocks or distribution centres in Poland or have their goods processed (improved) in Poland.

As due to the VAT Package EC Sales Lists have to be filed on a monthly basis, serious problems in the timely declaration of not only supplies of services but also regarding supplies of goods may arise.

According to the new EC Sales List regulations, the data to be reported is both those on intra-Community supplies of goods (ISG) and on intra-Community acquisitions of goods (IAG).

In the case of ISGs, the need for frequent corrections follows from the zero-rating regulations and their interpretation by the tax authorities, which is typically very restrictive.

An ISG is zero-rated on the condition that the taxable person making the supply holds a strictly specified type of documents that confirms that the goods were moved out of Poland and delivered to the purchaser in the territory of another Member State.

According to the tax authorities, if any of the documents is missing, the supply will have to be treated as a domestic rather than ISG. Contrary to the express language of the law, the tax authorities do not accept any alternative evidence in support of ISG. Importantly, the authorities have consistently held their ground despite administrative court decisions that are favourable for taxable persons.

If an ISG is treated as a domestic supply, it may not be reported in the relevant VAT return and EC Sales List. In practice, it can take even several months to obtain the supporting documents, so once the documents are in place, the taxable person will have to correct both their VAT return and their EC Sales List for the month in which the charge to tax arose in respect of the supply.

In the case of intra-Community acquisitions of goods (IAGs), EC Sales Lists are likely to have to be corrected either due to the absence of a clear law on the correction of the IAG taxable amount, or due to inconsistent views of the tax authorities and administrative courts.

The common practice amongst payers of Polish VAT so far was to file EC Sales List corrections for both those reasons. As the reporting period is now cut from one quarter to one month, the practical effect will be that a dozen or so corrections will have to be filed annually, instead of several as before. The need to correct

such a large number of EC Sales Lists will hugely increase the administrative costs of VAT compliance in Poland.

And the corrections are necessary because the Polish fiscal law imposes serious criminal penalties for declaring transactions in incorrect reporting periods, even if no tax deficiency arises. The tax authorities have recently been quick to penalize businesses on finding such non-compliance.

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VAT package – effects on international construction contracts

Works of construction are subject to special rules for VAT purposes. Neither Spanish VAT law nor Spanish Commercial Code provide such definition of works of construction. Thus we have to apply the Spanish Civil Code about the difference between a mere service contract and a construction contract. Whilst the object of the service contract consists in the mere service, in case of a construction contract the constructor grants his client a certain result. This happens in the case of turn-key contracts.

1. DELIVERY OF GOODS OR SUPPLY OF SERVICES

Depending on the question if the object to be constructed is movable or immovable and on the decision which of the parties (the constructor or the client) provides the construction materials the taxable event is defined as supply of goods or as service. This in turn is absolutely relevant in order to determine the corresponding VAT implications. In particular the VAT package has changed, amongst others, also the rules regarding the place of supply of construction services and therefore first of all it has to be determined if the construction contract has to be considered a delivery of goods or a supply of services.

In case of immovable objects the taxable event is considered a supply of goods if the constructor provides more than 20% of the construction material. Otherwise it is considered as service.

In case of movable goods in general the fulfilled taxable event is a service, unless the constructor delivers all the needed materials.

2. PLACE OF SUPPLY

In this regard we have to distinct between supply of goods or services and object of the contract (immovable or movable):

2.1. DELIVERY OF GOODS

2.1.1. IMMOVABLE GOODS

The place of supply is Spain.

2.1.2. MOVABLE GOODS

The place of supply is Spain if movable goods are constructed in Spain and the following requirements are met together:

- *the construction is completed in Spain*
- *the construction implies the immobilisation of the supplied goods*
- *the construction costs amount to more than 15% of the total price of the delivered goods*

2.2. SUPPLY OF SERVICE

2.2.1 IMMOVABLE GOODS

The place of supply is Spain.

2.2.2. MOVABLE GOODS

Up to December 31st, 2009 the place of supply was Spain as far as the service was physically rendered in Spain. As per January 1st, 2010 this rule only remains unchanged in the case of services rendered to non taxable persons ("B2C"). If the service is rendered to entrepreneurs (B2B), the general rule foreseen in Article 44 of Directive 2008/8/EC applies, according to which the place of supply is located where the recipient of the services has established his business.

Thus, for instance, a construction service regarding movable goods rendered in Spain by a Spanish contractor to a German Client who does not have a permanent establishment in Spain is not taxable for VAT purposes in Spain but in Germany, where the reverse charge rule applies.

3. ACQUISITION OF SERVICES IN SPAIN RENDERED BY NON-ESTABLISHED CONTRACTORS

Assuming that neither the client nor the supplier are established in Spain, in general up to December 31st, 2009 the reverse charge rule did not apply, wherefore the non-established supplier had to get registered in Spain and charge Spanish VAT to his non-established client, who in principle was entitled to ask for the refund of such Spanish input VAT according to the special procedure foreseen for non-established entrepreneurs.

As per January 1st, 2010 such exception to the reverse charge rule (i.e., in the case that neither the client nor the supplier are established in Spain) does not apply any more. This is why now the supplier does not need to get registered in Spain nor charge Spanish or foreign VAT to his client since the reverse charge rule applies. Now it is the non-established client who has to get registered in Spain in order to be able to apply the reverse-charge rule, i.e., to charge Spanish VAT to himself as far as according to the aforementioned rules the place of supply is Spain (supply of services connected to immovable property). Due to this circumstance, in order to obtain the refund of possible Spanish input VAT quotes, the client must follow the ordinary procedure of filing of periodical VAT returns and cannot claim such refund according to the special procedure foreseen for non-established entrepreneurs.

These rules apply also in case of construction contracts that have to be considered services according to our comments under heading 2 of this note.



4. ACQUISITION OF GOODS DELIVERED IN SPAIN BY NON-ESTABLISHED CONTRACTORS

In this regard, no changes have been made by the VAT package, since the aforementioned exception to the reverse charge rule in case of two non-established entrepreneurs only was applicable in case of services.

Thus again in this case as far as according to the aforementioned rules the place of the delivery is Spain, the client must get registered in Spain in order to charge to himself the corresponding Spanish VAT (reverse-charge rule) and is not entitled to ask for the refund of possible Spanish input VAT quotes according to the special procedure for non-established entrepreneurs but following the general procedure consisting in filing periodical VAT returns.

These rules apply also in case of construction contracts that have to be considered delivery of products according to our comments under heading 2 of this note.

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Implementation of VAT Package introduces very wide reverse charge cases and peculiar formal requirements

In Italy, the Decree implementing the VAT Package was approved on January 22nd, 2010. However it has been formally adopted on February 11th, 2010 and then published in the Italian Official Journal on Friday February 19th, 2010 (Legislative Decree February 11th, 2010 n. 18, hereinafter “Implementing Decree”). Such an Implementing Decree directly modifies the Italian VAT law, i.e. Presidential Decree 633/72 stating general principles and inland VAT rules and Law Decree 331/93 governing VAT on intra-EU transactions.

With reference to the place of supply of services, in order to avoid a breach of the EU VAT Directives, the Italian Tax Authorities had previously issued a Circular Letter December 31st, 2009 n. 58 clarifying that, for the period between January 1st, 2010 and the date of entry into force of the Implementing Decree (i.e. February 20th, 2010), the new EU rules concerning the provision of services included in Directive 2008/8/EC could be directly applied, being sufficiently detailed and precise. On the basis of a first analysis of the Implementing Decree, the main Italian features seem to be the following:

- *the reverse charge mechanism;*
and
- *the VAT refund in presence of a permanent establishment in Italy.*

1. REVERSE CHARGE MECHANISM ON SUPPLY OF GOODS OR PROVISION OF SERVICES MADE BY FOREIGN SUPPLIERS AND RELEVANT FOR VAT PURPOSES IN ITALY

According to the Implementing Decree, the reverse charge mechanism has a very wide application (as allowed by Art. 194, Directive 2006/112/EC). In fact, it applies to the supply of goods and the provision of services performed in Italy by a foreign supplier to an Italian VAT taxable person (except the case where the foreign supplier has a permanent establishment in Italy through which said supply of goods and/or provision of services is made).

Thus, in the case of services rendered by a foreign VAT taxable person to an Italian VAT taxable person, the foreign supplier (even if having a direct VAT identification or a tax representative in Italy) cannot issue an invoice (charging Italian VAT) using its Italian VAT identification number, but the Italian VAT taxable person (buyer) must apply the reverse charge mechanism. This would be the case, for instance, of services on movable goods rendered in Italy, services on immovable properties located in Italy, etc.

Similarly, in the case of goods present in Italy and sold by a foreign VAT taxable person to an Italian VAT taxable person, the foreign supplier (even if having a direct VAT identification or a tax representative in Italy) cannot issue an invoice (charging Italian VAT) using its Italian VAT identification number, but the Italian VAT taxable person must apply the reverse charge mechanism.

2. RELATED FULFILLMENTS

Operatively, in Italy, the application of the reverse charge mechanism by the Italian customer (being a VAT taxable person) implies the issuing of a “self-invoice”, i.e. a document subject to all the mandatory rules (issuing, booking, etc.) related to the invoice, to be booked both in the VAT sales ledger (showing output VAT, if any) and in the VAT purchases ledger (showing input VAT, if any).

In the case of services being relevant for VAT purposes in Italy and rendered by a EU VAT taxable person to an Italian VAT taxable person, (since a zero rate invoice has been issued by the EU supplier) it has been suggested to apply the reverse charge mechanism by way of integration of the invoice issued by the EU supplier, instead of issuing a separate self-invoice. However such a proposal has not been included, at present, in the Implementing Decree.

Additional fulfillments derive from the filing of the EU Listings, that on the Italian side will include:

- *the intra-EU sale of goods and the intra-EU “general” services rendered; and*
- *the intra-EU acquisition of goods and the intra-EU “general” services received.*

Please note that, according to Italian rules, the EU Listings include not only the intra-EU services rendered (as stated by Art. 262, Par. 1, Lett. c, Directive 2006/112/EC) but also the intra-EU services received. In addition, with reference to both services rendered and received, very detailed information must be disclosed, as for instance: invoice number, invoice date, service code, way of supply, way of payment, country of payment.

3. REVERSE CHARGE MECHANISM ON PROVISION OF SERVICES RENDERED BY ITALIAN SUPPLIERS AND NOT RELEVANT FOR VAT PURPOSES IN ITALY

As stated in the Implementing Decree, in certain cases, an Italian VAT taxable person must issue an invoice also for transactions non-relevant for VAT purposes in Italy. For instance, such an Italian VAT taxable person must issue an invoice (even if without charging VAT) when rendering services (being “general” services, as defined in Art. 44, Directive 2006/112/EC) to a foreign customer being an EU VAT taxable person.



4. PERMANENT ESTABLISHMENT IN ITALY AND FOREIGN HEADQUARTER

A foreign VAT taxable person having a permanent establishment in Italy may not have another VAT identification number, thus it can neither apply for a direct VAT identification nor appoint a tax representative in Italy. The form to be submitted in order to obtain a direct VAT identification number in Italy has already been amended accordingly since January 1st, 2010 (new ANR/3 form).

This reflects the dictum of the ECJ decision “Commission vs. Italy”, delivered on July 16th, 2009 (case C-244/08), stating that Italy has failed in relation to the VAT refund procedure (according to Directive 79/1072/EE and Directive 86/560/EEC). Italy in fact was “requiring a taxable person established in another Member State or in a non-Member State, but having a fixed establishment in Italy and who, during the period at issue, supplied goods and services in Italy, to apply for a refund of input value added tax according to the mechanism provided by those Directives rather than deduct it where the purchase in respect of which repayment of that tax is sought is made not through that fixed establishment, but directly by the principal establishment of that taxable person”.

According to the Implementing Decree, a foreign VAT taxable person having a permanent establishment in Italy may not apply for the VAT refund (according to Directive 79/1072/EE, so called “VIII Directive” or to Directive 86/560/EEC, so called “XIII Directive” and following amendments), but the input VAT must be included in the VAT return of the permanent establishment.

Operatively, it may be suggested to keep separate accounts referred to the permanent establishment transactions and to the headquarter transactions, mostly in the case of limited deduction on input VAT (for instance, due to the performance of exempt transactions by the permanent establishment or by the foreign headquarter).

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B2B Services, EC Sales Listings and Reclaiming Dutch input VAT

As of 1 January 2010, the VAT package is implemented in the Netherlands. In this article we listed the major issues we foresee for Dutch and foreign entrepreneurs.

1. B2B SERVICES

In case a Dutch VAT entrepreneur provides services to a foreign entrepreneur the main rule is that the service is taxable for VAT purposes in the country where the recipient is established and no Dutch VAT should be charged. The burden to provide the proof that the recipient qualifies as an entrepreneur for VAT purposes lies with the Dutch entrepreneur. In case he fails to deliver this proof, the Dutch Tax Authorities can argue that Dutch VAT should have been charged and impose additional assessments and penalties.

Regarding EU recipients the proof can be provided by requesting his VAT identification number and have that number verified by the Dutch Tax Authorities. Non-EU countries however do not always have a VAT system (e.g. The United States) so it will not be so easy to prove that the recipients from these countries qualify as entrepreneurs for VAT purposes. The Dutch Tax Authorities cannot provide any certainty regarding how the entrepreneurship of these recipients can be proved.

2. EC SALES LISTINGS

In the Netherlands, we only have to file an EC Sales Listing (no EC Acquisitions Listing obligations). Until 2009 the EC Sales Listing regarding the Intra Community supply of goods had to be filed each quarter. As from 2010 the filing period of the sales of goods depends on the amount of Intra Community supply of goods and can be either a month, a quarter or a year. The Listing of the Intra Community supply of services should be done each quarter or each month when the VAT entrepreneur requests to do so. When the filing period of the listing of the Intra Community supply of goods is different from the filing period of the supply of services these listings should be filed on separate forms.

There is one major irregularity in the implementation of the VAT package in the Dutch legislation. Based on the VAT package a provided service should be listed and the VAT is due in the period the service is actually provided. The Dutch listing period is implemented according to the VAT Package. Based on the Dutch VAT legislation however, the VAT regarding the supply of a service is still due in the period the invoice is issued. It is still not clear how strict these filing periods will be held by the Dutch Tax Authorities.

No listing for VAT exempt and zero rated supplies of services is needed. However, regarding some services it's possible that a service is VAT exempted in one country but taxable in another country.

For example, renting real estate is in principle VAT-exempted in The Netherlands. It's possible however to opt for taxation and charge VAT (and thus reclaim input VAT). This can lead to mismatches in the listings from countries where the service is VAT exempted.

3. RECLAIMING DUTCH INPUT VAT

Due to new EU legislation EU entrepreneurs with no VAT registration in the Netherlands can reclaim Dutch input VAT in their own country as from 1 January 2010. It is no longer possible for these entrepreneurs to reclaim Dutch VAT directly from the Dutch Tax Authorities.

Non-EU entrepreneurs with no VAT registration in the Netherlands must reclaim Dutch input VAT by filing a Thirteenth Directive refund request. Please note that the refund request for 2009 should be filed no later than 30 June 2010. The Tax Authorities can still allow refunds for the earlier years (2004 until 2008), however there is no possibility to file an appeal in case the Tax Authorities do not grant the whole refund.

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The interpretation of a „taxable person“ according to the VAT Package

On the first of January 2010 the changes to mervärdeskattelagen (1994:200) because of The Councils Directive 2008/8/EC of 12 February 2008 entered into force. Due to this new legislation the Swedish tax authorities have issued several guidelines regarding the interpretation of the new legislation. The following information will touch on the guideline concerning the concept of a taxable person and correlated problems we anticipate.

If a service is provided to a taxable person acting as such, the place of supply of the service is governed by the general rule in Article 44 provided that none of the exemptions are applicable to the provision. If a service is provided to a non-taxable person the place of supply is governed by Article 45 of the Directive provided that none of the exemptions are applicable to the provision of the service. It is thus essential for determining the place of supply of the service to be able to decide if the service is provided to a taxable person or a non taxable person. If the service is provided to a taxable person the place of supply is where the acquirer of the service is established and the acquirer, not the provider is liable for declaring VAT on the transaction.

The Swedish tax authorities have issued a guideline where they state that a provider of a service has to be able to prove that the acquirer of the service is a taxable person. If the acquirer is established within the EU the VAT registration number is sufficient. Even though an acquirer does not have a VAT registration number the Swedish tax authorities have stated that he can still be regarded as a taxable person and the place of supply should be decided by Article 44 of the Directive. As an example of a person who could be considered to be a taxable person but who might not have a VAT registration number the Swedish tax authorities mention persons whose activities are completely exempted from VAT. If the taxable person is not registered for VAT purposes a copy of registration documents or other document from the tax authorities in the acquirer's country that proves that the acquirer is a taxable person is sufficient for the acquirer to be deemed as a taxable person and Article 44 to be applicable. For example a German hospital that lacks a VAT registration number because all its activities are exempt from VAT could prove that it is a taxable person by providing the Swedish supplier with a copy of registration documents or other document from the German tax authorities. This would shift the place of supply to Germany.

This differs from the German point of view as the place can only be successfully shifted in this case if the hospital has been granted a VAT identification number

If the acquirer of the service is established outside the EU the Swedish tax authorities have stated that the provider of the service has to be able to prove that the acquirer of the service is a taxable person and that the taxable person is established outside the EU. This can be done by providing the authorities with a document stating that the acquirer is registered for VAT purposes in a country outside the EU. Another way of proving that the acquirer is a taxable person and

established outside the EU is providing registration documents or other documents from the tax authorities in the acquirer's country. The Swedish tax authorities are also of the opinion that a print-out from the acquirer's home page is a way for the provider to prove that the acquirer is established outside the EU. We believe that this is one of the areas where the VAT package might create problems for Swedish companies providing services to foreign companies. The new rules deciding the place of supply of services will increase the knowledge a provider of a service has to have about the acquirer of the service. Even though the service is provided in Sweden the place of supply is decided based on where the taxable person is established provided that the acquirer is a taxable person. The provider therefore has to investigate where the acquirer of the service is established and also puts pressure on the acquirer of the service to provide evidence of documents supporting this. Additionally, tax authorities in different countries have different opinions regarding how a supplier can prove that the service has been supplied to a taxable person. In Sweden this can be done by providing a VAT registration number or with copies of the companies registration documents from the local tax authority. In Germany however the companies VAT identification number is necessary. This means that Article 44 might be applied differently in different countries.

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Success for WTS Alliance at European Court of Justice: The SKF case

The European Court of Justice decided in favour of WTS Alliance: The SKF case was about deduction for input VAT on costs referable to sales of shares in subsidiaries.

1. INTRODUCTION

It follows from the European Court of Justice's (hereinafter ECJ) case law that the mere acquisition, holding and sale of shares do not in themselves constitute economic activities within the meaning of the VAT Directive (2006/112/EC). However, a holding company that is directly or indirectly involved in the management of the company in which the holding has been acquired performs economic activities in the meaning of the VAT Directive. That involvement has been exemplified with administrative, accounting and IT services.

With regard to input VAT referable to restructuring of a business that performs economic activities, the ECJ has held that there must, in principle, be a direct and immediate link between a particular input transaction and a particular output transaction. The ECJ has however also accepted that a taxable person has a right to deduct even where there is not such a direct and immediate link. That presupposes that the costs for the acquired services are part of the business' general costs and are components of the price of the business' supplies. In case C-16/00 *Cibo* the ECJ has held that a holding company that acquired services for its acquisition of shares in a subsidiary was entitled deduction, since the acquired services constituted general costs in the holding company's taxable business.

The ECJ has recently in Case C-29/08 *SKF* (hereinafter *SKF*) dealt with the question if a holding company as part of a restructuring of the group is to dispose of its shares in subsidiaries is entitled to deduct input VAT on services acquired as part of the disposal. Svalner Skatt & Transaktion was represented by Oskar Henkow, who was representing SKF, in the proceedings at the ECJ. In this article we give our comments and interpretation of SKF.

2. THE FACTS IN THE CASE

SKF is the parent company of an industrial group. SKF plays an active role in the management of its subsidiaries and supplies for consideration services, such as management, administration and marketing policy, to the subsidiaries. SKF invoices its subsidiaries for these services and SKF is liable for VAT on these services.

SKF intends to restructure its business by disposing of all the shares in a wholly-owned subsidiary, and 26.5 % of its shareholding in another company (the controlled company). The reason for those disposals is to obtain funds to finance other activities of the group. In order to carry out those disposals, SKF will acquire services in the area of valuation of shares, assistance with negotiations and specialised legal advice for the drafting of the contracts. These services will be subject to VAT.

Before restructuring its business, SKF applied for a preliminary ruling at Skatterättsnämnden on the right to deduct input VAT paid on services acquired as part of the disposal of shares in the subsidiaries. Skatterättsnämnden held that SKF in both cases was entitled to deduct the input VAT paid on the above mentioned services. The Swedish Tax agency (Sw. Skatteverket) appealed against the advance ruling to the Supreme Administrative Court (Sw. Regeringsrätten). Regeringsrätten referred the following questions to the ECJ:

1. Is SKF's disposal an economic activity in the meaning of the VAT Directive?
2. If yes, is the taxable transaction VAT exempt in respect of transactions in shares?
3. Irrespective of the answer to the above two questions, can there be a right to deduct for expenditures directly attributable to the disposal transaction, in the same way as there is for general costs?
4. Is it of significance for the answers to the above questions if the disposal of interests in a subsidiary takes place in stages?

3. THE ECJ'S DECISION

With regard to the first question referred to the ECJ, the court held that it is clear in the present case that SKF as parent company was involved in the management of the subsidiaries. Furthermore, the ECJ stated that the transaction has a direct link with the organisation of the activity carried out by the group and constitutes accordingly the direct, permanent and necessary extension of SKF's taxable activity. Such a transaction consequently comes within the scope of VAT.

However, if the disposal qualifies as transfers of a totality of assets or part thereof of an undertaking, within the meaning of the first paragraph of Article 19 of VAT Directive, and if Sweden has chosen to exercise this option provided for, that transaction does not constitute an economic activity subject to VAT.

Regarding the second question the ECJ held that the sale of shares by SKF is more than a mere sale of securities because it constitutes an involvement by SKF in the management of the subsidiaries. Moreover, it is apparent that the sale of shares at issue in the main proceedings is also directly linked to and necessary for SKF's taxable economic activity. It follows that that transaction is exempt from VAT pursuant to Article 135(1)(f) of VAT Directive.

The third question was answered according to the following. Firstly, the ECJ held that it is not possible from the case-file submitted to the court to



determine whether the costs have a direct and immediate link within the meaning of settled case-law. In order to establish whether there is such a direct and immediate link, it is necessary to ascertain whether the costs incurred are likely to be incorporated in the prices of the shares which SKF intends to sell or whether they are only among the cost components of SKF's products. It is consequently for the referring court to apply the direct and immediate link test to the facts of the case.

In order to give a useful answer to the referring court, the ECJ recalled that the court has held, on numerous occasions, that there is a right to deduct VAT paid on consultancy services used for the purposes of various financial transactions, on the ground that those services were directly attributable to the economic activities of the taxable persons. By referring to the principle of fiscal neutrality the ECJ held that, if the consultancy costs relating to disposals of shareholdings are considered to form part of the taxable person's general costs in cases where the disposal itself is outside the scope of VAT, the same tax treatment must be allowed if the disposal is classified as an exempted transaction.

To sum up, the ECJ stated that while a disposal of shares which is exempt from VAT does not give rise to a right to deduct, the fact remains that that interpretation holds true only if a direct and immediate link is established between the input services and the exempted disposal of shares as an output transaction. If, on the other hand, there is no such link and the cost of the input transactions is incorporated in the prices of SKF's products, the right to deduct VAT charged on the input services should be allowed.

The ECJ's answer to the fourth question is that the answers to the preceding questions are not affected by the fact that the disposal of shares is carried out by way of several successive transactions.

4. OUR COMMENTS

At first we would like to stress that Regeringsrätten has not yet decided upon the case in the Swedish proceedings. Our comments below are therefore solely based on the ECJ's decision.

From a Swedish VAT perspective the most interesting answers are the answers to the second and the third questions.

In Sweden transfers of going businesses are treated as non-supplies, but the Swedish application of this rule has until now not included the transfer of shares. It will therefore be most interesting to see Regeringsrätten's ruling in this matter, particularly in respect of what business is deemed as being transferred, i.e. the parent company's holding business including management alternatively the subsidiaries' businesses. From our point of

view, the ECJ should be interpreted as meaning that it is the subsidiaries' businesses that are subject to assessment for transfer of going business according to Article 19 of VAT Directive.

When it comes to the right to deduct input VAT, our interpretation of the ECJ's decision is that SKF will be entitled deduction on condition that the acquired services will be incorporated in the price of SKF's products and consequently not incorporated in the price of the shares. It will not matter whether the disposal qualifies as a transfer of going business or a VAT exempt share transaction. From our point of view, an incorporation of acquired services in the price of the shares is probably not common in any restructuring process of a group of companies. Since the reason for SKF's restructuring is to obtain funds to finance other activities of the group we find it most likely that the costs will be incorporated in the price of SKF's products. Therefore, we assess that there is a possibility for SKF, and other holding companies that take an active role in its holding by management, to obtain deduction for input VAT referable to costs for selling its subsidiaries.

¹ Case C-7701 EDM and C-435/05 Investrand.

² Case C-60/90 Ploysar Investements and C-142/99 Floridienne and Berginvest.

³ Case C-98/98 Midland Bank and C-408/98 Abbey National.

⁴ Case C-98/98 Midland Bank, C-408/98 Abbey National and C-465/06 Kretztechnik.

⁵ Case C-29/08 SKF p. 32.

⁶ SKF p. 33.

⁷ SKF p. 40.

⁸ SKF p. 52.

⁹ SKF p. 62.

¹⁰ SKF p. 63.

¹¹ SKF p. 64.

¹² SKF p. 68.

¹³ SKF p. 71.

¹⁴ SKF p. 79.

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eVAT Check-ID: How a new tool helps verifying VAT-IDs

According to the new VAT Package, services to other companies within the EU are generally charged without VAT. But German tax authorities demand the company issuing an invoice to exert a qualified verification of the VAT-ID for the recipients of such services in order to shift the place of taxation. WTS has therefore presented a new software tool to provide certainty.

eVAT Check-ID WTS AG Steuerberatungsgesellschaft

eVAT Check-ID is a software tool that makes life easier for companies issuing invoices. It is now possible to verify the VAT IDs stored in a customer database all at once.

The tool presented by World Tax Service WTS does not interfere with Enterprise Resource Planning systems like SAP®. All you need to do is export the address data of your customers and hand over the export file to WTS.

In a first run, WTS automatically matches the customer data (VAT ID, company name and address) with the information stored by the respective EU tax authorities. Data security during the exchange of data with the authorities is ensured by the use of a secure socket layer connection.

The client immediately gets a reply about the status of verification for the VAT IDs entered. Possible sources for failures during verification of a VAT ID are marked in color codes.

In a second run, the corrected data gets re-entered in order to receive a written qualified confirmation about successful verification of all the VAT IDs provided. This is the preliminary requisite to obtain legal certainty for issuing VAT-free invoices to corporate EU recipients of goods and services.

The portfolio of WTS also includes recommendations for the ideal organization of all the confirmations received. This enables clients to provide tax authorities during a company audit all the information necessary without the least delay, demonstrating the diligence of a prudent businessman. In case of high fluctuation of debtors, eVAT Check-ID is easily brought into line with the clients needs.

Joachim Strehle, Head of the WTS VAT Service Line: „During a company audit, tax authorities extremely comply with the strict formal guidelines by the German Ministry of Finance. This is our experience as regards VAT exemption for EU intra-community supply of goods. Now we expect the same to happen as regards

intra-community services. The new guidelines as of 2010 will be considered as rigorously. The real challenge is that – if the conditions for a VAT exemption (as a successful shift of the place of taxation) in a company are not met – tax has to be paid for the respective turnover in the aftermath. This is why we recommend our clients to gather a qualified confirmation for the verification of VAT IDs of their recipients of goods and services.“

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