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DIRECTORATE-GENERAL
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Value added tax

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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 893

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN: Commission

REFERENCE: Article 398

SUBJECT: How to deal with questions on the application of EU VAT provisions derived from activities of the EU VAT Forum, in particular regarding cross-border rulings (CBR)

1. INTRODUCTION

The VAT Committee is set up under Article 398 of the VAT Directive¹ and has as one of its tasks to promote uniform application of EU provisions on VAT. To that end, it examines questions raised by Member States or by the Commission on how to understand and apply those provisions. As no legislative powers have been conferred to the VAT Committee, it is not able to take any legally binding decision but it can issue non-binding guidance.

The EU VAT Forum, on the other hand, is not tasked with questions of that kind. It is a structured dialogue platform set up by the Commission² which brings together business and tax administrations in order for them, amongst others, to

- discuss tax administration issues in the field of VAT with which both are confronted in a cross-border environment, and
- elaborate on possible ways to manage the current VAT system more efficiently in their common interest with a view to achieving a smoother functioning of the current VAT system.

To avoid duplication of work, it should be ensured that the EU VAT Forum refrains from dealing with questions on the application of EU VAT provisions. Where in the context of its activities the EU VAT Forum is nevertheless confronted with such questions, it could be useful to clarify the role of the VAT Committee in dealing with those. That is particularly relevant in the case of cross-border rulings.

2. SUBJECT MATTER

The EU VAT Forum in June 2013 decided to set up a pilot project to allow taxable persons to obtain advance rulings on the VAT treatment of complex cross-border transactions ("the CBR")³. It did so with a view to achieving a smoother functioning of the current VAT system in a cross-border context. The CBR is scheduled to continue until 30 September 2018.

Even though partaking in the CBR is voluntary, a majority of Member States (18) are participating. Those are Belgium, Denmark, Estonia, Ireland, Spain, France, Italy, Cyprus, Latvia, Lithuania, Hungary, Malta, the Netherlands, Portugal, Slovenia, Finland, Sweden and the United Kingdom.

Any taxable person planning cross-border transactions between two or more of the participating Member States can ask for a ruling with regard to the VAT treatment of the transactions which that taxable person envisages to carry out. The request for such a ruling has to be introduced by a taxable person in a participating Member State in which the taxable person is registered for VAT purposes.

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

² Commission Decision 2012/C 198/05 of 3 July 2012 setting up the EU VAT Forum (OJ C 198, 6.7.2012, p. 4).

³ http://ec.europa.eu/taxation_customs/taxation/vat/traders/cross_border_rulings/index_en.htm

No common rules on how to deal with requests under the CBR have been put in place and so Member States in principle apply their own national rules governing national VAT rulings.

Any request will be assessed on the basis of the facts of the case presented by the taxable person and decided primarily in view of the national VAT legislation of the Member States concerned. As that legislation needs to be in conformity with EU VAT law, situations can arise where it appears that the Member States concerned have different approaches and more clarity is needed on how the relevant EU provisions on VAT should be applied.

The first mandate report of the EU VAT Forum⁴ identified certain deficiencies in the current framework governing the CBR. It was pointed out that there could, amongst others, be cases where Member States have dissenting opinions on the VAT treatment of a specific cross-border transaction. Where this would be caused by the EU VAT provisions in place, it was suggested that the question could be referred to the VAT Committee.

3. THE COMMISSION SERVICES' OPINION

The issue to be considered is whether the VAT Committee could and should be dealing with questions on the application of EU VAT provisions with which the EU VAT Forum may be confronted. It is particular relevant where, in dealing with a request for a CBR, Member States appear to have dissenting opinions on the VAT treatment of a specific cross-border transaction and this is linked to EU VAT law.

It is worth noting that the VAT Committee, pursuant to Article 398 of the VAT Directive, is not a regulatory committee put in place by the Commission⁵ but an "advisory committee" consisting of representatives of the Member States and of the Commission which has been set up by the Council. Having in mind the very particular character of the VAT Committee, the Commission services believe that the decision on the way in which issues raised above should be approached is a matter entirely for the Committee to decide upon. This can best be done by consensus.

The following may serve to frame discussions:

3.1. Background

Whilst it is not the task of the EU VAT Forum to examine questions which concern the application of EU provisions on VAT, it is inevitable that such questions may be a feature of the issues submitted.

This has in particular played a role in relation to the CBR: the cases that arrive at that level are issues where Member States have not been able to agree as to the VAT treatment of the transactions for which an application is submitted. Such disagreement can be due to

⁴ First mandate report (2012-2015) discussed at the meeting of the EU VAT Forum on 14 October 2015.

⁵ Such would have required that implementing powers had been conferred on the Commission (see Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13).

differences in views as to how to apply the relevant provision(s) of the VAT Directive to transactions or to a different assessment of the facts at stake in the particular case at hand.

One example is a recent case involving supplies of training between two companies of a group of companies, registered for VAT in the two Member States concerned, where despite efforts it has not yet been possible to reach an agreement between the Member States concerned. In that case, the source of the divergences in view appears first and foremost to be found in the understanding of how the VAT Directive should be applied, with its Article 53 being the point of contention. A consultation of other Member States participating in the CBR has shown disparity in the way this provision is applied.

When it comes to addressing such divergences, it has been suggested that the VAT Committee could be the appropriate forum.

3.2. What is the role of the VAT Committee?

The VAT Committee aims at assuring a more uniform application of EU VAT provisions. To that end, it is tasked with examining questions, raised by its chair or a Member State representative, concerning the application of EU VAT provisions.

In its work, the VAT Committee focuses on questions of a general nature, in other words, questions not linked to any specific and identifiable case occurring in a Member State. Even though questions submitted may relate to specific cases that Member States are confronted with, this does not imply that the VAT Committee is deciding on the outcome of individual cases. That is the prerogative of Member States which will take their decision based on an assessment of the facts of each individual case and subject to scrutiny by the courts.

3.3. How could the VAT Committee contribute?

If, in the context of the CBR, the application of certain EU provisions on VAT is disputed, the VAT Committee could be asked for its opinion. Member States are probably best placed to assess which questions to ask and when it would be suitable to put such questions. As a starting point, the Member States concerned by the dispute or another Member State participating in the CBR would be the one(s) best placed to bring the question to the VAT Committee.

Where questions on the application of those provisions come up as part of other activities in which the EU VAT Forum engages, there could also be occasion to carry those over.

The questions could obviously be different in nature:

- Some could be general. As such, the questions would fall within the realms of what the VAT Committee habitually deals with.
- Others could be more specific and may be predicated on the facts of the case discussed. If that is so, the question is whether the VAT Committee would then be taking on the role of an arbitrator.

The questions examined by the VAT Committee concern the application of EU provisions on VAT. Such questions are mostly raised in cases of doubt. As it turns out, Member States may have different views on how those provisions should be applied but it is rarely so that the VAT Committee is called upon to deal with questions on provisions the application of which is already disputed by Member States with them bringing that dispute to the Committee.

3.4. What would be the possible role of the Commission services?

The Commission is, pursuant to Article 398 of the VAT Directive, tasked with providing secretarial services for the VAT Committee. In addition to the organisation of meetings, its services are also preparing the documents that serve as basis for discussions. Those documents traditionally contain a section which in the case of questions provides an analysis and the opinion of the Commission services on the issue at hand.

If questions are brought to the VAT Committee on the application of a particular EU VAT provision in a specific and factual case for which opposing views have already been identified in the context of the CBR, discussion should better be conducted based on the submission made by the Member States concerned, explaining their opinion on the matter. The Commission services could prepare a Working paper indicating their opinion but given the nature of such questions, it is up to the VAT Committee to decide whether this would be appropriate.

There would not be the same concern when it comes to general questions, not linked to any specific and identifiable case occurring in a Member State that could be derived from other activities of the EU VAT Forum, but in dealing with those it is evident that account will have to be taken of the available resources in the Commission.

4. DELEGATIONS' OPINION

The delegations are requested to give their opinion on the role of the VAT Committee in dealing with questions on the application of EU VAT provisions which may arise from the work of the EU VAT Forum.

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