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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 850

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN: Italy

REFERENCES: Article 98 and Annex III, Point 5

SUBJECT: Transport of passengers and motor vehicles
accompanying them

1. INTRODUCTION

Italy submitted to the VAT Committee a question with regard to maritime transport of passengers and their accompanying motor vehicles. Italy seeks clarification about the taxation of the transport of the motor vehicle, in case the underlying passenger transport is taxed at a reduced VAT rate according to Annex III, Point 5 of the VAT Directive¹.

The question and analysis submitted by Italy are attached in annex.

2. SUBJECT MATTER

The request submitted refers to the difference in scope between Annex III, Point 5 and Annex X, Part B, Point 10 of the VAT Directive and concerns transport of passengers and the transport of goods accompanying them.

Annex III lists the supplies of goods and services to which the reduced rate referred to in Article 98 may be applied and includes under Point 5 the "transport of passengers and their accompanying luggage".

Covered by the derogation referred to in Article 371 of the VAT Directive, Annex X, Part B allows Member States under Point 10 to continue exempting "the transport of passengers and, in so far as the transport of the passengers is exempt, the transport of goods accompanying them, such as luggage or motor vehicles, or the supply of services relating to the transport of passengers"².

Annex III, Point 5 of the VAT Directive refers to the "transport of passengers and their accompanying luggage" and no distinction is made between maritime transport of passengers and other modes of transport. Consequently, the answer to the question raised by Italy will relate to all modes of transport and not be limited to maritime transport, although in practice the transport of motor vehicles does only happen by ships (maritime shipping and inland waterways) or by trains (rail transport).

3. THE COMMISSION SERVICES' OPINION

When comparing the scope of Annex III with that of Annex X, it is worth noting that Annex III is narrower in referring to "transport of passengers and their accompanying luggage". The assumption is that during the negotiations preceding the adoption of the VAT Rates Directive³ the Member States could only agree to apply the reduced rate to the luggage accompanying the passengers and not to motor vehicles accompanying them or the supply of services relating to the transport of passengers.

¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

² This derogation applies to those States which were members of the European Union on 1 January 1978. For States having acceded after that date, similar derogations have been granted by virtue of provisions which can be found in Section 2 of Chapter 1 of Title XIII of the VAT Directive.

³ Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC (approximation of VAT rates) (OJ L 316, 31.10.1992, p. 1).

3.1. Passenger transport

Before looking at the issue of accompanying luggage, it may be useful to look at the application of the VAT Directive with regard to underlying passenger transport services⁴.

Only if Member States apply a reduced rate according to Annex III of the VAT Directive it might potentially encompass the accompanying luggage as well. If passenger transport services are exempted under Annex X of the VAT Directive, also the transport of the accompanying motor vehicle can be exempted whereas if passenger transport services are taxed at the standard rate, also the transport of the accompanying motor vehicle is taxed at the standard rate.

Passenger transport services by ships and trains, where passengers can be accompanied by motor vehicles, are taxed at a reduced rate in Austria, Belgium, the Czech Republic, Finland, France, Greece, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden with regard to domestic transport services.

The domestic leg of international rail transport and international inland waterway transport is taxed at a reduced rate in Austria (waterway transport only on Lake Constance), Belgium, France, Greece, the Netherlands, Poland and Spain.

3.2. Accompanying motor vehicles

It can be observed that 12 Member States tax motor vehicles accompanying passengers at the standard rate, if the underlying passenger transport service is taxed at a reduced rate. These Member States are Italy, Austria, Croatia, the Czech Republic, Estonia, Germany, Greece, Latvia, Lithuania, Poland, Slovenia and Spain.

On the other hand, 11 Member States apply a reduced rate for motor vehicles accompanying the passenger, if the underlying passenger transport service is taxed at a reduced rate. The transport of the motor vehicles is classified as an ancillary service and therefore subject to the same rate as the underlying passenger transport service in Belgium, Bulgaria and Luxembourg (if included in advance in the price of the passenger transport service), Cyprus, Finland, France (bicycles and mopeds only), the Netherlands, Portugal, Slovakia, Sweden and the United Kingdom (zero rate).

In Denmark all passenger transport services and the accompanying vehicles are exempted. In Ireland accompanying motor vehicles are taxed at the standard rate, but all passenger transport services are exempted. In Malta, the VAT Act explicitly exempts the transport of accompanying motor vehicles, but it does practically only concern international maritime transport that is exempt as well. Romania has no special provisions in its national VAT law and for Hungary no information is available.

⁴ The information in this section and in section 3.2. are obtained from the Volume 2 of the final report of the study on the economic impact of the current VAT rules for passenger transport, which was published on the webpage of DG TAXUD on 15 January 2015:
http://ec.europa.eu/taxation_customs/common/publications/studies/index_en.htm

3.3. Meaning of the term “luggage” and cases in which it is the passenger who accompanies the motor vehicle

The Commission services consider that luggage in the meaning of the VAT Directive should be defined as suitcases or other bags in which to pack personal belongings for travelling. This would exclude motor vehicles and takes account of the distinction made between luggage and motor vehicles in Annex X, Part B, Point 10 of the VAT Directive.

Again, already the interpretation of Annex III together with Annex X shows that for the VAT legislator “luggage” does not include the vehicle of the passenger. According to settled case-law, provisions which constitute a derogation from a principle must be interpreted strictly⁵. To permit a reduced rate of VAT to be applied to accompanying motor vehicles, it would be necessary to interpret Point 5 of Annex III broadly.

Conversely, the definition of “luggage” in the Athens Convention of 1974⁶ establishes a regime of liability for death and injury of passengers travelling by sea as well as loss and damage to their luggage according to which the vehicle carried by the carrier is seen as part of the luggage of the passenger. This is also relevant for the application of Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea in the event of accidents⁷ which includes a definition of luggage in Annex I, Point 5.

However, it must be kept in mind that the aim of the Athens Convention and of Regulation (EC) No 392/2009 respectively is to define the liability of sea carriers for loss and damage of luggage. Hence, the definition of luggage in the Athens Convention needs to include vehicles (according to the Convention: “luggage” means any article or vehicle carried by the carrier under a contract of carriage) to be covered in case of loss or damage.

Consequently, the Convention distinguishes “luggage” from “cabin luggage”. Cabin luggage means luggage, which the passenger has in his cabin or which is otherwise in his possession, custody or control. Cabin luggage also includes luggage which the passenger has in or on his vehicle⁸.

Moreover, contrary to the definition of “cabin luggage” that accompanies the passenger, the Convention defines “passenger” as any person who is carried in a ship, (a) under a contract of carriage, or (b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods not governed by the Convention.

For VAT purposes in situation (b), a passenger accompanying his vehicle, would have implications on the VAT rate to be applied. In such a scenario the passenger transport service would either be regarded as distinct and independent or be regarded as an ancillary service to the transport of the vehicle. In both cases the transport of the vehicle would be subject to the standard VAT rate.

⁵ See, *inter alia*, Case C-399/93 *Oude Luttikhuis and Others*, paragraph 23, and Case C-492/08 *Commission v France*, paragraph 35.

⁶ The European Union joined the Protocol of 2002 to the Athens Convention 1974 by a Council Decision of 12 December 2011.

⁷ Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L 131, 28.5.2009, p. 24).

⁸ See Article 1 of the Convention for the exact wording of the definitions.

It should thus be concluded that the meaning of the term “luggage” in the VAT Directive, just like the term “cabin luggage” in the Athens Convention, excludes motor vehicles.

3.4. Accompanying motor vehicle: ancillary service or independent transport of goods service?

Contrary to the Athens Convention the VAT Directive sees the motor vehicle as accompanying the passenger and in terms of tax treatment the transport of the vehicle is interpreted differently by Member States, either as a service that is ancillary to the passenger transport service or as a transport of goods service.

According to the case-law of the Court of Justice of the European Union (CJEU), in certain circumstances several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent⁹.

In this context, the CJEU has held that a supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split¹⁰.

That is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied¹¹.

The Commission services consider that transport of accompanying motor vehicles cannot be regarded as an ancillary service to the underlying passenger transport service.

Firstly, the transport of the vehicle constitutes an end in itself. The typical aim for travelling with a motor vehicle is the use of such a vehicle to complete the other two parts of the journey, i.e. driving to the port of embarkation or train station and to continue the journey to the place of final destination. Transport of the accompanying motor vehicle is not a means of better enjoying the principal service supplied.

Secondly, the transport of the passenger and the transport of the motor vehicle cannot be regarded as being so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. This situation could only exist if passengers were exclusively allowed to travel on certain ships or trains when accompanied by motor vehicles. Such a situation might exist, but it must certainly be considered exceptional and therefore not determine the general VAT rules.

⁹ Case C-425/06 *Part Service*, paragraph 51, and Case C-392/11 *Field Fisher Waterhouse*, paragraph 15.

¹⁰ See, to that effect, Case C-41/04 *Levob Verzekeringen and OV Bank*, paragraph 22, and *Field Fisher Waterhouse*, paragraph 16.

¹¹ See, to that effect, Case C-349/96 *CPP*, paragraph 30; Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 *Bog and Others* [2011], paragraph 54; and *Field Fisher Waterhouse*, paragraph 17.

3.5. Passenger transport service as ancillary service

A situation where a motor vehicle is transported for a price which remains the same no matter whether it is accompanied by one or more persons should also be considered briefly.

For VAT purposes some Member States continue to exempt such goods transport services, if the transport of the passenger was exempted. Obviously, that means that the two services were regarded as a single supply and the passenger transport was seen as the predominant service in order to enable granting such an exemption.

However, to regard the passenger transport service as predominant solely on account of a price policy where the transport of the car is the determining factor in setting the price, is not possible. What must be acknowledged is that not only the price, but also the maximum number of accompanying persons in such cases would be determined by the motor vehicle. It is the opinion of the Commission services that in this situation the service of transport of a vehicle supplied together with the transport of passengers as a single supply would be subject to the standard VAT rate and the passenger transport service would constitute an ancillary service.

3.6. Conclusion

The Commission services conclude that accompanying motor vehicles, which by way of derogation can continue to be exempted according to Article 371 and Annex X, Part B, Point 10 of the VAT Directive, if the underlying passenger service is exempt, cannot be subject to the reduced rate according to Annex III, Point 5 of the VAT Directive, even where the underlying passenger transport is subject to a reduced rate. For VAT purposes the transport of the accompanying motor vehicle should be treated as a transport of goods service in its own right (and not as an ancillary service to the transport of the accompanied passenger) and should be subject to the standard rate.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on the question raised by Italy and on the observations made by the Commission services.

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Question from Italy

Subject: Sea transport of passengers and their accompanying vehicles

1.1. Question

National operators in the maritime sector have raised doubts of interpretation in relation to the VAT treatment applicable to the service of carriage by sea of motor vehicles accompanying passengers. In particular, they have asked whether the ‘accompanying vehicle’ is to be considered, like the ‘accompanying luggage’, an ancillary service to passenger transport, or rather as an independent service. The reason for this question is that, under Italian legislation, passenger transport benefits from a reduced rate of VAT, or from an exemption.

The transport of motor vehicles accompanying passengers is explicitly mentioned in the VAT Directive, Annex X, part B, point 10, among the transactions subject to the derogation referred to in Article 371 of the same Directive. Pursuant to such provision, Member States may continue to exempt the transport of passengers and, in so far as the transport of the passengers is exempt, the transport of goods accompanying them, such as luggage or motor vehicles, or the supply of services relating to the transport of passengers. Instead, such specific case is not mentioned in Annex III, No 5, of the VAT Directive, which envisages the application of reduced rates to the transport of passengers and their accompanying luggage. Thus, from the above provisions, no ancillary relation can be inferred between the carriage of an accompanying vehicle and the service of passenger transport.

From Article 2 of Directive 112/2006/EC it can be inferred that, as a rule, each supply must be considered as distinct and independent. However, a transaction which comprises a supply that is single from an economic point of view should not be artificially split in several parts, so as not to distort the functioning of the VAT system (Judgment of the European Court of Justice in *Everything Everywhere Ltd*, C-276/09).

According to the Court’s case-law, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (Judgment of 25 February 1999 in CCP – C-349/96). The same Court also made it clear that in order to determine whether the taxable person is supplying the customer with several distinct principal services or with a single service, the essential features of the transaction must be ascertained and regard must be had to all the circumstances in which that transaction takes place (*Everything Everywhere Ltd* Judgment cited above, C-276/09).

It should be noted, in this regard, that sea passenger transport and their cabin luggage is regulated at national level by Articles 396 *et seq* of the *Codice della Navigazione* (Navigation Code). Instead, in the absence of specific provisions within such Code, the ‘accompanying vehicles’ have been treated by national case-law as the service of transport of articles, governed by Article 419 *et seq* of the same Code (see *Corte di Cassazione, sezione I*, 19 October 1982, No 5409).

Conversely, it is clear from the definition of ‘luggage’ of the Athens Convention of 1974 relating to the carriage of passengers and their luggage by sea, which is relevant for the application of Council Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea (point 5 of Annex I to that Regulation), that the vehicle carried by the carrier can be considered as part of the luggage of the passenger, excluding vehicles carried under a charter party, bill of lading or other contract primarily concerned with the carriage of goods.

Having regard to all the above elements, in the absence of a definition of ‘transport of passengers and their accompanying luggage’ in the VAT Directive, Italy is requesting the opinion of the VAT Committee on whether the carriage of a vehicle on board a ship should be considered as an ancillary service to passenger transport, or as an independent service which must be appraised separately for VAT purposes.

1.2 Proposed solution

The *Agenzia delle Entrate* believes that carrying a vehicle on board a ship cannot be considered, like with accompanying luggage, as an ancillary service to passenger transport.

The above service should, instead, be regarded as distinct and independent from the passenger transport service as it is not possible to determine which service predominates over the other, nor any ancillary relation between them.

Consequently, according to the *Agenzia delle Entrate*, the transport of the accompanying vehicle should not be treated in the same way as passenger transport and, notwithstanding any derogations, subject to the standard rate.