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

taxud.c.1(2018)1700859 – EN

Brussels, 19 March 2018

VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 943

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Poland**
REFERENCES:	**Articles 25 and 28**
SUBJECT:	**VAT treatment of organisations collectively managing copyright and related rights**

1. INTRODUCTION

The Court of Justice of the European Union (CJEU) in the *SAWP* case[1] ruled that private copying fees collected by organisations collectively managing copyright and related rights on behalf of holders of reproduction rights do not constitute remuneration for services supplied by these right holders to the persons who pay the fees. That means that those fees are not consideration for any services which are therefore not subject to VAT under the VAT Directive[2].

In connection with this judgment, Poland raised questions on how the amounts retained by the collective management organisations of copyright and related rights (hereinafter "CMOs") from revenues they collect on behalf of the right holders should be treated for VAT purposes.

The questions and analysis submitted by Poland are attached in the annex.

2. SUBJECT MATTER

The collective management of copyright and related rights is the system whereby a copyright holder, such as an author or performer, authorises a specialised body to administer and commercially exploit his rights.

In some copyrighted sectors (e.g. music, print and publishing, audio-visual and film) it is difficult or almost impossible for authors and other right owners to individually exercise their rights over their work and monitor all the different uses of it. These tasks are therefore entrusted to a CMO which enables right holders to be remunerated for uses of their work. At the same time, the organisation facilitates users' access to a large quantity of copyrighted works, by reducing transaction costs.

In this document we only examine some aspects of the activity carried out by a CMO which are essentially related to the questions raised by Poland.

2.1. CMOs within the EU

Rules regulating CMOs vary greatly from one Member State to another. Recently, Directive 2014/26/EU[3] has laid down requirements for the collective management of copyright and related rights as regards modalities of governance, financial management, transparency and reporting.

Article 3(a) of this Directive defines collective management organisations as any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of

1 CJEU judgment of 18 January 2017, *SAWP*, C-37/16, EU:C:2017:22.
2 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).
3 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84, 20.3.2014, p. 72).

more than one right holder, for the collective benefit of those right holders, as its sole or main purpose and which fulfils one or both of the following criteria:

(i) it is owned or controlled by its members;

(ii) it is organised on a not-for-profit basis.

The management of copyright can also be performed by "independent management entities" which differ from CMOs, *inter alia* because they are not owned or controlled by right holders and are organised on a for-profit basis[4]. These entities are not taken into account in our analysis.

The legal status of the CMO is determined by the law of the country where it operates. It can be a private entity based on voluntary membership or a statutorily regulated entity which may allow voluntary membership. The members of a CMO are right holders, entities representing them or other CMOs.

In several Member States CMOs benefit from the monopolistic status granted to them by law[5]. Moreover in some Member States, certain categories of rights are subject to mandatory collective management, that is to say, right holders cannot manage their rights on an individual basis but have to assign them to a CMO[6].

On joining a CMO, members provide personal details and declare the works that they have created which form part of what is known as the "repertoire" that the CMO has to manage.

In particular, CMOs provide the following services: (1) granting of licences to commercial users[7]; (2) auditing and monitoring of rights by ensuring payment and terms of licensing (enforcement); (3) collection of rights revenue (royalties and other forms of remuneration); (4) distribution of rights revenue to rights-holders. Some organisations also provide social and cultural funding.

Most commonly a CMO will offer blanket licences to right users which allow them to make use of the entire repertoire represented by the organisation, for certain purposes and for a prescribed period, in return of a single payment.

The CMO collects all the payments and distributes them to their members according to deduction and distribution rules that should be approved by the general assembly of members[8].

---

4 See Article 3(b) of Directive 2014/26/EU.

5 It should be noted that in all Member States CMOs are subject to competition law provisions with regard to possible abuses of their dominant position.

6 The right to remuneration for cable retransmission is mandatory in all Member States by virtue of the implementation of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15). Other rights covered by mandatory collective management are in particular the right to remuneration for public lending, the resale right and the right to remuneration for private copying.

7 A copyright licence agreement is a permission for the use of copyrighted work in exchange for a payment (fee or royalty), without transferring the rights' ownership. Without such an agreement the use of the protected work would be an infringement.

8 See Article 8 of Directive 2014/26/EU.

In relation to the services provided, CMOs usually charge, deduct or offset from the right revenue they collect a "management fee" in order to cover the costs incurred which should be documented[9].

2.2. Private copying compensation

A private copy is usually defined as any copy of protected work for non-commercial purposes made by a natural person for personal use.

Under Article 5(b) of Directive 2001/29/EC[10] Member States have the option to provide for a private copying exception to the exclusive reproduction right of authors, performers, phonogram producers, film producers and broadcasting organisations. To make use of that option Member States must ensure a fair compensation to right holders affected by the application of that exception[11].

The compensation systems can differ considerably across the EU, notably as regards the level of tariffs and their setting, products that can be levied, the liability for paying levies, the collection and distribution schemes[12]. The compensation can be either State-funded with no levies or financed through levies on media and/or equipment. In the latter case, levies can be set either by law or by designated public bodies or via negotiations between right holders (e.g. CMOs administering the levies) and industry (e.g. importers/manufacturers).

The most common system is one under which importers and manufacturers, and sometimes professional traders, are required to pay levies that apply to recording equipment or media used by individuals for their private purposes. It is assumed that levies will consequently be included in the sales price of the levied products paid by the final users.

Usually private copying levies are charged on the sale of digital hardware equipment and devices used to reproduce protected works (such as USB keys, mp3 players, blank CDs, mobile phones, computers, etc.).

For practical reasons, levies are not paid directly to the right holders but to CMOs appointed by the government or by right holders. As for other categories of rights (e.g. resale rights), in most Member States the collective management of the right to remuneration for private copying is made mandatory by law.

From the total amount collected a percentage is taken by CMOs for administrative costs incurred by them, another percentage is allocated to social and cultural funds and the rest is directly distributed among the right holders.

---

9 See Articles 3(i) and 12 of Directive 2014/26/EU.

10 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

11 In situations where the prejudice to the right holder would be minimal, no obligation for payment may arise under Article 5(2)(b) of Directive 2001/29/EC in the light of recital 35 of the preamble of that Directive (see CJEU, judgment of 5 March 2015, *Copydan Båndkopi*, case C-463/12, EU:C:2015:144).

12 A description of different systems is set out in the "*International survey on Private Copying"* (2015), WIPO – World Intellectual Property Organisation.

2.3. The CJEU ruling C-37/16 - SAWP

The dispute in the main proceeding was between the Polish Ministry of Finance and SAWP, which is a collective management organisation in Poland. According to the national law on copyright[13], SAWP levies on behalf of right holders a fee on the sale of blank media and of recording and reproduction devices by the producers and importers of such devices and blank media for reproducing works for personal use.

SAWP asked the Ministry of Finance for an official opinion as to whether the fee collected was subject to VAT. The Ministry of Finance took the view that the fee constituted a payment for the use of the copyright or related rights that are connected with the sale of equipment for copying and recording works and that, therefore, those sums had to be regarded as remuneration for the services supplied by the holders of copyright or related rights and must, as such, be subject to VAT. Having a different view, SAWP brought an action before the Regional Administrative Court.

The questions subsequently referred to the CJEU for a preliminary ruling were the following:

1. *Do authors, performers and other right holders supply services, within the meaning of Articles 24(1) and 25(a) of the VAT Directive, to producers and importers of audio recorders and other similar devices and of blank media on whom collective management organisations levy on behalf of those authors, performers and other right holders, but in their own name, fees on those devices and media by virtue of their sale?*
2. *If the answer to Question 1 is in the affirmative, are collective management organisations, in levying a fee on devices and media by virtue of their sale by producers and importers, acting as taxable persons, within the meaning of Article 28 of the VAT Directive, who are required to document those activities by means of an invoice for the purposes of Article 220(1), point 1, of that directive, issued to producers and importers of audio recorders and other similar devices and of blank media, showing VAT as due by virtue of the fees, and, at the time at which the fees levied on behalf of the authors, performers and other right holders are distributed to them, are the latter required to document receipt of the fees by means of an invoice indicating the VAT, issued to the collective management organisation levying the fee?*

To answer the first question, the CJEU examined the conditions to be fulfilled in order to determine that a transaction for consideration is carried out under the VAT Directive, according to the settled case-law. The CJEU found that in this case it was not apparent that a legal relationship existed between the holders of reproduction rights and the producers and importers pursuant to which there is a reciprocal performance. The CJEU did so in view of the mandatory nature of the fee under national law (which also determines the amount to be paid) and the fact that the levies are intended to finance a fair compensation to right holders for harm arising from the reproduction of their works without authorisation.

[13] Polish Law on copyright and related rights, 4 February 1994, Article 20.

Ultimately the CJEU held that holders of reproduction rights do not make a supply of services, within the meaning of the VAT Directive, to producers and importers of blank media and of recording and reproduction devices on which organisations collectively managing copyright and related rights levy on behalf of those right holders, but in their own name, fees in respect of the sale of those devices and media.

Given the negative reply to the first question, there was no need for the CJEU to answer to the second question.

2.4. Questions from Poland

In Poland CMOs are associations of authors, performers, producers and radio and television organisations whose statutory task is the collective management and protection of the copyright entrusted to them[14].

These organisations are, in particular, under the obligation set by law to collect the private copying levy from the persons liable for the levy. They do so on behalf of the right holders. The right for those right holders to obtain remuneration for private copying is subject to a compulsory collective management system in Poland.

The first question from Poland is then how, in the light of the judgment in the *SAWP* case, the amount retained by a CMO from the collected amount of private copying levy in order to cover costs incurred in its activity should be treated for VAT purposes.

The second question is how the amount retained by a CMO from the collected revenues other than those relating to private copying, such as licence fees, should be treated for VAT purposes.

As regards the two types of transactions, Poland is also uncertain as to whether the CMO acts as an agent under Article 28 of the VAT Directive.

In this respect, by its third question, Poland would like to know whether the Commission services' opinion as stated in Working paper No 635 on a similar subject and discussed during the 89th meeting of the VAT Committee is still valid.

3. THE COMMISSION SERVICES' OPINION

A supply of services is subject to VAT when made for consideration by a taxable person acting as such, pursuant to Article 2(1)(c) of the VAT Directive. In turn, a taxable person is defined as any person carrying out an economic activity, whatever the purpose or results of that activity under Article 9 of the VAT Directive.

From the settled case-law of the CJEU it is clear that a supply of services is taxable under the VAT Directive, only if there is a direct link between the services supplied and the consideration received[15]. Such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal

[14] Law on copyright and related rights, 4 February 1994, Article 104(1).

[15] Amongst others, CJEU, judgment of 7 October 2010, *Loyalty Management UK*, C-53/09, EU:C:2010:590, paragraph 51; and judgment of 8 March 1988, *Apple and Pear Development Council*, C-102/86, EU:C:1988:120, paragraph 12.

performance, the remuneration received by the provider of the service constituting the actual consideration given in return for the service supplied to the recipient[16].

3.1. CMOs for VAT purposes

Status of taxable person

The principal functions of a CMO are:

(i) to grant licences on and collect revenue from the exploitation of rights it manages on behalf of its members, and

(ii) to collect the fees intended to finance, for holders of reproduction rights, fair compensation linked to the harm resulting for those right holders from the reproduction of their protected works without their authorisation.

According to Article 9(1) of the VAT Directive an economic activity does not necessarily have to be a business activity designed to make a profit. It can be in particular "any activity of producers, traders or persons supplying services". The Article also provides that the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity[17].

As regards the activity at issue, Article 25 of the VAT Directive further qualifies "the assignment of intangible property" as a supply of services. Similarly, Article 59(a) of the VAT Directive refers to "transfers and assignments of copyrights, patents, licences, trademarks and similar rights" as supplies of services.

From the above it is clear that under the VAT Directive the CMO carries out an economic activity which consists in the supply of services, irrespective of whether the organisation operates for profit or not for profit, in a competitive or monopoly system.

Transactions for consideration/direct link

The collective management of copyright and related rights, as explained in section 2.1, consists in various transactions carried out by a CMO on behalf of right holders among which it is possible to identify:

(i) the collection of revenue not linked to the economic exploitation of copyrighted work, such as remuneration for private copying, and

(ii) the collection of revenue derived from the granting of licences, which is a form of economic exploitation of copyrighted work.

The CMO keeps a portion of the two types of revenue collected which is ultimately distributed to right holders. Then it can be observed that:

---

16 Amongst others, CJEU, judgment of 27 March 2014, *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraph 29; and judgment of 3 March 1994, *Tolsma*, C-16/93, EU:C:1994:80, paragraph 14.

17 The term "exploitation" refers to all those transactions, whatever may be their legal form, by which it is sought to obtain income on a continuing basis – CJEU, judgment of 21 October 2004, *BBL*, case C-8/03, EU:C:2004:650, paragraph 36. See also judgment of 4 December 1990, *Van Tiem*, case C-186/89, EU:C:1990:429, paragraph 15.

- in case (i) it might not be clear whether the amount retained by a CMO is linked to a taxable transaction supplied to the right holders considering that, first, the right holders are entitled to the remuneration for private copying by law; second, the CMO is required by law to collect the fee (collective management is mandatory in Poland);
- in case (ii) while it is clear that the portion of the revenue collected kept by the CMO qualifies as consideration for a service supplied by a CMO to right holders, it cannot be assessed whether the CMO supplies a single service or more independent services and in such a case whether the consideration can be attributed to an individual or more services.

Then the existence of a legal relationship between the parties pursuant to which there is a reciprocal performance should also be examined.

Legal relationship

Under a voluntary collective administration, right holders can entrust their rights to a CMO by mandate, assignment, licence or transfer. In this case, according to Article 5 of Directive 2014/26/EU, they have to give consent specifically for each right or category of rights or type of works and other subject-matter which they authorise the organisation to manage.

Where a Member State provides for mandatory collective management[18], the right holder's choice would be limited and the CMO should be mandated by law to licence the rights or to collect the rights revenue, without an explicit permission of right holders. Although in that case there could be no contract between the parties, it seems that the right holders are still required to inform the organisation about their work in order to benefit from the collective administration and in particular to obtain remuneration for private copying.

It follows that a CMO, whether or not statutory-regulated, could not carry out its activity without identification of the right holders and their copyrighted work which constitutes the repertoire represented by the organisation. Such identification is substantially the connection between the CMO and the right holders.

In view of these elements, the Commission services agree with Poland that the two types of charges paid by the right holders should be seen as constituting remuneration for services supplied by the CMO to right holders and therefore these would be subject to VAT.

3.2. Do CMOs act as taxable persons within the meaning of Article 28 of the VAT Directive?

Article 28 of the VAT Directive states that where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.

[18] Directive 2014/26/EU should not interfere with arrangements concerning the management of rights in the Member States such as mandatory collective management, provided that they are consistent with Union law. See recital 12 of that Directive.

As explained by the CJEU in case *Henfling and Others*[19] this provision creates the legal fiction of two identical supplies of services provided consecutively. The taxable person who takes part in the supply of services (the agent) is regarded as receiving the services from the person on behalf of whom he acts (the principal) and then as supplying these services onwards. It follows that as regards the legal relationship between the principal and the agent, their respective roles of service provider and payer are notionally inversed for VAT purposes.

For Poland it is not clear whether the CMO acts within the meaning of Article 28. It observes that in the light of the legal fiction the services that the organisation should supply onwards do not coincide with those that it should receive from the right holders (i.e. CMO does not act as a mere intermediary). However, the fact that the organisation acts in its own name and on behalf of the right holders is not questioned by Poland.

In this regard, we must first keep in mind that Article 28 covers a situation in which the agent takes part in a supply of services with third parties on behalf of another person. It is so under this Article that based on his capacity to act in his own name the agent should not be seen as intermediary but as principal[20]. Under the VAT Directive it is indeed only when a taxable person provides a service in the name and on behalf of another person that he can qualify as intermediary[21].

From the *SAWP* ruling it is clear that the fee for private copying levied by a CMO, in its own name and on behalf of right holders, is not linked to the existence under the VAT Directive of a supply of services between the right holders and the persons who have to pay this fee. It follows that in levying the fee for private copying the CMO does not act within the meaning of Article 28 and must therefore charge VAT on the proportion of the fee retained as remuneration for the service supplied to right holders.

The situation is different in the case of royalties which are payments made by licensees in return of permissions to use copyrighted work. The CMO takes part in a supply of services with third parties by granting these permissions and collecting the revenue on behalf of the right holders. Moreover, as regards the condition that the taxable person must act in his own name, it seems that the CMO acts as principal (licensor) rather than as agent: the CMO in fact negotiates tariffs and other licence terms directly with the licensees and in a centralised manner. However such an involvement of the CMO in the supply must be assessed on the basis of all details of the case and in particular taking into account the nature of contractual obligations, where existing, of the CMO towards its right holders[22].

Thus, in so far as the conditions provided for in Article 28 are fulfilled, the consequences for VAT purposes would be the following:

- the CMO must issue an invoice to licensees and charge VAT on the whole amount of revenues it collects (as it is the principal);
- the right holders, when acting as taxable persons, must issue an invoice to the CMO for the amount of revenues received after deduction of expenses incurred.

19 CJEU, judgment of 14 July 2011, *Henfling and Others*, C-464/10, EU:C:2011:489.
20 See *Henfling and Others*, paragraphs 32-33 and 38.
21 See also Articles 46, 153, 306 and 347 of the VAT Directive.
22 See *Henfling and Others*, paragraphs 40-43.

3.3. Opinion stated in Working paper No 635

The Commission services' position set out in Working paper No 635, notably the part that relates to the existence of a supply of services between the holder of reproduction rights and the importer or manufacturer, should be considered overridden by the judgment of the CJEU in the *SAWP* case.

However, as regards the taxable supply of reproduction devices by the importer or manufacturer, the Commission services are still of the opinion that the private copying levy should be included in the taxable amount of that supply, as it forms part of the costs incurred by the importer or manufacturer in accordance with Articles 73, 78 and 86 of the VAT Directive.

4. DELEGATIONS' OPINION

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

*

* *

ANNEX

Questions submitted by Poland

Organisations collectively managing copyright and related rights (CMOs)

In Poland organisations collectively managing copyright and related rights (hereinafter 'copyright') comprise associations of authors, performers, producers and radio and television organisations whose statutory task is the collective management and protection of the copyright entrusted to them[23].

In particular, the activities of CMOs consist of the following:

(a) representing the rights of right holders ('authors');

(b) negotiating the conditions and granting permission for the use of works or the subject matter of related rights (usually through licences);

(c) levying (collecting, in the broad sense) royalties from the parties under an obligation to pay (namely, the users of works or of the subject matter of related rights) on behalf of authors;

(d) controlling (monitoring) use;

(e) dividing (distributing) royalties (namely, the payments collected from the parties using the media) among authors;

(f) investigating infringements of rights.

The copyright management services provided by CMOs in respect of their levying of a fee from producers and importers of reprographic devices and blank media (or holders of reprographic devices) used for recording or reproducing works for personal use ('fees for authorised personal use')

Fees for authorised personal use are fees on sales of reproduction devices and blank media and fees on reprography levied by CMOs on behalf of authors from parties such as producers and importers, or holders of reprographic devices engaged in the economic activity of reproduction of works for the personal use of third parties.

The provision of copyright management services by the CMOs arises by virtue of legislation (the law provides for producers, importers and holders of reprographic devices to pay a fee to CMOs, which then transfer the appropriate amount to authors). However, there is usually a civil-law relationship (contract) between CMOs and authors. When carrying out the above transactions, the CMOs act in their own name but on behalf of the authors.

In the case of a producer or importer, for instance, the obligation to pay the fees in question to a CMO arises at the time of sale of the device or medium concerned. The assessment basis in that situation is the amount payable in respect of the sale of the

[23] Article 104(1) of the Law of 4 February 1994 on copyright and related rights (Journal of Laws, No 24, item 83, as amended).

devices and media used for recording works, obtained by the producer or importer in a given accounting period.

After levying the fees, the CMO divides them up, splitting its share of the fees between the collective consumption fund and the justified and documented costs incurred by the CMO ('the collection costs') and paying the rest directly to the authors. The copyright management (provision of such services) by the CMO therefore manifests itself, inter alia, in the levying and division of the fees from producers and importers of media and other devices which the CMO carries out on behalf of authors.

It should be pointed out that such mechanism compensates authors for their financial loss, so to speak, caused to them by the use of their works by others (third parties) as part of authorised personal use (i.e. without the payment of licence fees, for example).

Copyright management services in respect of the levying of fees other than those for authorised personal use (e.g. licence fees)

CMOs also provide other copyright management services, for which they levy fees other than those referred to above (for example, licence fees for public performances).

By law, authors must be remunerated for any type of use of their works. The CMO grants the users concerned permission to use the works in the form of a licence. Parties organising public performances of protected works are required to pay licence fees for the use of the copyright entrusted by authors. The licence authorises the use of works in a specified manner, in a specified form of exploitation and for a specified period. In that way the operator (user) obtains the public performance right through the CMO.

CMOs for VAT purposes

In respect of the above activities, CMOs carry out various transactions which, for the purposes of VAT (Article 9 of the VAT Directive), constitute economic activity, while the organisation itself has the status of taxable person. It appears that a CMO receives remuneration (within the meaning and for the purposes of VAT) for providing its copyright management services. That is the part which is retained by the CMO, representing the difference between the payment levied as royalties from the parties under that payment obligation on behalf of authors (collection in the broad sense, here for example money/fees levied from restaurants which play music from loudspeakers under licences obtained for 'public performances' or money/fees from producers of blank media used for recording works for personal use) and the payment distributed (that is, the amounts transferred to authors). Irrespective of whether the part retained is considered to be the costs of collection (costs of levying the royalties) or will also be allocated for the 'collective consumption fund', for the purposes of the general scheme of VAT it constitutes remuneration for the CMO.

Judgment in Case C-37/16 *SAWP*

On 18 January 2017 in Case C-37/16 SAWP the Court of Justice of the European Union held that '*Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, must be interpreted as meaning that holders of reproduction rights do not make a supply of services, within the meaning of that directive, to producers and importers of blank media*

and of recording and reproduction devices on whom organisations collectively managing copyright and related rights levy on behalf of those right holders, but in their own name, fees in respect of the sale of those devices and media.'

In the light of the above account and in the context of the judgment of the Court of Justice in Case C-37/16 *SAWP*, Poland raises the following questions and uncertainties in interpretation concerning the issue described.

Question 1

How should the remuneration retained by the CMOs for copyright management in respect of their levying of fees for authorised personal use be treated for VAT purposes?

On the basis of legal provisions (such fees are levied by law) and under contracts concluded with authors (who have the right, for example, to choose a CMO and whether in relation to the same form of exploitation two such organisations will act and each of them will manage that same category of rights) the CMO manages the copyright entrusted to it and levies fees on authorised personal use on behalf of authors (as stated above).

It appears that for those transactions, despite their objective, which is to finance fair compensation and, as such, they remain outside the system of VAT (Case C-37/16 *SAWP*), the CMO receives, for VAT purposes, remuneration: this is because an organisation would not act here if it were not paid.

The remuneration is the amount retained by the CMO from the fees levied (in general CMOs have the right to offset against the fees levied, that is, the payment collected in the strict sense, which means in this case the organisation's profit/remuneration; it may be characterised differently, for example in terms of costs resulting from the activities of levying of royalties from the parties under that payment obligation, such as producers or importers, on behalf of authors).

The Polish authorities wonder whether that retained amount should be subject to VAT, considering that it concerns a service which was held to fall outside the scope of the VAT system in the judgment of the Court of Justice.

No VAT in respect of the payment collected referred to in question 1

One of the possibilities is that there is no VAT in respect of the payment collected referred to in question 1.

The basis for that assessment might be the view that the activities of the CMO, including the levying of fees and their distribution and any other activities which the organisation undertakes to comply with its statutory task, which is the management of the copyright entrusted to it and the levying of fees on authorised personal use on behalf of authors, do not constitute services for the purposes of VAT.

In view of the nature of the activities carried out by the CMO (on the one hand, under provisions of general application, the levying of fees and, on the other, their division and distribution), the Polish authorities wonder whether or not the fee levied by the CMO (the retained part, the 'payment collected' referred to in question 1) can constitute

remuneration at all for the provision of a service by that party (on the grounds that there is no supply of services by the CMO within the meaning of the VAT system).

The argument in the judgment in Case C-37/16, in which the Court held that holders of reproduction rights do not make a supply of services, within the meaning of that directive, to producers and importers of blank media and of recording and reproduction devices on whom organisations collectively managing copyright and related rights levy on behalf of those right holders, but in their own name, fees in respect of the sale of those devices and media, might confirm that such a position is legitimate.

VAT in respect of the payment collected referred to in question 1

The second possibility is that there is VAT in respect of the payment collected referred to in question 1.

In the opinion of the Polish authorities, the fact that the CMO does not seek, as it itself points out, to make a profit, cannot be relevant because, according to the fundamental principles governing VAT, an economic activity exists whatever the purpose or results of the activity. At the same time, for the purposes of VAT, the actual dependency and conditions and the resulting ties between parties to a given relationship have to be taken into account and assessed in the light of their economic impact.

The Polish authorities note the market nature of the relationship in question (between CMOs and authors: civil law contracts apply here, as a rule), or even, as it appears, the presence of an element of competition (between different CMOs acting in the same areas), which may confirm the reasonableness of the approach to interpretation which points to the taxation of the amount retained by the CMO (payment collected in the strict sense). Article 24(1) of the VAT Directive would apply here - the supply of services for consideration. The fact that the CMOs themselves and their activities in respect of levying fees on authorised personal use arise by law does not change that. Under Article 25 of the VAT Directive, a supply of services may consist, inter alia, in the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.

In the view of the Polish authorities, it cannot be accepted that the compensation condition for the CMO's activities in that area (fees on authorised personal use) suggests that the organisation collecting the fee in question is not acting as a taxable person carrying out economic activity for the purposes of VAT. Nor, moreover, can it be considered - as stated above - that the CMO does not levy appropriate remuneration for such transactions.

Accordingly, even though the activities for the purpose of compensating for harm are the reason for obtaining the payment and in spite of the fact that 'holders of reproduction rights do not make a supply of services ... to producers and importers of blank media and of recording and reproduction devices' as held by the Court, the CMO, by levying such fee and deducting remuneration for its activities (representing the difference between the fee collected and the amount transferred to authors), should be taxed on the part it retains. It is not contested that in such relationship there is reciprocal performance: the CMO provides the service of levying fees, part of which it retains as its remuneration, which should be taxable.

It follows from the judgment of the Court that the fee levied is not taxable for VAT purposes. However, the service supplied to collect such fee is an independent transaction in which the CMO acts as a payment collector. The organisation levies the fee and transfers it to the author deducting its part therefrom (collection in the strict sense). In the view of the Polish authorities, the part retained should be taxed at the standard rate (an invoice for copyright management would be issued to authors by the CMO concerning the amount of royalty retained).

Question 2

How should the remuneration retained by the CMOs for copyright management in respect of their levying of fees other than those for authorised personal use (such as licence fees) be treated for VAT purposes?

The Polish authorities take the view that fees which are not compensatory in nature, that is to say, fees other than those referred to in question 1, will also be taxable.

Copyright management services are 'intermediation' between the holders of copyright (authors or operators which transferred those rights to the management of the CMO) and third parties (such as broadcasters and record companies, users), which have been authorised to use the copyright concerned (licence). In that case too, the Polish authorities believe there can be no doubt that there is reciprocal performance whereby third parties obtain authorisation to use the rights in the form of the possibility of public performance of the works in return for a fee.

In cases in which CMOs levy a royalty, which is taxable for VAT purposes, the Polish authorities think that a (simplified) schema might look like this:

1. the CMO issues a VAT invoice to the party holding the licence (for the amount levied);

2. the CMO transfers the amount due to the author (that is, the entire amount of the royalty levied from the licensee minus the amount retained as its remuneration in the form of collection costs, for example);

3. the author:

    (a) issues an invoice to the CMO, if it is active as a taxable person for VAT purposes, for the amount received, at the appropriate rate depending on the subject-matter of the licence;

    (b) may issue an invoice to the CMO, if it is a taxable person exempt from VAT, for the amount received;

    (c) does not issue an invoice to the CMO if it is not a taxable person for VAT purposes.

Application of Article 28 of the VAT Directive (with regard to questions 1 and 2)

The Polish authorities are uncertain as to whether Article 28 of Directive 2006/112/EC applies to the transactions described above. Although with regard to the levy of the above

fees (both in the situation described in question 1 and in the situation described in question 2) the CMO acts in its own name but on behalf of authors, the application of that provision does not seem to be appropriate:

1. in the case of fees for authorised personal use (question 1): in the light of the nature of that fee and the statement of the Court in paragraph 27 of its judgment that '*it does not appear that there is a legal relationship pursuant to which there is reciprocal performance by, on the one hand, holders of reproduction rights or, as the case may be, the organisation collectively managing such rights and, on the other, producers and importers of blank media and of recording and reproduction devices.*'

2. in the case of other fees (question 2): since there is no identity of services provided between the CMO and the licensee and the CMO and the author (non-identical transactions, different tax status, in which the parties take part).

Article 28 of the VAT Directive establishes the legal fiction that, where a taxable person acting in its own name but on behalf of another person does not carry out the services itself but supplies them in its own name to the recipient, that taxable person is deemed to have received and supplied that service itself. Accepting that fiction means that intermediation in services has to produce the same effects as the direct supply of services.

In its judgment in Case C-464/10 *Henfling and Others* the Court of Justice interpreted Article 6(4) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (replaced by Article 28 of the VAT Directive). The Court held that:

(1) involvement in his own name means that a legal relationship is brought about not directly between the better and the undertaking on behalf of which the operator involved acts, but between that operator and the better, on the one hand, and between that operator and that undertaking, on the other;

(2) as regards the treatment of such involvement from a VAT point of view, Article 6(4) of the Sixth Directive provides that, where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he is considered to have received and supplied those services himself;

(3) accordingly, that provision creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, secondly, those services to the client himself. It follows that, as regards the legal relationship between the principal and the commission agent, their respective roles of service provider and payer are notionally inversed for the purposes of VAT.

Applying the above argument to the present case, it could be stated that the legal fiction under Article 28 of the VAT Directive presupposes the existence of two supplies of

services provided consecutively, namely, first the copyright holder (author) is considered to provide the service while the CMO, whose activities consist of levying fees from producers and importers (the situation in question 1) or the levying of other fees, such as license fees (the situation in question 2), is considered to be the recipient of the service and, secondly, the CMO (as an intermediary) then provides the service to the producer/importer or licensee.

The Polish authorities are uncertain as to whether Article 28 of the VAT Directive applies to the case here since, after carrying out a thorough analysis, it does not appear that the automaticity and identity of transactions required by that provision took place in the context of the services thus provided in the situations analysed, as follows.

1. Whether or not the CMO acts in its own name and on behalf of authors

The concept of acting in one's own name and on one's own/another's behalf is an EU concept (for example, Opinion in Case C-98/05, paragraphs 40-41, Opinion in Case C-520/10, paragraph 73). If Article 28 were applicable, that service should be taxable in the same way at the first and second stage (see Case C-224/11, paragraph 63, last sentence, and Case C-464/10, paragraph 43, last sentence); it follows from the case-law of the Court that transactions should be taxable by analogy, since the service transferred is similar and its structure does not change.

In the opinion of the Polish authorities, in the present case there is no such simple transfer of reciprocal services; the CMO supplies much more than the author supplies. The CMO definitely acts in its own name, but there is some uncertainty as to whether organisations of this kind act on behalf of authors in the EU sense.

2. The wording 'takes part in a supply of services'

The author transfers the 'licence' for performances, but the CMO not only transfers the licence but also carries out a series of other transactions: it levies fees, manages the system for such fees, divides them after first setting aside the costs, while also taking into account the beneficiaries, and so on. It therefore does more than merely automatically pass on a licence in return for commission, as took place in Case C-464/10 (taking of bets).

Article 28 basically concerns a service which passes from the first operator to the third without further 'processing'. The second operator does not modify it. In the cases examined it appears that it works differently: the CMO is not merely an intermediary, but the main executor which carries out many tasks, not only that of the resale itself. For example, in its judgment in Case C-224/11 *BGŻ Leasing*, in which the owner of a car purchased insurance and then resold it, making use of the same, since he de facto also obtained cover, the Court of Justice did not refer to Article 28 and merely took the fundamental principle as the basis for taxation (see paragraph 63: 'In so far as concerns the relevance for the circumstances at issue to the principal, in Article 28 of the VAT Directive, according to which '[w]here a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself', it must be observed, first, that although BGŻ Leasing concluded the insurance contract at issue in the main proceedings in its own name and on its own behalf it is for the referring court to ascertain, the transaction concerned does not fall within the scope of Article 28 (see, by analogy, Case C-520/10

Lebara [2012] ECR, paragraph 43). Second, if the insurance contract had been concluded on behalf of someone else, the case-law of the Court on Article 28 of the VAT Directive is such as to support the exemption of the transaction at issue in the main proceedings.)'.

Question 3

Are the clarifications of the Commission made during the 89th meeting of the VAT Committee in relation to working document No 635 still valid and, if so, to what extent?

At the 89th meeting of the VAT Committee, which took place on 30 September 2009, the European Commission stated in its opinion on this issue that the compensation paid by the producer or importer to organisations collectively managing copyright is consideration for the supply of services (Article 2(1)(c) of the VAT Directive) made by the holder of the right to copy to the producer or importer. Such a service is subject to VAT and the VAT on that service is deductible under the normal arrangements.

Having regard to the fact that the Court held in Case C-37/16 that '*it does not appear that there is a legal relationship pursuant to which there is reciprocal performance by, on the one hand, holders of reproduction rights or, as the case may be, the organisation collectively managing such rights and, on the other, producers and importers of blank media and of recording and reproduction devices*' the Commission's clarifications have yet to dispel all doubts and give rise to further questions. For reasons including the above judgment, the Commission should review and, if need be, update its position on this matter.