



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

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Brussels, 23 February 2016

**VALUE ADDED TAX COMMITTEE**  
**(ARTICLE 398 OF DIRECTIVE 2006/112/EC)**  
**WORKING PAPER NO 899**

**QUESTION**  
**CONCERNING THE APPLICATION OF EU VAT PROVISIONS**

**ORIGIN:** Poland

**REFERENCE:** Article 16

**SUBJECT:** Disposal by a taxable person of goods free of charge to another taxable person

## **1. INTRODUCTION**

Poland has asked to discuss with the VAT Committee several issues in connection with Article 16 of the VAT Directive<sup>1</sup>, in particular regarding the invoicing, deductibility and liability aspects arising from a situation where a taxable person disposes of goods free of charge to another taxable person.

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

## **2. SUBJECT MATTER**

Article 16 of the VAT Directive reads as follows:

*The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.*

*However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.*

In the situation envisaged by Poland, a taxable person (hereafter “business”) disposes of goods free of charge to another taxable person (hereafter “recipient”<sup>2</sup>). The goods in question are not samples or gifts of small value within the meaning of the second paragraph of Article 16 of the VAT Directive. It is assumed that the business has deducted the VAT charged by its supplier so that the conditions of the first paragraph of Article 16 of the VAT Directive are fulfilled.

On the basis that the disposal of goods free of charge is deemed to be a supply of goods made for consideration (therefore constituting a taxable transaction) in favour of another taxable person, Poland is of the view that the business should, in accordance with Article 220(1) of the VAT Directive, issue an invoice to the recipient of the goods. With regard to the data to be mentioned on the invoice, as required by Article 226 of the VAT Directive, and in particular under point (10), Poland seeks to clarify whether the reference to “the VAT amount payable” under this point would exclusively apply to the VAT amount which must be paid by the recipient to the supplier.

In the case where it is assessed that the VAT should be indicated on the invoice documenting the disposal of goods free of charge, Poland is of the view that the recipient, in favour of whom the goods are disposed free of charge, may deduct the VAT resulting from this transaction if he has paid such a tax. Poland is however uncertain whether the right of deduction can be denied to the recipient in the case he would not have paid the tax to the business.

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<sup>1</sup> 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).

<sup>2</sup> In its submission Poland refers to this taxable person as “the contractor”.

In the case that the goods disposed free of charge would be the kind of goods in respect of which a Member State applies the reverse charge mechanism<sup>3</sup>, Poland wonders whether such a deemed supply of goods should not be taxed in accordance with the general rule contained in Article 193 of the VAT Directive.

### **3. THE COMMISSION SERVICES' OPINION**

According to Article 2(1)(a) of the VAT Directive, the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT.

Article 14(1) of the VAT Directive defines the supply of goods as being the transfer of the right to dispose of tangible property as owner.

When a supply of goods is not made for consideration it will not be subject to VAT. However, particular transactions in goods mentioned in Article 16 of the VAT Directive, although not being carried out by the taxable person for consideration, are considered to have been made for consideration (deemed supply of goods) resulting in the transaction nevertheless being subject to VAT according to Article 2(1)(a) of the VAT Directive. The taxable amount of such a deemed supply of goods is determined by Article 74 of the VAT Directive.

Article 220 of the VAT Directive sets out the general rules on the issue of invoices by taxable persons.

In examining the VAT treatment that should be given in a situation such as that described by Poland, the Commission services have identified two different approaches both of which are analysed below with a view to feed into the discussion with delegations.

#### **3.1. First approach**

One approach is to follow the reasoning described by Poland which bases itself on a literal application of Article 16 of the VAT Directive. When the conditions of this provision are met, any application of goods by a taxable person made without consideration is regarded as a transfer of goods made for consideration to another person. That other person could be the taxable person himself not acting as a taxable person but could also be a member of his staff or any other person (the taxable person's contractor in the case described by Poland).

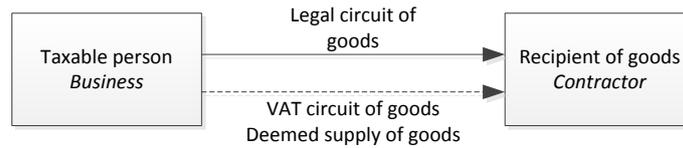
In the absence of consideration paid to the taxable person in exchange of the goods, the transaction is treated as a deemed supply with the taxable amount determined according to Article 74 of the VAT Directive. This transaction supposedly becomes a normal taxable transaction between two parties (the taxable person and the other party) as if there had been consideration paid, with VAT due on the taxable amount. From a VAT perspective, the deemed supply of goods tallies with the legal circuit of the goods.

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<sup>3</sup> Supplies of goods in respect of which the person liable for payment of VAT is the person to whom the goods are supplied (Articles 194 to 199b and Article 202 of the VAT Directive).

**taxud.c.1(2016)934742 – Working paper No 899**  
**VAT Committee – Question**

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In the case that the VAT due is paid by the taxable person himself and the recipient of the goods is a final consumer (an individual), this reasoning would not raise practical issues. VAT is simply due by the taxable person on the taxable amount determined by Article 74 of the VAT Directive and no invoice will be issued to the recipient of the goods.

If we were to follow this reasoning, the transaction would however have to be treated the same way regardless of whether the recipient of the goods pays the VAT due on the deemed supply and whether or not he is a taxable person.

Where the recipient of the goods is a taxable person (the contractor in the case submitted by Poland), issue of an invoice (by the business in the case submitted by Poland) would be needed under point (1) of Article 220(1) of the VAT Directive. This invoice would have to mention the details required by Article 226 of the VAT Directive, i.e. notably, details of the recipient (point (4)), the taxable amount determined according to Article 74 of the VAT Directive (point (8)) and the VAT amount due, whether or not payable by the recipient (point (10)).

In the example hereafter, the business takes goods from stock-in-trade for the recipient:

Value of the goods according to Article 74: EUR 1 000  
VAT (20%): EUR 200

The invoice would mention EUR 1 000 as taxable amount (the value determined by Article 74) and EUR 200 as the VAT due.

Invoice	
Customer details	...
Value of goods	EUR 1 000
VAT due (20%)	EUR 200

In so far as the recipient uses these goods for the purpose of his taxed transactions he would be entitled to deduct the amount of VAT mentioned on the invoice irrespective of whether he has actually paid this VAT.

Also the rules concerning the person liable to pay the VAT due should have to follow the rules applicable to similar supplies of goods made for consideration. The person liable to pay the VAT on the deemed supply would in principle be the business according to

Article 193 of the VAT Directive but VAT could also be payable by the recipient in cases where a national reverse charge mechanism is applied to the type of goods in question.

However, as also shown by the concerns voiced by Poland the result of this reasoning would be somewhat curious since the recipient would be entitled to deduct VAT on goods for which he did not pay any consideration (and for which there is no agreement requiring him to do so), and possibly, in respect of which he might not even have paid himself the VAT due (to note that the situation envisaged by Poland is precisely disposal of goods free of charge). It follows on from some inconsistencies which have been identified under this approach.

A commercial invoice is considered to be the starting document that underpins a specific transaction and is meant to indicate the amount that is to be paid by the buyer to the seller. As it stands above, the invoice would not reflect the agreement between the business and the recipient that consists in the goods being transferred for free. If the goods are given for free, there should be no consideration paid by the recipient (and the recipient should also not be liable to pay any such consideration).

To reflect this, the invoice could mention that no (or only partial) payment is expected from the recipient. However, consideration paid by the business itself would equate to a discount, possibly reducing the taxable amount to EUR 0 in case no payment is required from the recipient. This is the reason why in the case of goods being given for free, Article 16 of the VAT Directive would apply but then only in that case (thus not when the recipient pays an amount corresponding to the VAT due<sup>4</sup>).

Also, if at the outset, the taxable person (the business) would have known that his purchase of the goods was not intended to be used for taxed transactions (because his intention was to give the goods away for free), he would not have been allowed a right of deduction on the input VAT charged to him by his supplier, according to Article 168 of the VAT Directive<sup>5</sup>.

In addition, the recipient might be liable to pay VAT (possibly in another Member State) on goods he has received for free, implying that he should be informed about whether VAT had been deductible, even partially, for the business upon acquiring those goods.

### **3.2. Second approach**

Another approach is to examine the situation described in the submission of Poland in a more clear-cut way at the outset.

This implies taking a step back and having a closer look at Article 16 of the VAT Directive. The question to address first and foremost is whether the recipient of the goods is liable or not to pay any kind of consideration to the business. Article 16 in fact only applies in situations where there is no consideration for a specific transaction.

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<sup>4</sup> See section 3.2.1.

<sup>5</sup> See CJEU, judgment of 18 July 2013 in Case C-26/12, *Fiscale eenheid PPG Holdings BV*, paragraph 21: “For a taxable person to be accorded the right to deduct input VAT, and in order to determine the extent of that right, the existence of a direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct is, in principle, necessary.”

Although in the situation described, it is mentioned that the goods are made available free of charge by the business to the recipient, the fact that the recipient would have to pay a sum of money (the VAT due) in order for him to receive the goods could be taken to mean that consideration is paid. Provided that a direct link exists between the goods received and the consideration paid, the application of Article 16 of the VAT Directive is excluded. In doing so the reasoning would not end up with the paradoxical result pointed out by Poland in its analysis under point 2, the second but last paragraph of its submission, where VAT due on a supply of goods made free of charge would have to be paid by the recipient whereby the deemed supply of goods becomes a supply of goods made for consideration.

### *3.2.1. Application of Article 16 of the VAT Directive*

The reasoning in support of this second approach is further detailed below based on the concrete elements of the situation described in the submission of Poland.

- The recipient pays the VAT due

In cases where the recipient is required to pay an amount of money<sup>6</sup> in order to receive the goods, the transaction qualifies as a transfer of goods within the meaning of Article 14 of the VAT Directive effected for consideration by the business. The transaction is subject to VAT pursuant to Article 2(1)(a) of the VAT Directive and its taxable amount is determined by Article 73 of the VAT Directive, i.e. the amount effectively received by the business.

According to the case-law of the Court of Justice of the European Union (CJEU), the concept of supply of goods effected for consideration within the meaning of Article 2(1)(a) of the VAT Directive presupposes the existence of a direct link between the goods supplied and the consideration received<sup>7</sup>.

It is also settled case-law that the taxable amount for the supply of goods is represented by the consideration actually received for them. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria<sup>8</sup>.

The CJEU has also stated that the fact that the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a ‘transaction effected for consideration’<sup>9</sup>.

In view of the foregoing, if the recipient is required to pay any amount of money (even the so-called VAT due on the ‘erroneously’ qualified deemed supply of goods – for instance EUR 200 in the example mentioned before) to the business in order to receive the goods, a direct link would exist between the goods supplied and the amount of money received. In

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<sup>6</sup> Reference is made to an amount of money for reasons of simplification in this analysis but this of course covers anything which would fulfil the conditions to be viewed as “consideration” (“*consideration, when not consisting of money, must be capable of being expressed in money*” – see CJEU, judgment of 24 October 1996 in case C-288/94 *Argos Distributors*, paragraph 17).

<sup>7</sup> CJEU, judgment of 8 March 1988 in case 102/86 *Apple and Pear Development Council*, paragraph 12.

<sup>8</sup> CJEU, judgments of 5 May 1994 in case C-38/93 *Glawe*, paragraph 8; of 2 June 1994 in case C-33/93 *Empire Stores*, paragraph 18; of 24 October 1996 in case C-288/94 *Argos Distributors*, paragraph 16.

<sup>9</sup> CJEU, judgments of 9 June 2011 in case C-285/10 *Campsa*, paragraph 25; of 20 January 2005 in case C-412/03 *Hotel Scandic Gåsabäck*, paragraph 22.

this sense, whatever the name or qualification given by the parties to the payment made (VAT, subsidy, financial contribution, etc.), it will have to be seen as consideration for the supply of goods. The transaction in that case qualifies as a supply of goods for consideration by the business and VAT is due on the actual amount it receives from the recipient, i.e. the amount of money corresponding to the so-called ‘VAT due’ (that is EUR 200). Under certain conditions provided for in Article 80 of the VAT Directive, Member States may however consider that the taxable amount of a supply of goods is to be the open market value.

Invoice		
Customer details	...	
Amount of money paid	EUR	200
VAT due (20%)	EUR	40

Even if at first sight converting the so-called VAT due into a taxable amount could seem to make no sense, it nevertheless allows for distinguishing, from a VAT perspective, between real supplies of goods made for free to which Article 16 of the VAT Directive will apply and supplies of goods made for consideration to which Article 16 cannot apply.

In doing so, one can also avoid that transactions with minimal consideration are presented as ‘deemed supplies of goods’ (see first approach) to which Article 80 of the VAT Directive would not be applicable as it presupposes the existence of a consideration. Where there is no consideration (as is the case if covered by Article 16), the open market value could thus not be evoked.

Since, under such circumstances, the described transaction constitutes a supply of goods for consideration, the normal rules concerning invoicing, liability and deduction will apply. Consequently, the business should issue an invoice to the recipient in conformity with point (1) of Article 220(1) of the VAT Directive, mentioning the taxable amount (EUR 200) and the VAT due on it (EUR 40). Provided that the conditions under Article 168 of the VAT Directive are fulfilled, the recipient would then be entitled to deduct the VAT mentioned on this invoice.

We would like to stress that this however would not cover the transaction inquired by Poland which is disposal of goods free of charge (see just below).

- The recipient does not pay the VAT due

In cases where the recipient is not required to pay any amount of money<sup>10</sup> whatsoever (not even the VAT due on the so-called deemed supply of goods) in order to receive the goods, the conditions for Article 16 of the VAT Directive to apply are fulfilled. The disposal free

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<sup>10</sup> See footnote 6.

of charge of the goods by the business is deemed to be a supply of goods made for consideration. According to Article 2(1)(a) of the VAT Directive this supply of goods will be subject to VAT. Pursuant to Article 74 of the VAT Directive, the taxable amount of the deemed supply is the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the disposal takes place.

In order to provide an assessment of the consequences of the application of Article 16 of the VAT Directive, it is necessary to recall the purpose of this provision.

The objective of the first paragraph of Article 16 of the VAT Directive has been considered on numerous occasions by the CJEU. It has repeatedly held that the aim of that provision is to ensure equal treatment between various final consumers of the goods in question by ensuring that the final use of goods is subject to VAT when input tax has been deducted<sup>11</sup>.

The purpose is to ensure equal treatment between a taxable person who withdraws goods from his business and an ordinary consumer who buys goods of the same type<sup>12</sup>. As explained by the CJEU, it is clear from the wording of the first paragraph of Article 16 of the VAT Directive<sup>13</sup> that this provision treats as a supply made for consideration, and therefore as subject to VAT, a taxable person's disposal free of charge of goods forming part of his business assets, where input VAT was deductible on those goods, it being in principle immaterial whether their disposal was for business purposes<sup>14</sup>.

In that sense, it is apparent that the primary objective of Article 16 of the VAT Directive is to provide for a mechanism to correct the initial input VAT deduction made by a taxable person on goods in situations where those goods would otherwise not give rise to a taxable transaction because the condition that they are supposed to be supplied for consideration will not be fulfilled. Even situations where the disposal free of charge is made for business purposes are covered<sup>15</sup>.

The preparatory work for Article 5(6) of the Sixth Directive<sup>16</sup> shows that the intention of the legislator was to consider any of the situations mentioned in this provision to be 'own-consumption' ("consommation propre" or "autoconsommation" in the original French text). At the time the choice to have a mechanism consisting in a deemed supply of goods was favoured over a revision of the initial deduction. By charging them only the amount of VAT that they would have paid if the goods had been acquired from a third party, any prejudice caused to taxable persons was avoided.

Along this reasoning the mechanism provided for by Article 16 of the VAT Directive takes the form of a deemed supply of goods by the taxable person which is to be

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<sup>11</sup> See opinion of Advocate General Jääskinen delivered on 15 April 2010 in case C-581/08 *EMI Group Ltd*, paragraph 27.

<sup>12</sup> CJEU, judgment of 17 May 2001 in joined cases C-322/99 and C-323/99 *Fischer and Brandenstein*, paragraph 56.

<sup>13</sup> The CJEU referred to Article 5(6), first sentence, of the Sixth Directive which corresponds to the current Article 16(1) of the VAT Directive.

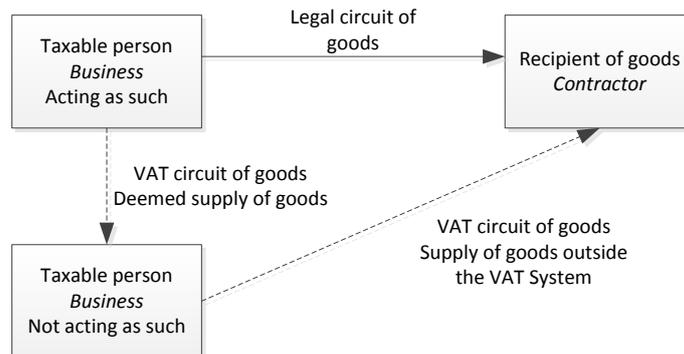
<sup>14</sup> CJEU, judgment of 27 April 1999 in case C-48/97 *Kuwait Petroleum (GB) Ltd*, paragraph 22.

<sup>15</sup> This is confirmed by the exception made for samples or gifts of small value under the second paragraph of Article 16 of the VAT Directive.

<sup>16</sup> Current Article 16 of the VAT Directive.

considered a supply of goods but made to himself (commonly referred to as ‘a self-supply’).

Under this approach, the mechanism is not to be viewed as a transaction made directly by a taxable person to another person (it does not tally with the legal circuit of the goods) but rather as a withdrawal of goods from the taxable person’s business assets. As explained by the CJEU, once the taxable person has withdrawn goods from his business and, where appropriate, paid the VAT on that withdrawal, he is free to dispose of those goods as he wishes<sup>17</sup>.



In view of the foregoing, an invoice within the meaning of Article 220(1) of the VAT Directive should not be issued since the withdrawal of the goods from the business assets cannot be considered to be a supply of goods to another taxable person (or to a non-taxable legal person).

In the example mentioned, the business would have to account for the self-supply by including an amount of EUR 200 as output VAT in his VAT return.

Member States may however impose obligations which they find necessary to ensure the correct collection of VAT in this respect<sup>18</sup>. These can for instance take the form of a document describing the disposal of the goods by the taxable person to himself (‘not acting as such’ in drawing above), its taxable amount and the VAT due on it. The purpose of this document would be to ensure compliance with the VAT rules and it would then be seen as an internal accounting document in a similar way as for example in the case of adjustments to the initial tax deduction on capital goods. When the taxable person not acting as such gives the goods for free to the recipient, this happens outside the VAT system and there can be no invoice issued for that. If an invoice were to be issued directly by the taxable person acting as such to the recipient, this recipient would be allowed to a deduction of VAT that he had not paid. It is to be recalled that, as explained under this second approach, the objective of Article 16 is to neutralise an initial deduction of VAT on goods without which the goods would go to final consumption<sup>19</sup> without being charged with VAT. This objective would not be attained if the VAT corrected would allow for a deduction.

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<sup>17</sup> CJEU, judgment of 8 March 2001 in case C-415/98 *Laszlo Bakcsi*, paragraph 43.

<sup>18</sup> Articles 242 and 273 of the VAT Directive.

<sup>19</sup> Situations meant under Article 16 qualify as final consumption.

This is a conclusion which could be criticised if the recipient of the goods is a taxable person who would use those goods for the purpose of his business. In this case, the goods that are being used for intermediate consumption and not final consumption could be viewed as carrying a ‘hidden VAT’. However, if indeed the purpose of deduction is to relieve the taxable person of any VAT<sup>20</sup>, it is also true that in this case he has not borne any costs related to the VAT since he has paid no consideration and no VAT for the goods received. To note that where a taxable person (recipient) has not deducted VAT on the goods (that he has purchased or been given for free) he will also not be required to charge VAT when he sells these goods<sup>21</sup>.

It is also worth mentioning that in respect of certain transactions treated as supplies of goods or services (those pursuant to Articles 18(a) and 27), the legislator has specifically provided for a right to deduct in Article 168(b) of the VAT Directive. One cannot but notice that no such right has been granted in regard to the deemed supplies of goods provided for under Article 16 of the VAT Directive.

- Other issues raised

Under this second approach, there is no need to examine questions 2 and 3 submitted by Poland.

#### **4. DELEGATIONS’ OPINION**

The Commission services invite the delegations to provide their opinion on their analysis and that made by Poland and to express their preference in terms of approach.

In particular, they invite Poland to provide further details that would help better understand the questions submitted.

Other delegations are also encouraged to share any practical experiences that they have in regard to situations related to this issue.

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<sup>20</sup> CJEU, judgment of 22 December 2010 in case C-438/09 *Dankowski*, paragraph 24.

<sup>21</sup> See notably reasoning of CJEU in its judgment of 27 June 1989, case 50/88 *Heinz Kühne*, paragraphs 9 and 10.

**QUESTION FROM POLAND**

**Questions concerning the application of the EU VAT provisions**

In connection with Article 16 of the 2006/112/EC Directive some doubts have arisen as regards the situation when an enterprise disposes goods free of charge (goods which are not samples or gifts of small value) to his contractor (who is a VAT taxable person). The questioned issues are as follows:

- 1) Should an enterprise, in such a case, issue an invoice to his contractor documenting the taxable free of charge disposal of the good and indicate the VAT amount – which is not paid by the contractor – on the invoice?
  - 2) Assuming that the enterprise should indicate the VAT amount on the invoice documenting the taxable free of charge disposal of the good does the contractor (the acquirer) have the right to deduct VAT in spite of the fact that the contractor (the acquirer) has not incurred the burden of the tax?
  - 3) Some doubts have also arisen in connection with a situation when goods which are subject of the said activity (i.e. the taxable free of charge disposal) are covered by the reverse charge mechanism, i.e. goods in respect of which the person liable for payment of VAT is a person (the acquirer) to whom the supply is made). Therefore, in a situation when goods – which are subject of the supply made without consideration – are covered by the reverse charge mechanism applied by the given Member State, should a general rule be applied according to which a person liable to pay VAT is the taxable person that carries out a supply (Article 193 of the 2006/112/EC Directive) or, instead, a special VAT settlement method takes place?
- 1) Issuing an invoice documenting the taxable free of charge disposal of the good and indicating the amount of VAT on the invoice.**

According to Article 16 of the 2006/112/EC Directive the application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible. However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.

In light of the above-mentioned regulations the case when the enterprise disposes free of charge goods which are not samples or gifts of small value (VAT on those goods was deductible) for his contractor (who is a VAT taxable person) constitutes a supply of goods for consideration.

In compliance with Article 220(1)(1) of the 2006/112/EC Directive there is a requirement of issuing an invoice in cases when a taxable person supplies goods in favour of the other taxable person. In the above-mentioned situation, pursuant to Article 16 of the 2006/112/EC Directive, the free of charge disposal of goods constitutes a supply of goods for consideration made in favour of the other taxable person and therefore – in the opinion of the Ministry of Finance of the Republic of Poland – should be subject to Article 220 of the Directive (there is no reason to exclude the free of charge disposal of goods, mentioned in Article 16 of the 2006/112/EC Directive, out of the scope of the Article 220 of the Directive). In light of the above, under situation describe herein, the enterprise ought to issue an invoice to the contractor documenting the taxable free of charge disposal of the good.

There is a catalogue of data required on the invoice as described in Article 226 of the 2006/112/EC Directive. As stipulated in Article 226(10) of the 2006/112/EC Directive, invoices issued pursuant to Articles 220 and 221, for VAT purposes, contain the VAT amount payable, except where a special arrangement is applied under which, in accordance with the Directive, such information is excluded.

In the opinion of the Ministry of Finance of the Republic of Poland, the free of charge disposal of goods, constituting under Article 16 of the 2006/112/EC Directive a supply of goods for consideration made in favour of the other taxable person, as a rule, is not subject to a special arrangement which otherwise would exclude the requirement to include the VAT amount on the invoice.

Simultaneously, there is a hesitation if the VAT amount indicated on the invoice in the situation described stands for the VAT amount payable, as referred to in Article 226(10) of the 2006/112/EC Directive. However, if it were to be assumed that the VAT amount payable, as referred to in Article 226(10) of the 2006/112/EC Directive, applies exclusively to the VAT amount which must be paid by the acquirer to the supplier, then the VAT amount payable should not be included on the invoice which documents the free of charge disposal of the good, taxable under Article 16 of the 2006/112/EC Directive. In such a case, questions 2 and 3 below are groundless.

**2) The right to deduct the input VAT, indicated on the invoice, by the acquirer of the taxable free of charge disposed good (the acquirer has not incurred the VAT burden).**

If assessed that the VAT amount should be indicated on the invoice which documents the free of charge disposal of the good, taxable under Article 16 of 2006/112/EC Directive, the question arises whether the acquirer of the free of charge disposed good has the right to deduct VAT.

Some instructions for the answer are included in the opinion of the Advocate General Nil Jääskinen delivered on 15 April 2010 in the case C-581/08 EMI Group Ltd v. The Commissioners for Her Majesty's Revenue & Customs:

*‘106. Question (f) essentially asks whether the answers given would be affected if the recipient were able to deduct input tax payable on the provision of the goods.*

*107. The Commission submits that the interpretation of Article 5(6) of the Sixth VAT Directive is not dependent on the status of the recipient or his ability to deduct input tax. It also states that, as a practical matter, it may be that a company which receives samples or gifts is able to deduct input tax. In order for it to do so, however, it must have borne that tax – that is, the donor must have charged it the VAT on the samples or gifts.*

*108. I agree with this logic. In addition, it is difficult to see the point of the question. The assumption mentioned by the Commission – that is, charging VAT on samples or gifts of small value – seem rather far from commercial realities.’*

In the opinion of the Ministry of Finance of the Republic of Poland the foregoing can be read that the contractor, in favour of whom the free of charge good, taxable under Article 16 of the 2006/112/EC Directive, was disposed, may deduct VAT resulting from this transaction (indicated on the invoice which documents the transaction) if he pays the tax. It should be however noted that if the contractor, in favour of whom the free of charge good – taxable under Article 16 of 2006/112/EC Directive – was disposed, pays the tax on this transaction, we will be dealing with the supply for consideration (paid transaction) not with the free of charge supply of good, taxable under Article 16 of the 2006/112/EC Directive.

There is also a question if – in case the VAT amount should be indicated on the invoice which documents the free of charge supply of goods, taxable under Article 16 of the 2006/112/EC Directive – the fact that the acquirer has not paid the tax to the supplier (and consequently has not incurred the burden of the tax) will be sufficient to recognize that there is no right to deduct VAT by the acquirer.

**3) Applying the reverse charge mechanism in case of the taxable free of charge disposal of the good.**

The free of charge disposal of goods fulfilling, in light of Article 16 of the 2006/112/EC Directive, conditions to be recognized as a supply of goods for consideration, gives rise to some doubts also when goods in respect of which Member State applies the reverse charge mechanism (hereinafter “RCM”), i.e. goods in respect of which the person liable for payment of VAT is a person to whom the supply is made, are the subject of such a transaction.

It should be noted that the reverse charge mechanism is a special method of VAT treatment adopted by the provisions of the 2006/112/EC Directive in response to frauds and abuses in the VAT area within the European Union. The *ratio legis* of this regulation is the fact that RCM has been seen as an effective measure of combating tax frauds and evasion. To that end, supplies of some particular goods are subject to the mechanism introduced by given Member States.

It wonders, therefore, whether in a situation where goods covered by the national reverse charge mechanism are the subject of the free of charge supply, such a supply should not be taxed in accordance with the general rule (instead of a special VAT settlement method) according to which the person liable for payment of VAT is the taxable person supplying such goods (Article 193 of the 2006/112/EC Directive).

In this context, it need to be borne in mind that the free of charge supply of goods falls within the scope of VAT only if goods being a subject of such a supply form part of the supplier's business assets, are applied for purposes other than those of his business, and the VAT on those goods or the component parts thereof was wholly or partly deductible. As a consequence, if it were to be assumed that a person obliged to settle VAT related to the free of charge supply of certain categories of goods is an acquirer it would result in his obligation to establish the circumstances which are essentially related to the supplier himself and are known only to him. In fact, it would mean that the acquirer is required to obtain such information from the supplier as well as that he is responsible for any irregularities in this area (therefore a question arises whether such situation would not stay in disproportion between the purpose of the reverse charge mechanism and the result achieved). On the other hand, it should be taken into account that there is nothing to prevent the acquirer from depending his decision regarding the free of charge acquisition of goods on being provided (by the supplier) with relevant information necessary to have made the VAT settlement correctly by the recipient of goods (in case the RCM method of VAT settlement applies).

Adoption of the position, according to which – in discussed case – the reverse charge mechanism applies, follows with a situation when, in case of using the goods by the acquirer for purposes other than those connected with taxable transactions, such a taxable person will be obliged to pay VAT due in respect of his supply without consideration, not being, at the same time, entitled to deduct input tax resulting from the transaction. As a matter of fact, he will find himself in a less favourable position than in case of the free of charge supplies of goods that are not covered by the reverse charge mechanism, i.e. supplies taxed in accordance with a general rule of the VAT settlement. This is due to the fact that in the latter situation the supplier is entitled to deduct input tax as well as he is also obliged to pay the tax due on the supply, whereas the acquirer does not incur any economic burdens associated with such a disposal as he receives the goods free of charge.