AMPLISCIENTIFICA AND VAT GROUPING

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In this article, the author discusses the implications of the ECJ Case Ampliscientifica[2] for VAT groups. The article is partly a summary of an article written by the author in 2009, which was published in the Swedish magazine SkatteNytt No 7-8, 2010, p 537-551.

For many years, VAT leakage and other problems relating to VAT grouping have been discussed in the doctrine[3] and within the Commission. FCE Bank[4], the principle "force of attraction" and the lack of harmonization of the rules on deduction of input tax made non-taxation of services between a company's main office and its branches abroad possible and created distortions of competition.

Somewhat simplified, the FCE Bank case from 23 March 2006 held that services between a company's main office in one country and its branches abroad did not fulfil the objective requirements for VAT liability and were outside the scope of VAT. The passing on of the costs to the permanent establishment was just an internal allocation of costs. The supply of services from a main office in one country, to a permanent establishment in another country (which is not a legal entity distinct from the company of which it forms part) could not be treated as a taxable supply, held the European Court of Justice of the European Communities (hereafter the "ECJ"). The ECJ did not mention the fact that FCE Bank was part of a VAT group in the United Kingdom.

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2 22 May 2008, ECJ C-162/07, Ampliscientifica Srl and Amplifin SpA v Ministero dell'Economia e delle Finanze and Agenzia delle Entrate

3 Christian Amand, International VAT Monitor, July/August 2007, p. 237 – 249 and Kenneth Vyncke, International VAT Monitor, July/August 2007, p. 250 - 261.

4 23 March 2006, ECJ C-210/04, Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v FCE Bank plc

The European Commission (hereafter the "Commission") eventually took note of an increased interest from the Member States to make use of the VAT grouping option. The Commission also noted that FCE Bank and the divergences between the Member States in applying the principle "force of attraction" may result in fiscal competition between Member States. The Commission found that the advantages offered by a VAT Grouping system to certain taxable persons also ran counter to the principle of fiscal neutrality. The divergences between the national VAT grouping schemes involved a potential impact on the internal market and on the basic principles of the Community VAT system.

Working Paper

The advisory committee on value added tax (hereafter, the "VAT Committee") therefore set out guidelines for implementing the VAT grouping option that the Commission departments were proposing to adopt, in a working paper. The Working Paper No 556 [5] (hereafter the "Working Paper") was issued on 30 October 2007. In the Working Paper, the VAT Committee stated, for example, that only companies or permanent establishments physically present in the territory of the Member State that has introduced the scheme may join a VAT group. Cross-border VAT groups cannot be allowed. The VAT Committee says that, "Such an approach is not at variance with the *FCE Bank* ruling which makes no reference whatsoever to a VAT group, which, in the opinion of the Commission departments, can exist only as a special form of taxable person set up on the sole initiative of the Member State concerned, subject to the limits of its territorial competence. Thus, all transactions between a VAT group and permanent establishments abroad are treated as transactions between two separate taxable persons…"

Ampliscientifica

Thereafter came Ampliscientifica on 22 May 2008. This ruling clarified that when a Member State applies provisions regarding VAT groups, the companies in the VAT group cease to be deemed as separate taxable persons. Instead, the companies in the VAT group are to be deemed to be one single taxable person with one single VAT number. The ruling also deals with the Member States' obligation to consult with the advisory VAT committee before national provisions regarding VAT groups are introduced. This obligation to consult will not, however, be further discussed in this article. Paragraph 19 of the Ampliscientifica case ECJ says:

> "It is to be observed, secondly, that the effect of implementing the scheme established in the second subparagraph of Article 4(4) of the Sixth Directive

5 Value added tax committee (article 398 of directive 2006/112/EC) Working paper No 556, 30 October 2007

> is that national legislation adopted on the basis of that provision allows persons, in particular companies, which are bound to one another by financial, economic and organisational links *no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person*. Thus, where that provision is implemented by a Member State, the closely linked person or persons within the meaning of that provision cannot be treated as a taxable person or persons within the meaning of Article 4(1) of the Sixth Directive (see, to that effect, Case C-355/06 *van der Steen* [2007] ECR I-0000, paragraph 20). *It follows that treatment as a single taxable person precludes persons who are thus closely linked from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations.* " (My italics).

Communication

On 2 July 2009, the Commission issued a written statement commenting on how the rules for VAT groups should be applied and formed, "COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax" (hereafter the "Communication"). The Communication is intended to contribute to a more unified application of article 11 in the VAT directive, and to constitute a guideline for the Member States when they introduce or amend rules regarding VAT groups. The Communication is founded on the same reasoning as put forward the VAT Committee's Working Paper. Accordingly, the Commission states that a VAT group may only include such persons and permanent establishments within the borders of the same Member State and that cross-border VAT groups are not permitted. A person's membership in a VAT group in one Member State means that person's permanent establishment in another member state suddenly constitutes another separate VAT taxable person. Thus, in a VAT respect, the permanent establishment constitutes an individual taxable person separate from the VAT group.

The Commission states that this view does not conflict with the principle established in FCE Bank since the circumstances in FCE Bank did not involve any VAT group. The Commission also finds support for its views in Ampliscientifica. The Commission confirms the VAT Committee's view that the companies in a VAT group cease to exist as separate taxable persons and that the persons in the group instead shall be treated as one entity and as a new taxable person. The Commission elaborates upon the importance of only permitting taxable persons and permanent establishments within one state's borders to be members of a VAT group and not to permit cross-border VAT groups.

Conclusions

Ampliscientifica (2008) is a later court case than FCE Bank (2006). The Ampliscientifica judgment was passed after the problems with tax evasion in conjunction with VAT groups had been noticed and debated for some time, *inter alia* in the Working Paper, but also in periodicals. FCE Bank says nothing regarding the fact that FCE Bank was a member of a VAT group. After the Working Paper was issued, Ampliscientifica came in 2008. Thereafter, the Commission's Communication was issued, on 2 July 2009, with the same clear guidelines as those contained in the Working Paper. The Commission is very clear in pointing out that in FCE Bank no reference at all was made to the VAT group situation, which is why the views do not contradict FCE Bank. The Commission also finds support in Ampliscientifica. The Commission's statement is characterised by the opinion that tax competition between Member States must be counteracted and tax evasion discouraged. A regulatory framework which allows cross-border VAT groups and an interpretation of FCE Bank in such a way that transactions between a head office in one state and a branch office in another would fall outside the scope of VAT, can be abused and lead to significant tax leakage.

The problems which arise when VAT groups include companies with, e.g. head office in one country and a branch office in another were discussed at a seminar on 30 August at the 2010 IFA conference in Rome. Delegates discussed the problems which are likely to arise if FCE Bank was applied so that transactions between the head office in one country and the permanent establishment in another were to fall outside the scope of VAT, instead of in the way recommended by the Commission. It would then be difficult to assess how the head office's transactions abroad would affect the deductible portion for input VAT. It will be difficult for the Tax Agency abroad to assess the extent of the deductible portion if it is connected to the entire group's business located in another country. Problems with failed taxation are possible when the VAT group has restricted deductibility. If, for example, a branch office abroad makes large purchases and then provides the head office in the EU with IT services, tax leakage will arise. The ECJ Case, Heerma[6], from 27 January 2000, was also discussed. Heerma held that a natural person could be deemed to be two different persons in respect of VAT. The Heerma case is in line with the assessment made in Ampliscientifica, in which one entity can be deemed to be two persons in respect of VAT; one is the VAT group and another is the branch or head office abroad.

Naturally, cases can always be interpreted in a number of ways. However, I am of the opinion that since 1) there is a territorial limitation in the VAT directive, in article 11, the result of which is that a VAT group only can concern entities in the Member State where the group is situated and 2) Ampliscientifica establishes that the entities included in the VAT group cease to be treated as separate taxable

6 27 January 2000, ECJ C-23/98, Staatssecretaris van Financien v J. Heerma

persons and instead become absorbed into the group's only registration number, one can draw the conclusion that, e.g., a branch office abroad is not member of the group. This interpretation of Ampliscientifica, by the Commission, would also probably prevent leakage of tax from the EU states, and counteract tax competition between the EU states.

In 2010 it has been discussed in the doctrine how the VAT grouping system could be improved[7]. It is surely possible to develop a VAT grouping system that may work better, that does not lead to leakage of VAT and distortions of competition. In the meantime, while developing a better VAT Grouping system, Ampliscientifica should mean that when a company's main office or its branch abroad is part of a VAT group, transactions between the main office and its branch abroad fall within the scope of VAT and are treated as transactions between two separate taxable persons.

It will be very interesting to see the future development within this field!

Summary

The VAT grouping schemes have for quite a period of time offered advantages to certain taxable persons which may run counter to the principle of fiscal neutrality and may be a source of fiscal competition between Member states. VAT leakage has often been a result. FCE Bank, the principle "force of attraction" and the lack of harmonization of the rules on deduction of input tax have made non-taxation of services between a company's main office and its branches abroad possible which has created distortions of competition. Ampliscientifica clarifies some of the crucial questions related to VAT grouping and this will decrease the leakage of VAT. Ampliscientifica states that a VAT group allows persons within the group no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person. Since cross border VAT grouping is not allowed, Ampliscientifica means that a supply of services from a company's main office in one country to its permanent establishment abroad is a taxable supply, when for example the company's main office is part of a national VAT group.

7 For example see Ruud Zuidgeest, International VAT Monitor, January/February 2010, p. 25 – 30 and Joep Swinkels, International VAT Monitor, January/February 2010, p. 36 – 42