VAT Expert Group
11th meeting – 11 September 2015

taxud.c.1(2015)4693280

VAT EXPERT GROUP

VEG N° 049

SUMMARY MINUTES

11TH MEETING
–11 SEPTEMBER 2015 –
The Chair welcomed the members of the Group and the meeting was opened.

1. **ADOPTION OF THE AGENDA**

The agenda (taxud.c.1(2015)4105484) was adopted as proposed.

2. **RESULTS FROM THE DISCUSSION**

The following agenda points were discussed:

2.1. **VEG No 047: Sub-group on the topics for discussion - VAT grouping and judgment in case C-7/13 Skandia America Corp. (USA)**

The Chair informed the Group that representatives of organisations from the financial sector with Observer status on the Group were invited to the meeting for this specific point of the Agenda in view of their interest in the subject.

The working document was presented by a member of the sub-group on the topics for discussion and leader of the team which drafted the paper. The presentation focussed on the methodology used in the analysis of the potential impact of the *Skandia* judgment, the findings of the assessment of the various impacts, the main conclusions and recommendations. As regards conclusions, it was stressed that (i) a consistent approach across Member States and in particular mutual recognition of VAT groups across the EU by every Member State to avoid potential distortions and anomalies in the functioning of the VAT system is needed; (ii) a broad application of the *Skandia* case could have huge implications and lead to significant practical complications, difficulties and risks related to conflicts with some fundamental principles of the VAT Directive; (iii) anti-avoidance provisions could be introduced in all Member States which have VAT grouping provisions in order to deal with situations of non-taxation.

As regards recommendations, it was emphasised by the sub-group that (i) VAT grouping is essential for businesses and the application of the *Skandia* judgment should not jeopardise the existence of VAT grouping provisions; (ii) the *Skandia* judgment should be applied only in the context of the case, i.e. narrow application, whereas a broad application of the *FCE Bank* principles is recommended; (iii) application of common anti-abuse and anti-avoidance measures at EU level to deal with situations of non-taxation by Member States applying VAT grouping regimes. Finally, it was indicated that the paper provided answers to the questions raised at the Commission's VAT Committee working paper No. 845 of 17 February 2015.

The group members and the observers were then given the floor for comments and questions.

Members of the Group, including the Observers present, considered the paper very thorough and were fully supportive of its findings, conclusions and recommendations. The need for legal certainty and therefore having, as a matter of urgency, a common and
consistent application across Member States of the *Skandia* judgment was considered crucial. The group strongly supported a narrow application of the *Skandia* judgment and the need for common anti-abuse measures to be introduced at EU level. It was agreed that the wording of the last part of the recommendations, namely to make transactions between head office and branch taxable by amending the VAT Directive, has to be modified to make it very clear that taxation is not the recommendation, but should be considered as a last resort solution in the long term and only if no other solution would appear possible.

The Observers emphasised the significance of the *Skandia* judgment for the banking sector and stated that the paper reflects well the concerns of the sector. At least internally generated supplies of services should be exempt. Although this principle is already in Article 132(1)(f) of the VAT Directive, the Article as such was considered extremely difficult to interpret.

One member suggested that the paper could look more into the Opinion of the Advocate General. Additionally, the fact that the VAT Directive leaves it to Member States to decide on anti-abuse and anti-avoidance measures was considered a defect which needed to be rectified.

One member raised the practical problems linked to the need for cross-border recognition by Member States of chain transactions with four parties, two of which are in a VAT group. It was confirmed that this problem is addressed in the scenarios.

Another member stressed that the optional nature of Article 11 of the VAT Directive on VAT grouping could lead to distortions and the real solution is to have common anti-abuse measures at EU level.

At the end of the discussion, the group agreed that the paper could be transmitted to and presented, by a member of the Group, to the VAT Committee at its next meeting in October 2015, if that would be accepted by the VAT Committee members.

2.2. VEG Nº 046: Sub-group on the topics for discussion - Proof of evidence in intra-EU supplies

The working document was presented by a member of the sub-group on the topics for discussion and leader of the team which drafted the paper. After introducing the background and giving an overview of the previous work on the matter, it was stressed that there are two working assumptions considered in the context of the suggested way forward, namely that (i) VIES is working well and the information therein used for customer assessment is reliable and (ii) tax authorities engage in appropriate controls to ensure the accuracy of the data in VIES via checks as regards the VAT registered taxable persons, including new registrations, but also deregistrations.

The paper considers that alternative documentary evidence to prove the transport or dispatch to another Member State should always be possible and that none of the documentation available to the taxable person should be disregarded. As regards conclusions and recommendations, it is suggested to use a comparable approach to the one put in place for digital services and it is recommended that the VAT exemption for intra-
EU supplies should be granted, on the basis of a rebuttable presumption, when: (i) the transaction meets the substantive criteria of Article 138 of the VAT Directive, which would be the case when the supplier holds at least three non-contradictory documents or elements certifying transport or dispatch to another Member State; (ii) there are no indications of misuse or abuse by the supplier. It was pointed out that a reasonable customer assessment could be expected from taxpayers when tax authorities audit whether transactions have taken place in the context of fraud and/or abuse.

The paper suggests that the above recommendation could be adopted in an Implementing Regulation and that the Commission would come forward with a Communication as an immediate delivery point to remind of the principles laid down in the VAT Directive, the administrative practices and the criteria set forth in the case law of the CJEU. Alternatively, if the adoption of an Implementing Regulation would be unrealistic, at least Explanatory Notes to the relevant Articles of the VAT Directive could be prepared by the Commission services.

The group members were then given the floor to react to the content of the paper and the recommendation.

Members were supportive that there should not be specific documentation established solely for complying with the rules. It was considered important that the taxable person chooses which three items of proof to deliver and that these are not imposed by the tax authorities. It was clarified that three pieces of evidence is seen as a rebuttable presumption so that it would be up to the tax authorities to prove the contrary. Some members inquired on the number of documentary evidence, why three items and not more or less. Other members indicated that a number of items of evidence listed in the paper are not strictly related to the transport and it was suggested to remove them from the list. Several members suggested a change to the wording of the first conclusion in order to make it clear that not three proofs but rather one is needed per requirement, therefore one item that transport takes place, one item that it is a B2B transaction etc.

On reasonable customer assessment, some members stressed that this could be difficult for businesses which have many customers.

To make the information in VIES reliable, one member suggested that information from national tax registers could be integrated in VIES. It was clarified that attempts had been made in the past to include more information in VIES, for example data on the date of first identification for VAT, but Member States could not agree on this.

Several members were sceptical that a Communication and explanatory notes by the Commission could bring the necessary legal certainty to business, given that these tools are not legally binding.

It was agreed that a new version of the paper will be discussed at the next meeting of the Group as the paper needs to be further developed; certain parts would be redrafted as requested by some members; concrete examples of how Member States apply in practice the standard of proof, as well as examples of cases before national courts which were not referred for preliminary ruling to the CJEU, are to be included in the paper.
2.3. VEG N° 048: Sub-group on the topics for discussion - Welmory sp. z o.o. (Case 605/12)

The working document was presented by a member of the sub-group on the topics for discussion and leader of the team which drafted the paper. It was stressed that the sub-group has not yet reached firm conclusions.

The members were then given the floor to share their views on the analysis in the paper, the conclusions to be drawn and the possible way forward.

Several members suggested that the structure of the paper needs to be changed as the focus currently seems to be on the Welmory case whilst the objective is to address the whole issue of fixed establishment after Welmory.

Members widely concurred that the paper needs a more practical dimension. It was thus agreed to include concrete practical examples where the question arises whether or not a fixed establishment exists. Some members suggested considering the GST case (C-11/14). The relevance of the Daimler case (C-318/11) and Widex case (C-319/11) to the assessment of what is a passive fixed establishment was referred to as well. There was a suggestion to make a reference to the Proposal for a 19th Council Directive (COM(84) 648 final).

It was also agreed that the paper needs to provide the view of the Group on whether or not there is a fixed establishment in the Welmory scenario.

Some members suggested that the paper should elaborate on the impacts of having a fixed establishment, for both the supplier and the customer, on the place of supply, the liability to pay VAT and the right of deduction/refund of VAT.

The issue of the relationship between the direct tax notion of permanent establishment and the concept of fixed establishment in VAT was also briefly discussed. Following some clarifications, it was concluded that, in view of the inherent differences between the two, it would not be appropriate to draw parallels and apply the same tests.

The Group concluded that a new version of the paper will be discussed at the next meeting of the Group as the paper needs to be further developed taking also into account the above comments and suggestions.

3. FOLLOW-UP

The Chair indicated that the next meeting of the VEG is scheduled to take place on 20 November 2015, but the date is yet to be confirmed.

***