EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value added tax

taxud.c.1(2015)2177802 – EN

Brussels, 6 May 2015

VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 857

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Commission and Italy**
REFERENCES:	**Article 192a of the VAT Directive** **Articles 11 and 53 of the VAT Implementing Regulation**
SUBJECT:	**Clarifications on the concept of fixed establishment**

1. INTRODUCTION

The Commission services have been faced with various issues arising from the interaction between the rules governing the place of supply and intra-Community acquisition of goods and the concept of fixed establishment, in particular when identifying the person liable to pay the VAT. Also, implications of the fact that the supplier may have a warehouse in the Member State of arrival of the goods seem to create problems.

Additionally, Italy submitted to the VAT Committee some questions with regard to the implementation of the concept of fixed establishment as referred to in the VAT Directive[1] and defined by the VAT Implementing Regulation[2], and more specifically with regard to the implementation of Article 192a of the VAT Directive and the determination of the person liable for payment of the VAT.

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

2. SUBJECT MATTER

The issues at stake and the request presented by Italy to the VAT Committee are similar in nature to a question previously submitted by Italy and which was discussed in the 100th VAT Committee[3].

The Italian request relates to the use of the concept of fixed establishment for taxation of supplies of goods and to the notion of intervening fixed establishment when it comes to the assessment of the person liable for payment of the VAT. It seeks clarification on the scope of Article 192a of the VAT Directive, in situations in which a fixed establishment is seen as intervening in a supply of goods and on whether this provision applies only to domestic or also to intra-Community supplies of goods.

3. THE COMMISSION SERVICES' OPINION

According to the Commission services, the request submitted by Italy reverts to some of the questions which have already been addressed in a previous meeting of the VAT Committee. Those are questions which are also reflected in issues encountered by the Commission services.

In Working paper No 791, clarifications were provided with regard to the possibility to apply the concept of 'fixed establishment' as defined in Article 11 of the VAT Implementing Regulation, to the supply or intra-Community acquisition of goods, as well as on situations in which a fixed establishment should be regarded as 'intervening' in a supply in the terms of Article 192a of the VAT Directive. However, since it is important to avoid confusion and the risk that the concept of fixed establishment is misused for

[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] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) (OJ L 77, 23.3.2011, p. 1).

[3] See Working paper No 791.

instance for the purposes of taxation of supplies of goods, the questions raised should be further clarified.

To this end, the conditions for characterising a fixed establishment for VAT purposes should first be recalled. Second, the interaction between the provisions defining the concept of fixed establishment and the provisions determining the person liable for the payment of VAT should be examined. Finally, it should be clarified whether Article 192a of the VAT Directive can be applied both for domestic and for in intra-Community supplies.

3.1. Definition of a fixed establishment for VAT purposes (Article 11 of the VAT Implementing Regulation)

As already pointed out in Working paper No 791, for VAT purposes, the concept of fixed establishment is defined only with regard to supplies of services as in general it is not relevant with regard to determining the place where supplies of goods are made for VAT purposes[4].

Under the EU VAT legislation, there is one single definition of this concept and it is provided under Article 11 of the VAT Implementing Regulation. This provision reads as follows:

Article 11

1. For the application of Article 44 of Directive 2006/112/EC, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

2. For the application of the following Articles, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies:

(a) Article 45 of Directive 2006/112/EC;

(b) from 1 January 2013, the second subparagraph of Article 56(2) of Directive 2006/112/EC;

(c) until 31 December 2014, Article 58 of Directive 2006/112/EC;

(d) Article 192a of Directive 2006/112/EC.

3. The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment.

[4] With the exception of the supply of gas, supply of electricity and supply of heat or cooling energy through heating and cooling networks, referred to in Articles 38 and 39 of the VAT Directive.

It is important to stress that even if the concept of fixed establishment also appears under other provisions of the VAT Directive and of the VAT Implementing Regulation, the only definition of this notion in the VAT field is contained in Article 11 of the VAT Implementing Regulation. That definition is derived from settled case law of the Court of Justice of the European Union.

As a consequence, tax administrations and other interested parties can only conclude to the existence of a fixed establishment if the conditions set out under Article 11 of the VAT Implementing Regulation are fulfilled, i.e. if a supplier has an establishment characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to either[5] receive and use the services supplied to it for its own needs or to provide the services which it supplies.

Therefore, *a contrario*, carrying out transactions consisting in supplies of goods cannot create a fixed establishment. For example, a transfer of goods by a taxable person to another Member State for the purposes of its business, which is considered as a deemed supply of goods under Article 17(1) of the VAT Directive followed in turn by a taxable intra-Community acquisition under Article 20 of the VAT Directive, is not sufficient to conclude that as a result of those transactions this taxable person has a fixed establishment in the Member State to which he has transferred the goods for the purposes of Article 17(1).

Also, the mere existence of a warehouse in a Member State does not in itself allow characterising this to be a fixed establishment in that jurisdiction. Moreover, even in the situation where a warehouse would actually meet the conditions of Article 11 of the VAT Implementing Regulation and would qualify as a fixed establishment, it cannot be automatically considered that all goods supplied to the Member State where that fixed establishment is located are necessarily transferred to the warehouse, thereby refusing that the goods could have been directly supplied to customers of that Member State.

In this regard, it should also be recalled that Article 11(3) of the VAT Implementing Regulation explicitly states that '*The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment*'.

In view of all these elements, it is clear that Article 192a of the VAT Directive cannot be used as a legal basis for characterising or assessing the existence of a fixed establishment. This assessment should be conducted exclusively against the criteria of Article 11 of the VAT Implementing Regulation and only when these criteria are met and the presence of a fixed establishment is legally ascertained, the subsequent analysis of the intervention or not of this fixed establishment in a concrete transaction can be operated.

The Commission services would finally like to recall that the existence in the Member State of arrival of the goods (B) of a warehouse of a supplier established in another

[5] These two requirements should not be seen as creating two different definitions of the concept of fixed establishment for 'purchasing' and 'supplying' fixed establishments. There is only one single definition of the concept of fixed establishment requiring on the one hand a sufficient degree of permanence and, on the other hand, a suitable structure in terms of human and technical resources which however has to be assessed on a case-by-case basis with regard to the circumstances at stake. This is explained by the fact that in some scenarios the human and technical resources needed for receiving services may not be as important as the resources needed to provide these same services. See also Working paper No 791.

Member State (A) does not automatically result in the warehouse becoming a fixed establishment of the supplier in Member State B. For that to be the case, the conditions in Article 11 of the VAT Implementing Regulation would first have to be met. Further, it cannot be assumed automatically that a supplier dispatching goods to another Member State where he has a fixed establishment in order for the goods to be supplied to a local customer necessarily carries out the transaction through that fixed establishment.

3.2. Determination of the person liable for payment of the VAT (Article 192a of the VAT Directive and Article 53 of the VAT Implementing Regulation)

For the implementation of the harmonised VAT system, the concept of fixed establishment is used, firstly, for the purposes of establishing the place of some taxable transactions (see above) and, secondly, for the purposes of determining the person liable for the payment of VAT to the relevant tax authorities.

Article 192a of the VAT Directive provides that when a taxable person makes a taxable supply of goods or services to a Member State where it has a fixed establishment and that fixed establishment does not intervene in that supply, this taxable person shall be regarded as not established in that Member State for the purpose of Section 1 of Chapter 1 of Title XI of the VAT Directive. The consequence of this provision is that, where the condition of non-intervention is met, that taxable person shall not be considered to be established in the Member State to which he has supplied goods or services and he will therefore not be liable for payment of the VAT.

Article 53 of the VAT Implementing Regulation clarifies under which conditions a fixed establishment is to be regarded as intervening in a supply in the meaning of Article 192a of the VAT Directive.

According to paragraph 1 of Article 53 of the VAT Implementing Regulation, the first requirement is that the fixed establishment must be '*characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to make the supply of goods or services in which it intervenes*'.

According to paragraph 2 of Article 53 of the VAT Implementing Regulation, the second requirement is that '*the technical and human resources of that fixed establishment are used by him for transactions inherent in the fulfilment of the taxable supply of those goods or services made within that Member State, before or during this fulfilment*'.

It stems from Article 192a of the VAT Directive and from Article 53 of the VAT Implementing Regulation that a taxable person should not be seen as established and therefore not be liable for the payment of VAT due in Member States where he is not established unless:

- The taxable person has, in that Member State, a fixed establishment (first condition to be assessed prior to any other analysis as explained above).

- This fixed establishment is '*characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to make the supply of goods or services in which it intervenes*' (Article 53(1) of the VAT Implementing Regulation). In this regard, it should be noted that a structure that would have the necessary human and technical resources to receive and use services supplied

to it for its own needs would not necessarily have sufficient resources to provide those services on its own (Article 11 of the VAT Implementing Regulation).

– This fixed establishment has actually intervened in a supply of services or goods provided by the taxable person, i.e. '*the technical and human resources of that fixed establishment are used*' (Article 53(2) of the VAT Implementing Regulation).

– The technical and human resources of the fixed establishment are not just used for any purpose but '*for transactions inherent in the fulfilment of the taxable supply*' (Article 53(2) of the VAT Implementing Regulation). In this regard, administrative support tasks are not sufficient for considering the fixed establishment as intervening in the supply.

It follows from these legal requirements that the intervention of a fixed establishment (the existence of which has first been established against the criteria of Article 11 of the VAT Implementing Regulation) in a concrete supply should be assessed on a case-by-case basis against the conditions listed in Article 53 of the VAT Implementing Regulation. A fixed establishment cannot be seen, in any case, as intervening in a supply by default.

3.3. Intervention of a fixed establishment in domestic and intra-Community supplies

The conditions set out under Article 192a of the VAT Directive and under Article 53 of the VAT Implementing Regulation do not target specifically domestic or intra-Community supplies. These two provisions do not, in any way, make reference to any of these two categories of supplies.

This is due to the fact that Article 192a of the VAT Directive and Article 53 of the VAT Implementing Regulation are only relevant in situations involving, on the one hand, a main place of business established in one Member State and, on the other hand, a fixed establishment and a customer located in another Member State. In fact, in a purely domestic supply, it would not be possible, nor would it be necessary, to apply these two provisions.

Therefore, in the Commission services' opinion, the question of whether Article 192a of the VAT Directive applies only to domestic or also to intra-Community supplies is irrelevant.

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.

*

* *

ANNEX

Question from Italy

Subject: Clarifications on the concept of fixed establishment

Supply of goods – Intervention of the fixed establishment

1.1 Question

Pursuant to Article 192a of Directive 2006/112/EC, a taxable person who has a fixed establishment within the territory of the Member State where the tax is due shall be regarded as a taxable person who is not established within that Member State when he makes a taxable supply of goods or of services within the territory of that Member State and an establishment which he has within the territory of that Member State does not intervene in that supply.

Italy is hereby seeking the opinion of the VAT Committee concerning the proper scope of that provision to learn which are the cases that the 'taxable supply of goods' applies to and, in particular, whether the rule regards only the domestic or also the intra-EU supplies of goods.

Indeed, uncertainties still remain in the application of Article 192a, both because in some cases there are doubts on how to class the taxable transaction itself, and also since the notion of 'intervention' of the fixed establishment in the supply of goods does not seem to be sufficiently self-explanatory, in spite of the provision of Article 53 of Implementing Regulation No 282/2011.

In general, Article 192a should not cover the possibility of an intra-Community supply of goods with direct transport from State "A of the supplier to State "B" of the customer, even in the presence of a fixed establishment of the supplier in State "B" intervening, with its human and technical resources, in some phases of the operation, for instance stipulating a contract with the customer. Indeed, in such a case, the customer receiving the goods, who is a taxable person, should be deemed to be making a taxable intra-Community acquisition under Article 20 of the Directive and should therefore be liable for payment of VAT in accordance with Article 200 of that Directive. Thus, the intervention of the fixed establishment in the above-described supply should not be relevant for the purposes of designating the person liable for payment of VAT.

The circumstances are different where the goods are transferred from State "A" of the supplier to the warehouse of his fixed establishment situated in State "B" in which VAT is due, i.e. where the goods become physically available to such fixed establishment prior to their delivery in State "B" to the final customer who is a taxable person. In this case, it is deemed that the supplier carries out, through its fixed establishment, a transaction, to be 'treated as' an intra-Community acquisition of goods pursuant to Article 21 of the VAT Directive and, subsequently, a domestic supply of goods to his customer. In such circumstances, with regard to the cross-border transfer between the parent company and the fixed establishment, the person liable for payment of VAT can only be the fixed establishment.

It should be noted, however, that the above restrictive interpretation of Article 192a involves onerous administrative burdens on part of the taxable persons as final purchasers of the goods, including, in particular, the obligation to register in the VIES system and the requirement to submit recapitulative statements of their intra-Community acquisitions, even where the contract is stipulated with the fixed establishment.

For these reasons, in fact, some operators would be in favour of considering the supplier as established in the Member State in which the VAT is due and, consequently, of excluding the application of the reverse charge mechanism under Article 200 with the obligations entailing from it. The rationale behind this interpretation is that the fixed establishment stipulates contracts with the customers and intervenes in the supply with its human and technical resources, even if the goods do not become physically available to it.

Against this background, the Italian authorities wish to ask the VAT Committee to clarify in which circumstances the involvement of the fixed establishment in the supply of goods is such as to indicate that the supplier is established in the Member State in which the tax is due, and, in particular, if the determining factor is whether the goods have become available to the fixed establishment before or during the performance of such supply.

1.2 Proposed solution

The *Agenzia delle Entrate* considers that Article 192a, in which the concept of intervention of the fixed establishment is formulated, does not cover the intra-Community supplies that are exempt under Article 138 of the Directive, even in the presence of a fixed establishment of the supplier in the State of destination of the goods that intervenes in the supply, with its human and technical resources.

Moreover, the aforementioned Article does not apply in the case of a domestic supply of goods carried out from the warehouse of the fixed establishment situated in the Member State in which the tax is due, that is, where the latter has already acquired the physical possession of the goods at the time of the sale. In other words, in this case the taxable person making the supply should be regarded as established in the Member State in which the VAT is due.

In particular, the fixed establishment is regarded, unless there is proof to the contrary, as 'not intervening' in the supply, pursuant to Article 192a of the Directive and to Article 53 of Implementing Regulation No 282/2011, in any of the following cases:

– the fixed establishment stipulates contracts in the name and on behalf of the parent company

– the fixed establishment is in charge of marketing and the relations with the customers

Conversely, under the aforementioned provisions, the supplier is regarded to be established in the State in which the VAT is due, in any of the following cases:

– the fixed establishment acquires the physical possession of the goods before or during the fulfilment of the supply (for instance, through a transaction to be 'treated as' an intra-Community acquisition of goods, pursuant to Article 21 of the Directive)

– the goods are stored by the fixed establishment prior to their sale

– the invoice is issued the fixed establishment in its own name, unless there is proof to the contrary

Example 1

Company Alfa in Member State 'A' carries out a supply of goods in State 'B' in which it has a fixed establishment. The supply consists in the transport of the goods from A to B directly to the taxable customer, without the goods becoming physically available to the fixed establishment. However, the fixed establishment is involved with its human and technical resources in the supply, since it stipulates the contract with the customer in the name and on behalf of the parent company, it is in charge of business relations, strategy of the sale price, supply personnel management and performs other activities that cannot be considered as simple administrative support tasks.

In the case above, although the fixed establishment is significantly involved in the fulfilment of the supply of goods, it is not believed that such intervention is relevant for the purposes of determining who is the person liable to pay VAT, as this transaction clearly qualifies as an intra-Community supply of the supplier in State A and as an intra-Community acquisition of the customer in State B. As a result, the person liable to pay VAT is the customer making an acquisition of goods in accordance with Article 200 of the Directive.

Example 2

As in the previous example, company Alfa, established in State 'A', carries out a supply of goods in State 'B' for a taxable customer established in State 'B', where Alfa has a fixed establishment. The goods are transported from State A to the warehouse of the fixed establishment in State B for storage activities, before the final delivery to the taxable customer.

In this case, the transfer of the goods from State A to the warehouse of Alfa's fixed establishment in State B is regarded, under Article 21 of the Directive, as an transaction to be 'treated as' an intra-Community acquisition which is taxable in State B. Subsequently, Alfa performs, through its fixed establishment, a domestic supply in State B for its taxable customer. The Alfa company, i.e. its fixed establishment, will charge the VAT with respect to the two taxable transactions in State B pursuant to Articles 200 and 193 of the Directive.

It is believed, therefore, that the involvement of the fixed establishment in the transaction described above is such as to indicate that the supplier is established in State B in which the tax is due.