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

taxud.c.1(2017)6116515 – EN

Brussels, 7 November 2017

VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 932

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Romania**
REFERENCES:	**Articles 44 and 47**
SUBJECT:	**VAT treatment of services in relation to waterways**

1. INTRODUCTION

Romania has submitted a question (**Annex**) concerning the VAT treatment of two categories of services: (a) *"services consisting of making available the naval transportation infrastructure of waterways for which transit tariff is charged"* and (b) port services, namely *"the use of port infrastructure for which the infrastructure usage tariff is charged"* (pier stationing, operation, stationing).

Issues around the VAT treatment of such services have been raised by the port and inland waterways management company (the concessionaire), which holds in concession two waterways making the connection between the Danube and the Black Sea: the Danube – Black Sea channel and the Poarta Alba Midia Navodari channel. The company, which is registered for VAT purposes in Romania, has been given the right to manage the naval transportation infrastructure belonging to the public domain. In this regard, it carries out, *inter alia*, the above services for a fee: a charge for the transiting of waterways and a charge for pier stationing, stationing or operation.

The company and the Ministry of Public Finance have divergent views on the VAT regime applicable to the services in question. The concessionaire considers that these services are related to water transport and thus subject to Article 44 of the VAT Directive[1]. In contrast, the Ministry considers that these services are directly linked to immovable property (the waterway/the port infrastructure) and hence subject to Article 47 of the VAT Directive.

As a result, according to the company, if the services in question are provided to taxable persons not established in Romania, they would not be taxable in Romania. In contrast, the Ministry takes the view that irrespective of the place where the beneficiaries of these services are established (in the EU, outside the EU or in Romania), the place of supply of the services is the place where the immovable property is located, namely Romania.

2. SUBJECT MATTER

Romania seeks to clarify whether it is Article 44 or Article 47 of the VAT Directive which applies in respect of (a) services consisting of making available the naval transportation infrastructure of waterways for which a transit tariff is charged and (b) port services. The relevant provisions read as follows:

"Article 44

The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides."

[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).

"Article 47

The place of supply of services connected with immovable property […] shall be the place where the immovable property is located."

3. THE COMMISSION SERVICES' OPINION

1.1. Introduction

The Commission services note that, although Member States may submit to the VAT Committee questions arising from concrete cases, the VAT Committee is not the appropriate forum to resolve legal disputes and thus decide on concrete cases. Therefore any discussion performed at this level should only take place where it can provide some guidance at EU level for a harmonised interpretation of the VAT Directive. The question raised entails an interpretation of the new rules – in force as of 1 January 2017 – of the European VAT legislation on services connected with immovable property[2]. This provides the Commission services with the opportunity to shed light on how these rules should be interpreted. In this regard, the views of the Commission services and the opinion of the VAT Committee should be seen as aiming to provide general guidance on the application of VAT rules through a concrete case, rather than adjudicating on a dispute.

1.2. Single supply or two independent supplies?

The Romanian authorities indicate that there are two categories of services, each one consisting of several elements, whose VAT treatment needs clarification. Hence, it is necessary to examine, in the first place, whether these categories are to be regarded as two distinct and independent supplies – and thus be assessed separately from the point of view of VAT – or as a single supply.

The services in question are described as follows: firstly, services of making available the naval transportation infrastructure of the two waterways in question, namely the Black Sea channel and the Poarta Alba Midia Navodari channel (transit services); secondly, services in relation to the use of the port infrastructure, in particular pier stationing, operation and stationing (port services). Both categories of services are offered to ships and convoys for a fee.

In this regard, Romania indicates that the concessionaire charges *"tariffs of transiting of waterways"* for entry on the waterway through the lockage process, transiting the waterway and exit through the lockage process. Transiting means making available at the vessels captains' request the naval transportation infrastructure for navigation between two points located on the waterways. Likewise, pier stationing/stationing/operation tariffs are charged for the use of the port infrastructure once the vessels are stationed in a waterway.

The transit and port services are provided by the concessionaire, a joint stock company established and registered for VAT purposes in Romania, to EU and non-EU vessels transporting goods or passengers or performing other activities on the water. Romania seeks clarification as regards the VAT treatment of these services when they are supplied to *"river ships in international transit"*.

[2] See Section 3.2.

The Commission services recall the CJEU jurisprudence, which has consistently held that *"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 independent"*[3]. In this regard, it is recognised that a supply must be considered 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 split"*[4].

That is also the case where one or more supplies constitute a principal supply, whilst the other supply or supplies are regarded as 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 supplied[5].

In this light, the Commission services consider that the transit services may be seen as constituting a principal supply while the port services should amount to only ancillary supplies. For the vessels, the port services do not constitute an aim in themselves, but are rather transactions which are indispensable to navigation and enable the vessels to enjoy better the principal service. At the same line, both transit and port services may consist of several supplies. In the Commission services' view, these supplies are nevertheless inherent, dependent on and therefore ancillary to the principal supply. As it is noted, a ship anchored on a pier or stationed in a port has the same status, complies with the same rules and receives the same treatment as a ship in transit.

In conclusion, the Commission services share the view that both the transit and the port services may be regarded as a single supply from the point of view of VAT.

1.3. Place of supply

Article 47 of the VAT Directive lays down a particular rule in respect of the place of taxation of services connected with immovable property. The purpose of this rule is to ensure taxation at the presumed place of consumption of the service. Hence, services connected with immovable property are considered to be consumed at the place where the property is located.

Article 47 is not an exception to the general rule of supply contained in Articles 44 and 45[6]. Therefore, the criterion of strict interpretation does not apply to the definition of services connected with immovable property. As a consequence, Article 47 should be applied on the basis of an objective assessment of the conditions provided under the VAT

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3 CJEU, judgment of 21 February 2008 in Case C-425/06, *Part Service*, ECLI:EU:C:2008:108, paragraph 51; CJEU, judgment of 27 September 2012, Case C-392/11, *Field Fisher Waterhouse*, ECLI:EU:C:2012:597, paragraph 15; CJEU, judgment of 27 June 2013, Case C-155/12, *RR Donnelley Global Turnkey Solutions Poland*, ECLI:EU:C:2013:434, paragraph 20.

4 CJEU, judgment of 27 October 2005, Case C-41/04, *Levob Verzekeringen and OV Bank*, ECLI:EU:C:2005:649, paragraph 22, and *Field Fisher Waterhouse*, paragraph 16; *RR Donnelley Global Turnkey Solutions Poland*, paragraph 21.

5 CJEU, judgment of 25 February 1999, Case C-349/96, *Card Protection Plan* , ECLI:EU:C:1999:93, paragraph 30; CJEU, judgment of 10 March 2011, Joined Cases C-497/09, C-499/09, C-501/09 and C−502/09, *Bog and Others*, ECLI:EU:C:2011:135, paragraph 54; *Field Fisher Waterhouse*, paragraph 17.

6 See e.g. CJEU, judgment of 7 September 2006, Case C-166/05, *Heger Rudi*, ECLI:EU:C:2006:533, paragraph 17.

Directive and the VAT Implementing Regulation[7], taking into account the Explanatory Notes issued by the Commission services[8] as to the practical implementation of the place of supply rules for services connected with immovable property.

In cases where there is uncertainty with regard to the application of Article 47, the VAT treatment of the transaction should be determined by carrying out an objective assessment taking into account the purpose of this particular rule, which is to allow taxation in the Member State where the service is consumed[9]. As a first step, it should be verified whether the service in question falls within the scope of the particular rule of Article 47. In the affirmative, the service will be considered as connected with immovable property. If not, and if no other particular rule applies, then the general rules of Articles 44 and 45 should apply[10]. In the case where the conditions for two or more particular rules are fulfilled, the rule to apply should be the one better assuring taxation at the place of presumed consumption.

To be considered as connected with immovable property, a service needs to have a sufficiently direct connection with immovable property. Therefore, an assessment of whether the service relates to a good that can be qualified as immovable property is required. If the answer to this question is affirmative, an assessment of whether the service may qualify as service connected with immovable property is necessary.

It follows that to determine the VAT rules applicable to the transit and port services at issue, it is necessary to first examine whether these services fall within the scope of Article 47. In the first place, it has to be assessed whether [the naval transportation infrastructure and the port infrastructure of] the waterways may be regarded as immovable property under the current VAT legislation. In this regard, the concept of immovable property needs to be clarified.

Definition of immovable property

The concept of immovable property can be found both in Article 47 and in the area of exemptions. However, until recently, the VAT Directive did not contain an explicit definition of immovable property. It is only since 1 January 2017 that the last amendment[11] to the VAT Implementing Regulation shed light on the concept of immovable property by providing an EU wide definition of immovable property for the

7 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).

8 See 'Explanatory notes on EU VAT place of supply rules on services connected with immovable property that enter into force in 2017 (Council Implementing Regulation (EU) No 1042/2013)', 26.10.2015, a non-legally binding guidance tool prepared by the Directorate General for Taxation and Customs Union of the European Commission (DG TAXUD): https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/explanatory_notes_new_en.pdf

9 Explanatory notes, paragraph 10.

10 *RR Donnelley Global Turnkey Solutions Poland*, paragraph 29.

11 Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services (OJ L 284, 26.10.2013, p. 1).

purposes of the VAT Directive. This definition is based on the jurisprudence of the CJEU as well as the Guidelines of the VAT Committee agreed at its 93rd meeting[12].

In particular, as of 1 January 2017, Article 13b of the VAT Implementing Regulation stipulates *inter alia* that *"(a) any specific part of the earth, on or below its surface, over which title and possession can be created"* as well as *"(b) any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved"* shall be considered as immovable property for VAT purposes.

The reference to a specific part of the earth means that the concept of immovable property consists of clearly identified or identifiable areas of the earth over which title and possession can be created. The scope of the term 'earth' is broad and includes the soil itself and everything which is either on or below it. The soil encompasses thus any piece of land, including the portion of land covered by water, for example, the sea, rivers, lakes and other inland waterways. Waters covering the earth should be considered as immovable as long as water is not removed from its water basin.

The fact that an area is completely or partially under water does not prevent it from being categorised as immovable property has been consistently recognised by the CJEU[13]. In this regard, the CJEU has held that a piece of land which is permanently delimited, even if it is underwater, can be classified as immovable property[14]. It has been deemed, for instance, that immovable property may include water-based mooring berths[15], stretches of river to which fishing permits relate[16], as well as houseboats, including the mooring space and landing stage contiguous therewith[17]. The CJEU has moreover stressed that the submerged and demarcated part of the riverbed, which is covered by the river water on which a houseboat may rest, constitutes immovable property[18]. As regards constructions (that could be piers, for instance), it is not necessary to be indissociably incorporated into the ground in order to be considered as immovable property[19].

Article 13b of the VAT Implementing Regulation has a potential broad scope, as only immovable goods that could not belong to anybody would not be covered by it[20]. Nevertheless, there is no definition for VAT purposes of the concepts of 'title' and 'possession'. The decisive criterion should be whether the immovable property is likely to be 'owned' in the sense that somebody can dispose of it as if he were the owner[21]. Therefore, what matters is the 'economic ownership', a concept of ownership that goes beyond the simple fact of owning a title. According to case-law, inland waterways –

12 Guidelines resulting from the 93rd meeting of 1 July 2011, Document A – taxud.c.1(2012)400557 – 707, p. 145.

13 CJEU, judgment of 3 March 2005, Case C-428/02, *Fonden Marselisborg Lystbådehavn*, ECLI:EU:C:2005:126, paragraph 34.

14 *Heger Rudi*, paragraph 20.

15 *Fonden Marselisborg Lystbådehavn*.

16 *Heger Rudi*, paragraph 22.

17 CJEU, judgment of 15 November 2012, Case C-532/11, *Leichenich*, ECLI:EU:C:2012:720.

18 *Leichenich*, paragraph 21.

19 CJEU, judgment of 16 January 2003 in Case C-315/00, *Rudolf Maierhofer*, ECLI:EU:C:2003:23, paragraph 33.

20 According to the United Nations Convention on the Law of the Sea, the high seas are open to all States. Hence, a State may carry out activities such as drilling, excavation of the seabed and subsoil of the high seas. These will relate to immovable property, even if no State has sovereignty over this part of the earth.

21 See Explanatory Notes, paragraph 59.

unlike the high seas – can be held in the ownership and possession of a person[22]. However, even if no title or possession can be created, the sea, its bed and subsoil may also be categorised as immovable property[23].

In line with the above reasoning, it is accepted that Article 13b(a) of the VAT Implementing Regulation covers inalienable immovable goods, such as public property including inland waterways and harbours, even when the title over them is not transferrable. Apart from the fact that their legal status may change over time under public authorities' decisions, they can also be the object of supply of services, which may be regarded as services connected with immovable property.

In the light of the above, it may be concluded that the naval transportation infrastructure and the port infrastructure of the two waterways in question – which constitute indeed public property belonging to the Romanian State – may be considered as immovable property under the current VAT legislation.

Definition of services connected with immovable property

In the context of the assessment of whether the services at issue fall within the scope of Article 47 of the VAT Directive, a second criterion that has to be examined is whether there is a sufficiently direct link between the services in question and the immovable property to which they relate so as to be considered as services connected with immovable property. In other words, the connection between the transit and port services and the [naval transportation infrastructure as well as the port infrastructure of] waterways has to be examined.

Article 31a(1) of the VAT Implementing Regulation, as it applies from 1 January 2017, lays down a definition of services connected with immovable property, as referred to in Article 47 of the VAT Directive. It provides that such services *"shall include only those services that have a sufficiently direct connection with that property"* This connection exists where, for example, the services *"(a) […] are derived from an immovable property and that property makes up a constituent element of the service and is central to, and essential for, the services supplied"*. The VAT Implementing Regulation provides a non-exhaustive list of examples of such services, including *"[t]he assignment or transfer of rights […] to use the whole or parts of an immovable property, including the licence to use part of a property, such as […] the use of an infrastructure for which tolls are charged, such as a bridge or a tunnel"*[24].

Article 31a(1)(a) of the VAT Implementing Regulation requires a sufficiently direct connection between the service supplied and the immovable property. This means that the service has to be carried out in close relation to an expressly specific immovable property[25]. Not only must the outcome of the service originate from the immovable

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22 See point 30 of the Opinion of the Advocate General in *Fonden Marselisborg Lystbådehavn*, ECLI:EU:C:2004:626.

23 According to the CJEU, judgment of 29 March 2007, Case C-111/05, *Aktiebolaget NN*, ECLI:EU:C:2007:195, the supply and laying of an undersea cable had to be taxed as an installation and in proportion to its length. This can be taken as recognition of the seabed as immovable property.

24 Article 31a(2)(j).

25 *RR Donnelley Global Turnkey Solutions Poland*, paragraph 34.

property but that property must also be the main and dominant element of the supply[26]. In other words, without the underlying property, it may not be possible to perform the particular service.

The example of an infrastructure for which tolls are charged is provided to illustrate a service directly in connection with an immovable property. By analogy, it may be considered that the central element of the supply of the transit and port services, for which tariffs are charged, is the immovable property (namely, the waterways). Indeed, as Romania notes, the purpose of the services is the transiting of channels and thus there is a sufficiently direct connection between the services at issue and the expressly determined immovable property of the waterways.

The argument that the object of the transit services *"is represented only by vessels and goods that are to be transited"* because *"the immovable property represents just a means for the supply of services"* cannot be maintained, because the services in question can be exercised only in relation to the waterway. In other words, the waterway makes up a constituent element of the services. Similarly, the argument according to which *"the beneficiaries of the supply do not have at their disposal a determined part of the immovable property for exclusive use"* is not valid, because, for example the vehicles paying tolls to cross a bridge do not enjoy the exclusive use of the bridge either.

The Commission services confirm that the transit and port services at issue do not constitute the object of a VAT exemption. In this regard, it is noted that Article 148 of the VAT Directive does not apply to services related to inland waterways of a Member State, because it covers only transactions in the context of international transport. Hence the services in question are taxable in Romania since they are connected with an immovable property – the waterways – located in Romania. The obligation to pay VAT is to be determined on the basis of Article 193 of the VAT Directive.

1.4. Conclusion

In the light of the above considerations, the Commission services take the view that it is Article 47 of the VAT Directive which applies in respect of transit and port services supplied by the concessionaire in the Black Sea and the Poarta Alba Midia Navodari waterways. The Commission services agree with Romania that any other interpretation would contravene the purpose of the rule of Article 47, which is to assure taxation at the place of actual consumption of the services.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on the matters raised.

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[26] *Heger Rudi*, paragraphs 23 and 24 and CJEU, judgment of 27 October 2011, Case-530/09, *Inter-Mark Group*, ECLI:EU:C:2011:697, paragraph 30.

ANNEX

QUESTION FROM ROMANIA

The request about the inclusion on the agenda of the following meeting of the VAT Committee of the issues related to *the VAT regime applicable to* services consisting of *making available the naval transportation infrastructure of the waterways (transit),* and to *port services related to the use of port infrastructure (pier stationing, operation, stationing).*

Description of the situation:

The issues which form the object of this request were raised by a port and inland waterways management company (hereinafter referred to as the company), which was concessioned the naval transportation infrastructure belonging to the public domain for management purposes. The company is subordinated to the Ministry of Transportation, but it is not organized as a public authority, being a Romanian legal entity organized as a joint-stock company.

Two waterways situated between the Danube and the Black Sea, namely the Danube – Black Sea channel and the Poarta Alba Midia Navodari Channel, objectives defined as *inland waterways*, which make the connection between the Danube (Cernavodă) and the Black Sea – Constanta Port (Agigea), were concessioned to the company.

The Danube-Black Sea and Poarta Alba-Midia Navodari waterways represent a complex infrastructure, with multiple functions. This infrastructure includes installations, equipment and hydro-technical constructions which serve both the main activity of navigation and the system of takeover and transit of the water of the two waterways.

As part of the activities performed with regard to the exploitation of the naval transportation infrastructure of the waterways Danube-Black Sea and Poarta Alba Midia Navodari, as well as of the activities related to the use of the port infrastructure for ships and convoys, the company which holds in concession such infrastructure carries out, among other things, two categories of services, namely:

- ✓ Services of *making available* the naval transportation infrastructure of the waterways (*transit*);
- ✓ Port services – *the use* of the port infrastructure (*pier stationing, operation, stationing*).

The activity consisting of making available the naval transportation infrastructure of the waterways, as well as the use of the port infrastructure for ships and convoys in accordance with the legislation in the field is made for a fee, for the services consisting of *making available the naval transportation infrastructure of waterways*, and for *the use of the port infrastructure and of the naval transportation infrastructure*, the economic operators which hold in concession the port infrastructures collecting **tariffs** as follows:

– for making available the naval transportation infrastructure for ships and convoys for the purpose of ensuring the transiting of waterways are charged ***tariffs of transiting of waterways*** (entry on the waterway through the lockage process, transiting of the waterway, exit through the lockage process). Transiting represents making available at

the beneficiary's request the naval transportation infrastructure for the navigation of a ship or of a convoy between two points located on the waterways;

– for the use of the port and naval transportation infrastructure are charged pier stationing/stationing/operation tariffs (the stationing of marine and river ships on the waterways).

The issues we are facing refer to the VAT regime that corresponds to the services of the type of those mentioned above, provided by the company established and registered for VAT purposes in Romania to beneficiaries from the European Union and from outside the European Union for the **river ships** in international transit, in the framework in which:

– the economic operator which holds in concession the channel considers that the services in question are services related to water transports for the transit of waterways by ships and convoys for the purpose of goods and/or passenger transportation, as well as for the performance of other activities on the water, in accordance with the legislation in force and with the rules of navigation on waterways and also, other activities related to and auxiliary to naval transportation activities, which in the economic operator's opinion are subject to the provisions of art. 44 in the VAT Directive;

– the specialty directorate of the Ministry of Public Finance considers that the services of transit of waterways and of use of the port infrastructure or of the infrastructure for naval transportation, although in accordance with the specific legislation represent services related to water transportation, are services directly linked to the immovable property (the waterway/the port infrastructure), being subject to the provisions of art. 47 in the Directive 2006/112/EC on the common VAT system (the VAT Directive).

Thus, in the company's opinion, the services in question are provisions of services related to water transports and, if they are provided to the benefit of taxable persons not established in Romania (from the EU or outside the EU) they **would not be taxable in Romania**, based on the provisions of art. 44 in the VAT Directive (the equivalent of art. 278 para. (2) in the Fiscal Code, according to which *the place of supply of the services to a taxable person acting as such is the place where that person who receives the services has established his bisiness*).

Starting from the reasoning according to which the services performed are related to water transport and have the purpose of transiting the waterways by ships and convoys, for the purpose of goods and/or passenger transportation, as well as for the purpose of performing other activities on water, the company considers that the operations are not services directly linked to the immovable property from the perspective of the VAT rules, motivating as follows:

– the sufficiently direct connection between the supply of services and immovable property is when a certain immovable property forms the object of the supply of services or in the case at hand, although there is a certain connection between the supply of services made by the company, it is only secondary in nature;

– for the purpose of applying art. 47 in the VAT Directive it is presumed the existence of a sufficiently direct connection between the supply of services and immovable property

when the supply of services has the object of the use, processing or assessment of a certain immovable property or if this is expressly mentioned in the provision;

– the services in question may have a sufficiently direct connection with immovable property only when they are related to a right of use over a certain immovable property or of a certain part of immovable property, or the beneficiaries of the services are not given a right of use;

– the vessels which transit the waterways are closely followed by the Traffic Information Service, which performs an ensemble of activities such as: scheduling vessels to transit, tracking navigation on the channel, master guidance, sending customers the details regarding the state of the fairway and of the vessels they would interact during the voyage. Also, Traffic Information Service performs surveillance and control, and customers can receive information about the situation hydro forecast in order to control, and customers can receive information about the situation hydro forecast in order to achieve optimum navigation

– if the services supplied for the transit of the vessels for carriage of goods are not related to a right of use over a certain immovable property, then the object of the service is represented only by vessels and goods that are to be transited. The fact that for the transit immovable property is absolutely necessary is not relevant in the company's opinion, because in this case the immovable property represents just a means for the supply of services;

– the beneficiaries of the supply do not have at their disposal a determined part of the immovable property for exclusive use.

Also, the company mentions that for the purpose of providing the services for which are charged the transit tariffs (making available the naval transportation infrastructure for ships and convoys for the purpose of ensuring the transit of the waterways) and, respectively the pier stationing tariffs, (the use of the port and of the naval transportation infrastructure), the company makes a series of activities meant to ensure the performance of the traffic in optimal conditions on the waterways, among which:

– scheduling, routing and tracking performance of the vessels and convoys traffic on waterways in different ports in Romania;

– sluice services of vessels and convoys, according to scheduling;

– coordination of vessels and convoys transit, approved by the customer through the waterways and locks;

– allocation of the berths in order to carry sluicing operations;

– allocation on demand, depending on the availability of berths for mooring, in order to carry out port operations of loading/unloading in its own ports or places designated for that purpose;

– monitoring the traffic of vessels in ports and waterways administered by the company, dispatching and issuing of information on traffic in the area;

– providing other related activities, shipping and auxiliary services (services of safety, supply of water on the ship, resupply of electricity to the ships, the takeover of waste from the ships through specialized and authorized companies, the assurance of the spaces necessary for the storage of goods, the loading and unloading, etc.);

– to advise the navigators when carrying out activities that may limit traffic in the waterways;

– ensuring, by pumping water from the canal, level needed for the activities conducted by vessels safely on waterways and ports managed by the company.

According to the company's opinion, the aforementioned operations cannot be delimited or excluded, representing in general a unitary group in the total of services provided within the hydro-technical complex. In particular, for the supply of port services of the type of pier stationing/stationing/operation, generically called "use of the port and naval transportation infrastructure", apart from the activities listed in the aforementioned paragraph, is also carried out the operation of allocation of berths for mooring, for the purpose of performing the port operations of loading/unloading. In this respect, it also mentions that a ship which is on the pier, stationing in a port, has the same status, comply with the same rules and receives the same treatment as in transit, namely it is supervised by dispatchers, monitored, controlled, and does not have the infrastructure available, not being given any right.

The company also mentions that supply to its beneficiaries (economic operators established and registered for VAT purposes in other Member States) *a complex service for transit of ships and convoys on waterways for the purpose of passenger transportation*, this service implying the aforementioned activities.

Therefore, in the company's opinion, the transiting of waterways by ships and convoys must be considered, in principle, as being the main provision, and the other operations must be considered to be accessories thereto. But, as mentioned above, **according to the company's interpretation, the services under discussion are not related to immovable property, therefore the place of supply thereof should be set in accordance with the provisions of art. 44 in the VAT Directive, in which case the services would not be taxable in Romania, if they are provided to the benefit of taxable persons not established in Romania.**

The specialty directorate of the Ministry of Public Finance agrees with the naval transportation infrastructure operator with regard to the fact that in exchange for the tolls charged, the company carries out a series of activities which, viewed separately, do not reflect the economic content of the operations performed, which is why the operations **consisting of making available the naval transportation infrastructure of the waterways** and, respectively, **the use of the port and naval transportation infrastructure** made for the purpose of ensuring the transit of waterways should not be analyzed separately, being strongly connected in economic terms. In this respect, we consider relevant the principles of the case law of the CJEU, according to which we are in the presence of a single supply when two or several elements or acts supplied by the taxable person are so closely connected that they objectively form a single indivisible service from an economic point of view, whose decomposition would be artificial in nature (for example: The Court's Decision in case C-41/04 Levob Verzekeringen and OV Bank and the Decision in Case C-392/11, Field Fisher Waterhouse). The situation is

identical when one or several supplies represent the principal supply to which the others are ancillary which form the object of the same tax treatment as the principal supply. Especially, 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 (these principles derive from cases like C-349/96 CPP, the connected cases C-497/09, C-499/09, C-501/09 and C-502/09, Bog and others, as well as from the Court's Decision in case C-392/11 Field Fisher Waterhouse, cited above).

But, with regard to the place of supply of services in question, in the opinion of the specialty directorate of the Ministry of Public Finance, the services consisting of making available the naval transport infrastructure of the waterways (transit) and, respectively, the services consisting of the use of the port infrastructure (pier stationing, operation, stationing) have a direct connection with immovable property (the waterway).

Therefore, being services directly connected with immovable property from Romania, for these services the place of supply of services is considered to be the place where the immovable property is located, namely in Romania, according to art. 47 in the VAT Directive, no matter where the beneficiaries of the services are established (in the EU, outside the EU or in Romania) and irrespective of their statute, namely if they are taxable persons in respect of VAT or not.

In the opinion of the specialty directorate of the Ministry of Public Finance, this approach reflects the purpose of the rule under art. 47 in the VAT Directive, namely the assurance of taxation at the place of actual consumption of the services.

Thus, in accordance with the provisions of art. 47 in the VAT Directive, as subsequently amended and supplemented (transposed into the national legislation through art. 278 para. (4) letter a) in the Law no. 227/2015 on the Fiscal Code, as subsequently amended and supplemented), the place of supply of services connected with immovable property, including the services of experts and estate agents, the provision of accommodation in the hotel sector or in sectors with a similar function, such as holiday camps or sites developed for use as camping sites, the granting of rights to use immovable property and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision, shall be the place where the immovable property is located.

Also, we consider relevant the guidelines of the VAT Committee, resulting from the 93rd meeting thereof, according to which a service is considered to be sufficiently directly connected with immovable property in the following situations:

a) where it is derived from an immovable property and that property makes up a constituent element of the service and is central and essential for the services supplied;

b) where it is provided to, or directed towards, an immovable property having as its object the legal or physical alteration of that property.

Also, under point 6 letter b) in the guidelines of the VAT Committee resulting from the 93rd meeting thereof, *among the services related to immovable property*, it is mentioned by large majority ***the use of an infrastructure for which tolls are charged, such as a bridge or a tunnel***.

With respect to the national legislation, we mention the provisions of art. 278 para. (4) letter a) in the Fiscal Code, according to which *for the supply of services connected with immovable property, including the services of experts and estate agents, the provision of accommodation in the hotel sector or in sectors with a similar function, such as holiday camps or sites developed for use as camping sites,* ***the granting of rights to use immovable property*** *and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision,* ***the place of supply is considered to be the place where the immovable property is located.***

According to the provisions of point 16 para. (2) in Title VII of the of the Methodological Norms for the application of the Fiscal Code approved through Government Decision no. 1/2016, as subsequently amended and supplemented, *the services connected with immovable property provided under art. 278 para. (4) letter a) in the Fiscal Code include only those services which* ***have a sufficiently direct connection with the immovable property.*** *[...]*

In accordance with the provisions of point 16 para. (3) letter j) in the Methodological Norms, *the provisions of para. (2) shall be especially applied for:*

[...] j) the assignment and transmission of rights other than those covered by letters h) and i), related to the entire or to a part of an immovable property, including the licence to use part of a property, such as the granting of fishing and hunting rights or access to lounges in airports, or ***the use of an infrastructure for which tolls are charged, such as a bridge or tunnel.***

In this framework, we mention that the provisions of the methodological norms we referred to above, have taken into account the guidelines of the VAT Committee resulting from the 93rd meeting thereof.

The provisions of the national legislation also reflect the principles of the case law of the Court of Justice of the European Union, according to which, in order to decide if a service is directly connected with immovable property it must be considered the specific nature thereof, namely if it has a sufficient connection to the immovable property (for example, cases *C-166/05 Heger Rudi GmbH* and *C-155/12 RR Donneley Global Turnkey Solution Poland*).

In case *C-166/05 Heger Rudi GmbH*, the transmission of the right to fish by means of a transfer of fishing permits for valuable consideration constitutes a supply of services connected with immovable property within the meaning of Article 9(2)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, currently art. 47 in the VAT Directive.

The analysis of the same case reveals that in order to be subject to the provisions of art. 9 (2) of Directive 6, an economic activity carried out in connection with immovable property must *cumulatively* fulfill certain conditions, namely:

– the operation in question must be a supply of services;

– it is necessary for that supply to refer to immovable property;

– There must be a sufficient direct connection between the supply of services and the immovable property concerned.

Also, as it results from the Decision of the CJEU in case *C-530/09 Inter-Mark Group*, only the supply of services which have a sufficiently direct connection with immovable property fall under the scope of application of article 47 in the VAT Directive.

With regard to the situation subject to analysis, we consider that the central element of the supply of **services of making available the naval transportation infrastructure** and that of **the supply of port services related to the use of port infrastructure**, for which ***tolls*** are charged, is the immovable property expressly determined – the waterway which is transited, and the port infrastructure, respectively – because it represents a central and indispensable element of the supply of services (see in this respect the CJEU cited above). Thus, since the purpose of the services is the transiting of channels, the services consisting of *making available the naval transportation infrastructure of waterways (transit)* and *the use of the port infrastructure, respectively*, have *a sufficiently direct connection with the immovable property* within the meaning of the case law of the CJEU, being connected with the expressly determined immovable property.

Concretely, for the reasons listed above, the specialty directorate of the Ministry of Public Finance considers that the services consisting of making available the naval transportation infrastructure of the waterways (transit), and the use of the port infrastructure, respectively, qualify as services directly connected with immovable property, for which the place of supply is considered to be the place where the immovable property is located, namely in Romania, no matter the place where the beneficiaries of the services are established (in the EU, outside the EU or in Romania).

With respect to the applicability of possible VAT exemptions, we consider that, if the services consisting of *making available the naval transportation infrastructure of the waterways (transit) and the use of the port infrastructure, respectively*, correspond to the transit of convoys of river vessels, a VAT exemption is not applicable. Therefore, those services are operations taxable in Romania and the obligation to pay the VAT belongs to the supplier, in accordance with art. 193 in the VAT Directive (transposed into the national legislation through art. 307 para. (1) in the Fiscal Code).

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Considering the aforementioned, Romania requests a debate by the VAT Committee of the VAT regime applicable to services consisting of *making available the naval transportation infrastructure of waterways (transit) for which transit tariff is charged*, and *the use of port infrastructure for which the infrastructure usage tariff is charged*, respectively, supplied to a beneficiary from the European Union and from outside the European Union for river ships in international transit, namely if these services are considered services *of use of an infrastructure for which duties are charged, considered to be directly connected with immovable property*, within the meaning of the VAT Directive, of the case law of the CJEU and in accordance with the guidelines of the VAT Committee resulting from the 93rd meeting thereof.