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

taxud.c.1(2022)2712022 – EN

Brussels, 4 April 2022

VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 1042 FINAL

MINUTES

119TH MEETING
– 22 NOVEMBER 2021 –

The Chair welcomed the delegations to the non-public 119th meeting of the VAT Committee that took place in the form of a videoconference.

Next meeting: the 120th meeting is likely to take place in end-March 2022. Whether or not in-person, will depend on the evolution of the Covid-19 pandemic.

Procedural, housekeeping and information points

VAT Committee functional mailbox: delegations were reminded to always use the dedicated functional mailbox for exchanges, especially for the transmission of consultations.

Update on proposals by the Commission

The Chair informed delegations about the following:

- VAT e-commerce: smooth launch of the new rules without major operational problems. In the Import One Stop Shop (IOSS), more than 7 000 traders are currently registered with the top 8 IOSS registered traders accounting for approximately 91% of all transactions declared for import into the EU via the IOSS. In the first quarter concerned (Q3 2021), the total amount of VAT collected on low value consignments is estimated at around EUR 710 million. As a conservative estimate, due to the seasonality of the upcoming Christmas period, the VAT collected will equate to almost EUR 3 billion on a yearly basis, with half generated from imported goods with a value below EUR 22, which can be seen as additional VAT revenue due to the abolition of the VAT exemption. The other half is generated from imported goods with a value between EUR 22 and EUR 150, on which studies showed that the level of fraud was very high before the reform (65%).

  Although the implementation went smoothly, some issues of interconnection between customs practices and VAT law still merit further looking into. A joint technical meeting with experts from both tax and customs administrations has been looking into possible solutions to tackle issues such as cases of double taxation for certain types of goods. A more comprehensive evaluation of the VAT e-commerce package will be carried out at the beginning of 2022 and there will be a consultation in this respect. This evaluation will feed into the VAT in the Digital Age proposal. There are also several initiatives to improve e-commerce policy on the customs side too. These include considerations of the Wise Persons' Group. Moreover, the Commission has launched a comprehensive e-commerce study by an external contractor.

- "VAT in the Digital Age" initiative: the study 'VAT in the Digital Age' was launched at the end of last year. A virtual Fiscalis event which took place recently with representatives of both businesses and tax administrations went very well. The next step will be to launch a Public Consultation and prepare an Impact Assessment leading to a legislative proposal planned for the second half of next year.

- VAT treatment of financial services: this initiative was announced in the Tax Action Plan and had been foreseen by the end of 2021. However, due to its complexity (i.e. implications going beyond the VAT exemption and cost sharing arrangements) the file has been postponed. Meanwhile, the summary report of the outcome of the public consultation was published in August 2021 and is available on the Have Your Say Portal of the Europa website. The outcome was mixed, with the sector showing both support for taxation and concern for insufficient right of deduction.

- SME scheme – Implementing Regulation: in view of the updated SME scheme to be applied from 2025, *Commission Implementing Regulation (EU) 2021/2007 of 16 November 2021 laying down detailed rules for the application of Council Regulation (EU) No 904/2010 as regards the special scheme for small enterprises* was adopted and published in the Official Journal of the European Union (OJ). The next step will be work on the IT implementation.

- Draft Proposal prolonging Articles 199a and 199b on the optional domestic reverse charge: with regard to the optional reverse charge mechanism and the Quick Reaction Mechanism, the Commission plans to come forward with a proposal to extend their application period beyond 30 June 2022. The adoption by the Commission is foreseen by the end of the year/early next year.

- New study on VAT rules applicable to travel and tourism: a new study is about to be launched with a wide and holistic approach covering: 1) the special scheme for travel agents, 2) the VAT rules on passenger transport and 3) the exemption on supply of goods to non-EU travellers The study should start early next year and support the Commission in preparing a legislative VAT package on tourism foreseen in 2023.

- Extension of Commission Decision 2020/491 – (Covid decision): the use of the temporary relief from customs duties and VAT on the import of medical devices and protective equipment from third countries has decreased but with a new Covid-19 wave starting an extension is contemplated. Although a consultation of Member States is still ongoing, most seem in favour of the prolongation of the measure.

- List of gold coins for the year 2022: the list of VAT exempt gold coins valid for the year 2022 was published in the OJ (2021/C 446/06) on 3 November 2021.

Topical issues in the Council

The Chair briefly mentioned the latest developments in Council:

- 2018 Proposal on VAT rates: The last Council Working Party on Tax Questions (Indirect Taxation / VAT) took place on 18 November 2021. An agreement is close to be achieved with just few issues to be resolved remaining.

- “Buy and donate” Proposal: *Council Directive (EU) 2021/1159 amending Directive 2006/112/EC as regards temporary exemptions on importations and on certain supplies* was adopted on 13 July 2021 and published in the OJ. Whether there is an interest to go beyond the current limited scope resulting from negotiations on the Buy and donate Proposal will be discussed at the next meeting of the Group on the Future of VAT. As the proposed procedure to adapt the VAT and/or excise duty exemption certificate was left aside, the Commission is now preparing a proposal to amend the certificate which is expected to go to Council around the end of the year.

Other topical issues - Follow-up of the last meetings

Guidelines from the 114th, 116th and 117th meetings: the Chair noted that, awaiting input to enable picking up discussions on vouchers, the Commission services may consider to move forward with drafting guidelines on certain aspects previously discussed.

1. ADOPTION OF THE AGENDA

(Document taxud.c.1(2021)7616995)

While no delegation asked for a change in the order of treatment of agenda points, the Chair suggested that the points relating to VAT grouping be addressed together, starting with point 5.1 (on principles) followed by point 4.4 (on practical issues). The Chair also suggested that the point on the “accelerated consultation procedure on reduced VAT rates on natural gas, electricity or district heating” be dealt with under point 3 of the agenda.

The agenda was adopted with no comments from delegations.

2. REPORT ON THE RESULTS OF THE WRITTEN PROCEDURES

2.1. Minutes of the 118th meeting

The Chair stated that the final version of the minutes from the 118th meeting held on 19 April 2021 had been published on CIRCABC.

2.2. Guidelines from the previous meetings

The Chair indicated that since the last meeting of 19 April 2021 the following guidelines had been agreed in written procedure and published on CIRCABC and on the Directorate-General's public website:

- The **almost unanimous** guideline on the **Special scheme for investment gold – notion of investment gold**.
- The **almost unanimous** guideline on the **Exemption of educational services on the example of maritime and security training**.
- The **almost unanimous/ by large majority** guideline on **Video-chat services (case C-568/17, *Geelen*, interactive sessions filmed and broadcasted in real time via the internet)**.
- The **unanimous** guideline on **Recharging of electric vehicles**.

The Chair seized on this occasion to make the following statement:

The unanimous agreement of the Member States on the guideline on VAT rules applicable to transactions related to the recharging of electric vehicles is an important step to ensure a common approach regarding the VAT treatment of the charging of electric vehicles in the EU. This should provide more legal certainty for business operating in this growing sector in the EU. The Commission is however aware that this VAT treatment could lead to the need for business to have numerous VAT registrations in the EU. As this sector is expected to further expand in the EU, the Commission will consider the inclusion of such transactions in the further extension of the One-Stop-Shop currently examined in the context of its upcoming proposal on VAT in the Digital Age.

With regard to the **draft guideline** on the **Calculation of the EU place-of-supply threshold** and the interpretation of the new Article 59c of the VAT Directive (Guideline from the 118th meeting, Document D, WP No 1021), the Chair reported that following the written procedure the intention was to verify orally during the meeting the position of delegations to see whether any comments not taken on board translated into opposition on their part before finalising the draft guidelines, in an effort to boost the majority, given their importance from an e-commerce perspective.

The Commission services outlined their understanding of the comments made while informing that an overall cautious approach was taken in the analysis and noted that the meeting was a good opportunity to assess delegations' willingness to ultimately agree with the guideline, despite the cautious approach adopted in the interpretation of their comments.

Following an exchange showing that no unanimous agreement could be reached, the Chair thanked the delegations and concluded that when finalising the draft guideline, the text would remain unchanged.

2.3. Member State consultations by written procedure

The Chair stated that a consultations was received from Spain on a reduced VAT rate to certain supplies of electricity, pursuant to Article 102 of the VAT Directive, which had been dealt with in written procedure.

3. CONSULTATIONS PROVIDED FOR UNDER DIRECTIVE 2006/112/EC

Accelerated consultation procedure - Reduced rates - Natural gas, electricity or district heating

The Chair gave the floor to Latvia, Cyprus and Poland to present their consultations submitted under the accelerated procedure.

Latvia presented its consultation on a temporary (for the heating season) reduction of the VAT rate for the supply of thermal energy from 12% to 5% to support inhabitants purchasing and consuming thermal energy for domestic needs.

Cyprus thanked for opportunity to present its consultation on the application of a reduced rate of 5% on electricity consumption by vulnerable households already differentiated by the utility company (such as large families, public assistance recipients, beneficiaries of guaranteed minimum income, beneficiaries of severe motor disability allowance, beneficiaries of care allowance and people suffering from multiple sclerosis) for an initial period of 6 months starting as of 1 November 2021. Cyprus also consulted on the application of a reduced rate of 9% on electricity consumption by all households (which accounts for about 20% of electricity consumption in Cyprus) for a maximum period of 3 months starting as of 1 November 2021.

Poland consulted on the application of a reduced rate of 8% to the supply of natural gas, normally subject to a standard rate of 23%, facing growing demand for heating purposes for the winter season. The Polish delegation specified that the measure would be temporary and envisaged for 3 months with an option for further temporary prolongation for another strictly defined short period if necessary depending on the energy market situation. It clarified that whether the scope of application would be limited to household would be decided at political level.

Before opening the floor, the Chair explained the context of this accelerated consultation. Following the adoption by the Commission on 13 October 2021 of a Communication on Energy Prices, aimed at enacting and supporting appropriate measures to tackle the exceptional rise in global energy prices, delegations had been informed that, given the particular circumstances and with a view to avoiding undue delays, delegations which envisaged lowering the VAT rate on any of the energy products in question might consult the VAT Committee on the introduction of such reduced rates through an accelerated procedure. Delegations had been invited to submit a short outline of their plan so that, due to the exceptional circumstances, such submissions could be dealt with in oral during the current meeting, to accommodate for the formal requirement of consultation.

The Chair thanked Latvia, Cyprus and Poland and opened the floor.

A delegation asked the number of Member States having introduced a reduced VAT rate for natural gas or electricity. With regard the Communication on Energy Prices, it also asked clarifications on the functioning of a possible tax rebate scheme for VAT paid on electricity or natural gas and whether any Member State would be willing to provide information on this scheme.

The Chair referred to the VAT rate table published on the Commission's website with regard to the first question. As regards the second question, the Chair explained that in the context and within the limits set by the Communication on Energy Prices, Member States may reduce taxes (energy taxes or VAT) or apply rebates in the form of tax subsidies using receipts from VAT or energy taxes for the benefit of targeted consumers, but the latter are outside the scope of VAT legislation.

The Commission services offered to circulate after the meeting a table with the requested applied reduced VAT rates. It was also reiterated that in the context of the Communication on Energy Prices, Member States may choose to reduce VAT rates or excise duties (having an impact on VAT revenues as well) or provide tax subsidies. Although tax subsidies may take different forms, normally VAT rates are not modified but the most vulnerable people are compensated after VAT has been paid. These measures however are taken by Member States at national level and no further information could be provided.

The Chair thanked again Latvia, Cyprus and Poland and took note of their consultations.

3.1 Origin: Poland
Reference: Article 155 of the VAT Directive
Subject: VAT warehousing arrangements in the fuel sector
(Document taxud.c.1(2021)7444138 – Working paper No 1028 and taxud.c.1(2021)7931806 – Working paper No 1028 – Addendum)

The Commission services presented the Working paper on the consultation submitted by Poland on the introduction of VAT warehousing arrangements in order to reduce the scale of VAT fraud in the fuel sector. The draft Polish arrangements foresee an exemption from VAT of the importation, intra-Community acquisition and domestic supply of specific types of fuel covered by the Polish excise duty act (such as motor petrol, diesel fuel, liquefied petroleum gas (LPG), aviation gasoline, biofuel and others) where such fuel is moved into a VAT warehouse. The exemption will also apply to the supply of goods taking place within a VAT warehouse and the supply of services therein directly related to these goods. The payment of output VAT becomes due only upon removal of the goods from a VAT warehouse and is to be paid by the person responsible for removing the goods from the VAT warehouse. Together with this person, the VAT warehouse keeper is to be held jointly and severally liable. An option pursuant to which the exemption would not apply is also being considered.

In their analysis, the Commission services asked Poland *(i)* with regard to the suitability as an anti-fraud measure, to explain how such VAT warehousing arrangements, being at traders' discretion to apply, could help improve the fight against such fraud and whether a notification procedure to the tax authority would be foreseen; *(ii)* with regard to the optionality of the arrangement, to clarify how such optional exemption should work in practice and which transactions would be covered (i.e. the stage at which the goods are moved into a VAT warehouse and not subsequent supplies of those goods within the VAT warehouse); *(iii)* since many of the fuel products covered by the Polish draft VAT warehousing arrangements are ready for supply to final consumers at the retail stage, to explain how it intends to ensure that retailers active in the fuel sector do not make use of the VAT warehousing arrangements which would see them enjoy an unjustified economic advantage; *(iv)* to provide more information on the exclusive application to goods listed in the Polish Excise Duty Act as goods subject to excise duties could not give rise to exclusive placing under VAT warehousing arrangements; *(v)* with regard to the joint and several liability, to clarify how it intends to treat VAT warehouse keepers acting in good faith and particularly which type of proof can be provided to escape liability, also in light of CJEU case-law according to which no unconditional liability can be imposed.

The Commission services mentioned that additional comments had been provided by the Polish delegation and circulated and then invited the Polish delegation to clarify the matters raised.

Thanking the Commission services, the Polish delegation indicated that it understands the general purpose of the VAT warehousing arrangements and while having the effect of reducing VAT fraud due to their construction these measures would also simplify the settlement of supplies before they reach the retail market and may increase attractiveness of investments and supplies from honest operators.

With a view to prevent tax fraud, the Polish delegation clarified that placing listed goods under the VAT warehouse arrangements will imply the payment of VAT on goods introduced on the domestic market (release for consumption and supply of goods outside the VAT warehouse) with the entity guaranteeing the payment of the tax being the VAT warehouse keeper (as a reliable entity), who will be jointly and severally liable in the event of non-payment by the entity removing the goods from the VAT warehouse. Alternatively, instead of joint and several liability, a solution could also be to appoint the VAT warehouse keeper as the tax remitter in connection with the removal of goods from the VAT warehouse obliging the warehouse keeper to calculate and collect the amount of tax from the entity removing goods from a VAT warehouse and then pay the tax to the competent tax authority. The Polish delegation added that the joint and several liability will in any event not be unconditional: the VAT warehouse keeper will be seen to have exercised due diligence if it collects documents proving payment and settlement prior to removal of the goods from the warehouse. In practice, the potential 'missing trader' will not be able to sell the goods without prior payment of the tax due upon removal of the goods from the VAT warehouse and thus this measure may have the effect of reducing VAT fraud.

With regard to goods falling within the scope of warehousing arrangements, the Polish delegation noted that it is optional for Member States to introduce such arrangements and for which goods (i.e. some or all of the goods listed in Annex V of the VAT Directive or even extending to other goods). In their view, the provisions of the VAT Directive would not limit the possibility of placing excise goods under the VAT warehousing arrangements. The goods covered by the consultation are those listed in Annex V, so there should be no obstacles to include them within the scope of a warehousing arrangement. The arrangements in their proposed scope would have a pilot character and if these bring positive effects, they will be extended to other goods.

As no delegation asked for the floor, the Chair thanked the Polish delegation and concluded that the VAT Committee took formal note of the consultation.

3.2 Origin: Estonia
Reference: Article 318 of the VAT Directive
Subject: Global margin scheme
(Documents taxud.c.1(2021)6685778 – Working paper No 1024 and taxud.c.1(2021)7909449 – Working paper No 1024 – Addendum)

The Commission services presented the Working paper on a consultation submitted by Estonia as it would like to introduce as of 1 January 2022 a global margin scheme into its national legislation, in accordance with Article 318(1) of the VAT Directive. Member States may provide that, for certain transactions or for certain categories of taxable dealers, the taxable amount in respect of supplies of goods subject to the margin scheme is to be determined for each tax period during which the taxable dealer must submit the VAT return. Simplification is a condition for the global margin scheme to be applied in circumstances where it is difficult to tax the margin on a transaction-by-transaction basis. If use is made of this option, the taxable amount in respect of supplies of goods to which the same rate of VAT is applied will be the total profit margin made by the taxable dealer less the amount of VAT relating to that margin.

The Commission services then set out the essential elements of the global margin scheme that Estonia plans to implement: *(i)* the simplification would apply to supplies by taxable dealers of second-hand goods where the purchase or selling price is not specified for each individual item, e.g. in cases of sales in bulk of low value items; *(ii)* it allows taxable dealers to calculate the taxable amount periodically and not item by item; *(iii)* a taxable dealer supplying second-hand goods subject to the margin scheme may opt to apply this simplification but first needs to submit a written and reasoned request to the Estonian Tax and Customs Board; *(iv)* the application is granted in circumstances where it is difficult to tax the margin on a transaction-by-transaction basis; *(v)* under the global margin scheme it is possible to carry forward losses.

In their analysis, the Commission services noted that the information provided was not sufficient to enable to examine and understand in full the Estonian global margin scheme and in particular sought clarification on the following points:

(i) Broad scope of application

While the global margin scheme may be applied where the purchase or selling price is not specified for each individual item, this rule does not, however, stem from the draft legal provision to be introduced in the Estonian Value Added Tax Act but only in the explanatory memorandum. Moreover, simplification is a condition for the application of the global margin scheme which cannot be applied for cases where there is no difficulty in taxing the margin on a transaction-by transaction basis. A restrictive application of the scheme is necessary pursuant to Article 318 of the VAT Directive which refers to "certain transactions" and "certain categories of taxable dealers". Applying the global margin to all transactions, could be seen to go beyond what is permitted under the VAT Directive. In addition, the option in Article 318(1) is granted to Member States alone and once applied, it is binding on all the taxable persons concerned. The scheme should therefore not be optional for dealers to apply.

(*ii*) Carrying forward losses without limitation

While Estonia had explained that the IT systems would notify the tax authority when losses are carried forward for too long, it is not clear how this would work and when actually the relevant alert would be triggered. A procedure whereby negative margins can be carried over indefinitely is fundamentally incompatible with the nature of taxation of second-hand goods, which is supposed to be effected on a transaction-by-transaction basis. Therefore, the only possible way of proceeding is to set time limits beyond which offsetting is no longer possible.

(iii) Safeguard measures

Article 318(3) of the VAT Directive requires Member States to take the measures necessary to ensure that taxable dealers do not enjoy unjustified advantage or sustain unjustified harm as a result of an application of the global margin. Under the Estonian measures in question, domestic tax authorities would however enjoy a large scope of discretion. The fact that the tax authorities will assess on each occasion the justification for the request to apply the global margin scheme and taxable dealers are required to keep detailed records of the acquisition and supply of the goods is not considered sufficient as a safeguard, especially since the scope of the Estonian scheme has not been clearly delimited.

Further to the comments submitted after the Working paper had been finalised, the Chair invited the Estonian delegation to clarify the matters raised.

The Estonian delegation thanked the Commission services and further to the clarifications already submitted indicated that: *(i)* with regard to the scope, the foreseen draft legal provision had been changed to explicitly provide that the simplification is available only in cases where it is difficult to tax the margin on a transaction-by-transaction basis; *(ii)* with regard to safeguards, the new wording ensures that the scheme would apply only in cases where it is difficult to tax the margin on a transaction-by-transaction basis and not be allowed for other transactions; the tax authorities will assess each request to apply the global margin scheme, taking into account the specific situation of the requesting taxable dealer who would be required to keep detailed records of goods acquired and supplied and thus not enjoy unjustified advantage or sustain unjustified harm; *(iii)* the possibility to carry forward the negative margin would not be restricted to a particular tax period which is seen as compliant with the VAT Directive and should not cause problems whereas setting a limitation of carrying forward losses to the next tax period would.

The Commission services asked whether the scheme would remain optional for taxpayers to apply. The Estonian delegation replied in the affirmative and added that prior to granting permission to apply the global margin scheme, the tax authorities would assess the justification for each request submitted.

As no other delegation asked for the floor, the Chair thanked the Estonian delegation, and concluded that the VAT Committee took formal note of the Estonian consultation.

Before moving to the next point on the agenda, the Chair reminded that any extension in time of the consultations made (notably those dealing with VAT rates) would require under the VAT Directive a new consultation of the VAT Committee.

4. QUESTIONS CONCERNING THE APPLICATION OF EU VAT PROVISIONS

4.1 Origin: Commission
References: Articles 38 and 39 of the VAT Directive
Subject: Place of supply of liquefied natural gas
(Document taxud.c.1(2021)6440310 – Working paper No 1023)

The Commission services presented their Working paper on the place of supply rules applicable to supplies of natural gas when transported in liquid form (liquefied natural gas or LNG). The issue was raised as apparently Member States are applying different rules to these supplies. The VAT Directive in Articles 38 and 39 provides for special rules to determine the place of supply of gas and electricity. For these special rules to apply, the supply must take place through a natural gas system in the territory of the Community or any network connected to such a system. If that is not the case, then the place of supply is determined according to the general rules. The relevant question is whether LNG is supplied through a natural gas system. The reason for the special rules is that, in the case of a natural gas network, it is almost impossible to trace physical flows where gas originating from different locations intermingles to be distributed to end users. Therefore, the practical application of the general rule would entail severe difficulties.

In their presentation, the Commission services reminded that such difficulties are not present when the gas is liquefied and supplied via traditional means of transport such as a lorry, train or vessel as it is the case for the LNG. In such cases, there is no particular difficulty to follow the physical flow of gas being transported as is the case with other goods. These traditional means of transport cannot be considered a natural gas system or a network connected to such a system and therefore the special rules cannot be applied to the LNG supplied using a traditional means of transport. Such supplies are then governed by the general place of supply rules for goods with transport. That is also the reasoning set out in the Explanatory memorandum to the proposal since adopted as Council Directive 2003/92/EC.

In conclusion, the Commission services stressed that the general rules should apply to the supply of liquefied natural gas when transported in liquid form through traditional means of transport (such as a lorry, train or vessel). Only once the LNG goes through the regasification process, is converted back into a gaseous form and fed into the national gas pipeline system, the difficulties to physically trace the location reappear and the special rules laid down in Articles 38 and 39 of the VAT Directive will apply to determine the place of supply of the natural gas in its gaseous form.

The Chair opened the floor.

In the ensuing discussions, several delegations taking the floor agreed with the Commission services' analysis. One of these in principle agreed on the basis of a literal reading of the provisions of the VAT Directive which would lead to the conclusion reached but also noted that a more flexible approach had been applied in the past based on individual decisions if the supplier was able to provide proper proof that the gas was transported by other means of transport to be introduced in a natural gas system afterwards, based on recital 3 of Directive 2009/162/EC which introduced the special place of supply rules.

One delegation did not agree with the analysis and instead noted that Article 38 of the VAT Directive should apply. In the absence of a definition of the concept of "natural gas system" in the VAT Directive, it found that reference should be made to Article 2 of Directive 2009/73/EC concerning common rules for an internal natural gas market which provides for a broad concept of network. This delegation took the view that an amendment to the VAT Directive would be necessary in order to exclude LNG supplies from the special rules.

The Chair thanked delegations for their contributions which will be taken into account, and concluded that, in light of the broad consensus, his services would prepare draft guidelines on the place of supply of liquefied natural gas.

4.2	Origin:	Slovakia
	References:	Articles 19 and 29 of the VAT Directive
	Subject:	Transfer of all business assets by a taxable person when those assets are acquired by that taxable person shortly before the transfer takes place
	(Document taxud.c.1(2021)6386422 – Working paper No 1022)	

The Commission services presented the Working paper dealing with a question raised by Slovakia on whether Articles 19 and 29 of the VAT Directive would be applicable to a transfer of all business assets by a taxable person when those assets are acquired by that taxable person shortly before the transfer takes place. If so, this would imply that the transfer is not taxed since no supply of goods or services would be considered having taken place.

In their presentation, the Commission services reminded that the VAT Committee is not the appropriate forum to decide on concrete cases. However, the question was an opportunity to look into the general issues raised by the case at hand and provide some general guidance at EU level for a harmonised interpretation of the VAT Directive. The situation in this case could be described as consisting of two successive transfers of a piece of building land and certain intangible assets (an urban study and other assets such as licences and permits linked to the land). The first transfer is carried out by company A which sells the building land and the intangible assets to a related company B which had no other assets before that transfer. This first transfer is taxed and does not seem to be disputed. The same day company B sells the land, together with the intangible assets, to an unrelated party, company C which wants to perform an economic activity (such as erecting residential buildings on the purchased land) leaving B with no assets. Being related to B, company A was fully aware of B's intention to make this subsequent transfer.

The question is whether the second transfer from company B to company C could be seen as covered by Articles 19 and 29 of the VAT Directive, since B transmits the totality of its assets, so that no supply of goods or services could be considered having taken place or if the transfer should instead be qualified as a taxed transaction. In the opinion of the Commission services, based on the legal analysis performed, *(i)* first, it should be determined whether the chain of transactions at stake constitutes an abusive practice, given that the interposition of company B (having no assets other than those acquired from company A and acting solely as a shell company) could be qualified as artificial and company A being aware of the intention to immediately transfer these assets the essential aim of which is to create a tax advantage, contrary to the purpose of the rules in the VAT Directive, thus meeting with the principles laid down by the CJEU, for example, in the case C-255/02 *Halifax*. If so, transactions should be redefined disregarding the existence of B and thus there would be only one transaction: the sale of the assets from A to C which would be taxed; *(ii)* should there be no abusive practice, for example if there is no evidence of a tax advantage deriving from the interposition of B, then the question of whether Articles 19 and 29 of the VAT Directive are applicable to a sale of assets such as that from B to C should be analysed.

The Commission services pointed out that, in principle, the fact that the transfer from A to B is taxed does not necessarily mean that also the transfer from B to C should be taxed, although in this particular situation this could be the case. As stated by the CJEU in the case C-497/01 *Zita Modes*, for the purpose of Articles 19 and 29, "*the concept of a transfer (…) of a totality of assets or part thereof must be interpreted as meaning that it covers the transfer of a business or an independent part of an undertaking including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of products*". In their opinion, the transfer at stake is not a transfer of a business or an independent part of an undertaking, capable of being carried on as an independent economic activity, but rather a plot of land with other complementary assets that are closely linked to it having no value by themselves if sold without that land. Thus, the transaction between B and C would consist in the sale of a single item and Articles 19 and 29 should not be applicable. If, nevertheless, the sale of the building land and the related intangible assets were to be considered as a transfer of a business or an independent part of an undertaking, capable of being carried on as an independent economic activity, then the transfer from A to B could also be covered by Articles 19 and 29 of the VAT Directive (although in the case none of the parties claimed for that to be the case).

In conclusion, the Commission services stressed that first it should be determined whether a chain of transactions constitutes an abusive practice. If so, then only the transaction between A and C would be relevant. Second, if that is not the case, and no abusive practice is detected, then Articles 19 and 29 of the VAT Directive could apply between B and C but only in the case of a transfer of a business or an independent part of an undertaking, capable of being carried on as an independent economic activity. It was finally recalled that, if the transaction qualifies as a transfer of a totality of assets under Article 19 or 29 of the VAT Directive, the Member State concerned could take the measures necessary to prevent distortion of competition even if there is no abusive practice when the recipient (in the case at issue company C) is not wholly liable to tax.

Before opening the floor to all delegations, the Chair gave the floor to the Slovakian delegation.

The Slovakian delegation thanked the Commission services for the preparation of the Working paper and noted that while the VAT Committee is not competent to deal with specific cases such as the one at issue, the substance of the case could be better illustrated through a concrete case as an example of a larger group of similar cases that Slovakia is currently faced with. In that regard, the Slovakian delegation clarified that they seek to find a general solution on whether the sale of a single building block together with intangible assets of negligible price would qualify as a transfer of totality of assets or part thereof capable of carrying on an independent economic activity under Articles 19 and 29 of the VAT Directive. The CJEU judgments have provided limited answers to that but as the concept of transfer of a totality of assets or part thereof should be independent from the provisions of national law, provisions from national commercial laws should in their view not be taken into account. There is therefore a need for clarification on whether a transfer of these types of asset could be considered sufficient for the performance of an economic activity by the acquirer at the time of transfer, in particular in the context of CJEU judgments in cases such as C-268/83 *Rompelman* and C-249/17 *Ryanair* according to which the concept of economic activity has to be interpreted broadly including preparatory activities of the entrepreneur. The Slovakian delegation expressed its interest in having guideline on the issues raised.

The Chair thanked the Slovakian delegation and opened the floor to the other delegations.

One delegation thanked the Commission services for the analysis and expressed doubts on treating differently the first and the second transfer. It also noted that this chain of transactions with interposition of B could be motivated by legitimate business reasons, insofar as there is no fraudulent intent. In such a case, in the opinion of this delegation, both the transfer from A to B and that from B to C could be considered as a transfer of assets.

The Commission services agreed with this delegation and confirmed that the same assets were transmitted in two transactions so, in principle, the same logic should be applied to both transfers. In principle, if these assets can be seen as forming part of an undertaking in the transfer from B to C, the same should be the case in the transfer between A to B. If, instead, they were considered as single goods, the same logic should apply between A and B and between B and C.

The Chair thanked delegations for their contributions, and concluded that his services would reflect on whether to prepare draft guidelines.

4.3 Origin: Latvia
References: Articles 132(1)(b) and (c) of the VAT Directive
Subject: Dietary recommendations administered by a medical treatment institution within a medical treatment process
(Document taxud.c.1(2021)7270162 – Working paper No 1026)

The Commission services presented the Working paper on the scope of the medical care VAT exemption provided for under Article 132(1)(b) (and (c)) of the VAT Directive. This briefly summarised the case presented by Latvia, relating to dietary recommendations forming part of a short-term, non-invasive set of measures encompassing a detailed assessment of the body of a patient and a general view on the health of a patient, aimed at preserving or improving the health of that patient with regard to a healthy and balanced diet. Those are targeted to two groups: *(1)* people with diagnosed diseases (such as type one or two sugar diabetes, podagra, renal deficiency, anaemia, tumours and other diseases), and *(2)* practically healthy people (such as children, pregnant women, seniors, athletes and others). Latvia wonders whether the VAT exemption for medical care is applicable to these services.

In their presentation, the Commission services reminded that according to the wording of Article 132(1), medical sector transactions are exempt, firstly, if they concern "hospital and medical care" (point (b)) or "the provision of medical care" (point (c)) and, secondly, if they are provided "by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature" (point (b)) or by "medical and paramedical professions" (point (c)). According to settled case law of the CJEU, the exemptions in Article 132 are independent concepts of EU law and have to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, the interpretation must be consistent with the objectives pursued by those exemptions and not deprive the exemptions of their intended effect. Their objective is to reduce the cost of medical care and to make that care more accessible to individuals.

The CJEU has held that the term 'medical care' used in both points (b) and (c) is interchangeable and covers services that are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health. The determining factor on whether services should be exempt from VAT is thus their therapeutic purpose which must not necessarily be interpreted narrowly so services of a prophylactic nature can be considered to be medical care (even when the person is not necessarily suffering from any disease) but this is subject to strict criteria (which has seen plastic surgery excluded). In very recent case law (C-581/19, *Frenetikexito*), the CJEU held that a nutrition monitoring service provided in a sports facility, while potentially preventing, in the medium to long term or viewed very broadly, certain conditions, such as obesity, in principle does not have a therapeutic, but a health purpose only and therefore did not fall within the scope of medical care. What was missing was a sufficient concrete link between the treatment and a health condition that created a specific risk of health impairment.

In the opinion of the Commission services, services of dietary recommendations, when targeted at the second group of practically healthy people, cannot be seen as provided for therapeutic purposes since no sufficiently concrete link with a health condition that puts the patient health at risk can be found. Such services would therefore not be exempted under Article 132(1)(b) (or (c)) of the VAT Directive. When, instead, the dietary recommendations are targeted at the first group of people with diagnosed diseases, where improving the nutrition is directly linked to the prevention, diagnosis, treatment of a condition or restoration of health, the therapeutic purpose could exist and the services would fall under the scope of exemption for medical care.

In conclusion, the exemption of medical care only applies where there is a therapeutic purpose, meaning a purpose of prevention, diagnosis, treatment of a condition or restoration of health. Therefore, when services of dietary recommendations are provided by a medical practitioner of a medical treatment institution, they could fall within the scope of Article 132(1)(b) (or (c)) of the VAT Directive, if they form part of a patient's medical treatment and aim directly at the protection of the health of that patient. However, the Commission services stressed that whether or not the services in question have a therapeutic purpose, is to be assessed on a case-by-case basis by the national authorities.

Before opening the floor to all delegations, the Chair gave the floor to the Latvian delegation.

The Latvian delegation thanked the Commission services for their analysis and explained that Latvian health experts have approved a new medical technology (dietary recommendations) and asked for it to be included among the VAT exempted medical services. According to Latvian health experts, medical treatments do not include only disease prevention and patient care but also dietary recommendations that can help relieve patient symptoms and improve patient health. This is a medical technology which can be used for patients with various diseases and for practically healthy people.

The Latvian delegation agreed with the Commission services' conclusions and if there is a common understanding, it would highly appreciate guidelines on this issue to ensure a uniform application of the VAT provisions in question.

The Chair thanked Latvia and underlined that, although this may derive from health law in Latvia, the terms governing the VAT exemption are independent concepts of EU law. The Chair then opened the floor to the other delegations.

One delegation agreed with the Commission services that the therapeutic aim is crucial for a medical care service to be exempted, in line with past CJEU case law and also the VAT Committee guideline on plastic surgery. According to this delegation, dietary recommendations cannot be compared with nutrition monitoring services provided in a sports facility, not even with regard to patients included in group 2 (healthy people), as these recommendations are provided in the context of a medical treatment. If provided by medical practitioner of a medical treatment institution to patients within medical treatment process and directly aimed at prophylactic or therapeutic medical treatment, the two cumulative requirements for exempting dietary recommendations are met, also keeping in mind the guideline on the VAT treatment of ‘combined lifestyle intervention’ which had not been qualified as medical care, since it was not directly aimed at nor provided in the context of prophylactic or therapeutic treatment.

Another delegation thanked the Commission services for the analysis and agreed that in the absence of a medical treatment (e.g. when it is an autonomous choice of a patient) the exemption cannot be granted. However, the existence of a medical treatment cannot depend on whether the targeted patient is healthy. That delegation stressed the importance of preventive medicine: perfectly healthy people can be recommended to follow a diet in order to prevent future possible diseases, as in Latvia’s dietary programme, and noted that a case-by-case approach could imply a medical assessment to be made by the tax administration which would not be in line with Article 132(1)(b) and (c) of the VAT Directive.

Finally, a delegation, with the support of another, agreed with the Commission services’ analysis, and with the explanations provided by the other delegations, and wondered what the difference is between prevention (via dietary recommendations) targeting practically healthy people (falling within the scope of exemption) and services (dietary recommendations) targeting practically healthy people with no therapeutic purposes (falling outside the exemption). For practical reasons, the decisive element should be that this kind of services (dietary recommendations) are provided by medical practitioner within the exercise of her/his medical practice rather than leaving it for the national tax authorities to assess how the exemption applies on a case-by-case basis.

The Chair thanked delegations for their contributions, ensured that comments would be taken into account and concluded that his services would consider the preparation of draft guidelines on the VAT treatment of dietary recommendations.

4.4	Origin:	Commission
	References:	Article 11 of the VAT Directive
	Subject:	Interaction between the VAT Group, the new provisions on e-commerce and the OSS schemes
	(Document taxud.c.1(2021)7400501 – Working paper No 1027)	

The Commission services presented the Working paper aimed at clarifying the interaction between the VAT grouping rules (Article 11 of the VAT Directive) and the new provisions on e-commerce and the OSS schemes, going through its different sections.

With regard to Section 3.1, the Commission services recalled the effects of forming a VAT group, such as the VAT group assuming on behalf of its members all VAT rights and obligations, a single VAT number allocated to the VAT group and to be used by group members with third parties, and supplies by or to third parties deemed to be made to or received by the VAT group.

Regarding Section 3.2, the Commission services outlined the VAT group cross-border implications, not being restricted to Member States that have implemented VAT groups, nor limited to supplies with foreign branches of group members. The VAT Directive does not restrict the supplies the VAT group can make, so the VAT group can make any supply within and outside its Member State of establishment. Although a case-by-case analysis is always needed, if a group member owns (or is the tenant of) a warehouse in another Member State from which supplies are made, the warehouse is likely to be seen as a fixed establishment. Those supplies should thus be considered to be made by that fixed establishment and not by the VAT group. In the absence of a fixed establishment, the supplies would be regarded as made by the VAT group but when both the VAT group and the fixed establishment of a group member are involved, it might not be straightforward to identify who the supplier is. Interactions of a commercial nature between the VAT group and a foreign fixed establishment of a group member may constitute distinct taxable transactions between different taxable persons to which Article 192a of the VAT Directive could however not apply. The mere existence of a fixed establishment of a group member in a Member State thus does not automatically imply an involvement of that fixed establishment in the supply made by the VAT group.

Regarding Section 3.3, the Commission services explained how the OSS provisions should apply in the context of VAT grouping, recalling that guidance already exists pursuant to which, for example, a VAT group established in a Member State must be permitted to use the OSS/IOSS schemes in order to declare and pay VAT due in other Member States, and a VAT group cannot include in its OSS return supplies carried out by a fixed establishment of a group member located in another Member State. However, in light of questions received from businesses and Member States, some examples served to provide additional clarifications.

With regard to the first example, in which a VAT group carries out intra-Community distance sales from other Member States and distance sales of imported goods from third countries to various Member States, the Commission services noted that the VAT group should register, declare and pay VAT in each Member State where VAT is due (or in the alternative use the OSS and IOSS schemes to fulfil its VAT obligations) and that the Member State of identification of the VAT group in both the OSS and the IOSS can only be Member State where the group is established. In addition, since none of the VAT group members has any establishment located abroad, all of these supplies are regarded as made by the VAT group and, if eligible, they have to be declared in the OSS/IOSS return of the VAT group.

With regard to the second example, in which a company is member of a VAT Group in a Member State and has a fixed establishment in another Member State from which intra-Community distance sales of goods are made to various Member States, the Commission services noted that the supplies carried out from the fixed establishment cannot be regarded as made by the VAT group, but the fixed establishment can register and declare these sales in OSS scheme of its own Member State. However, if the company's head office is located in a third Member State, the head office should register for the OSS in that third Member State, including in the registration details of the fixed establishment with which it forms the same taxable person.

With regard to the third example, in which a company, member of a VAT group in Member State X, holds a stock of goods, which does not constitute a fixed establishment, in Member State Y from which intra-Community distance sales of goods are made, the Commission services noted that the supplies from the warehouse in Y from which the transport of goods begins should be regarded as supplies made by the VAT group and can thus be declared in the OSS return of the group.

With regard to the fourth example, in which a company makes intra-Community distance sales of goods from Member State X to Member State Y where it has a fixed establishment that belongs to a VAT group there, the Commission services noted that since the fixed establishment is part of a separate taxable person (the VAT group), the provisions set out in Article 192a of the VAT Directive cannot apply. The company should therefore register in Y to pay VAT on these supplies or alternatively use the OSS. However, it was pointed out that in a similar scenario without membership of a VAT group, the mere existence of a fixed establishment of the supplier in the Member State to which the goods are transported or dispatched would not of itself imply a transfer being made by the supplier to his fixed establishment subject to VAT.

Regarding Section 3.4, the Commission services stated that the concept of VAT group, set out in the VAT Directive, cannot apply to similar groups outside the EU based on provisions which are not EU law. As a consequence, non-EU VAT groups should not be treated as a single taxable person in the EU VAT system and therefore, for the purpose of the EU OSS and IOSS systems, members of a non-EU VAT group carrying out supplies taxable in the EU shall be treated as separate taxable persons (each member shall register, declare and pay VAT on its own respective supplies). The Commission services concluded by pointing out the importance of reaching common views on the treatment of non-EU VAT groups, especially for the purpose of the EU OSS and IOSS systems.

The Chair opened the floor inviting the delegations to focus on the practical consequences just described (and not on the principles already discussed) and stressing the importance of reaching a common understanding on how to treat non-EU VAT groups, notably after Brexit.

One delegation underlined that difficulties might stem from Annex 1 of the Commission Implementing Regulation No 194/2020, with regard to the identification details to be provided by taxable persons for availing themselves of one of the schemes: i) the information on the VAT group is required only if availing of the Union scheme and not in the case of the IOSS; ii) in Annex 1, box 6, if using the Union scheme, the place of business, namely the place of the head office, must be provided only if it is located outside the EU, while for the non-Union scheme and IOSS the place of business is always mandatory information. This delegation explained that if, for example, the head office is part of a VAT group in one Member State and the fixed establishment, which is a separate taxable person from the VAT group, is located in another, then the fixed establishment would be able to register in the Union scheme in its Member State if the information on the place of business being located in another Member State (which is not compulsory) is not provided. If that information was to be made compulsory, most probably the request for registration in the Union scheme of the fixed establishment would be subject to discussions. If, instead, the fixed establishment wanted to register in the IOSS, it would have to provide the information on the place of business (which is located in another Member State) and therefore its request would most probably be denied. Where the head office, part of VAT group, is located in a Member State and the fixed establishment in a third country, the fixed establishment would need to join the non-Union scheme to avoid multiple registrations. With no information required on the head office being member of

VAT group while information on the place of business being in a Member State must be provided, this would most probably cause issues. While this delegation therefore ultimately agreed with the Commission services' analysis, it could not, also based on the OSS functional specifications, see how Member States could perform this type of controls when receiving the registration request.

Another delegation fully supported the Working paper on *Danske Bank* (previous point of the agenda), and most points of the Working paper under discussion. This delegation, however, disagreed on the treatment of non-EU VAT groups since, given the strong similarities of VAT grouping systems in some non-EU countries, such as Norway, there would not be a need to distinguish between non-EU and EU VAT groups. This delegation however stated that, with a view to ensure uniform application of the OSS, it could agree to such a different treatment of non-EU VAT groups but with practical implications for the OSS only.

Another delegation in general agreed with the conclusions of the first example provided in the Working paper but disagreed that "*The VAT group should register for VAT, declare and pay VAT in each Member State where VAT is due* […]": the VAT group cannot opt for registration in each Member State where the VAT is due, since in territorial terms it is limited to the Member State where it is established and thus there might not be a legal basis for the proposed approach. The question is whether, instead of the VAT group, its members could register separately in the Member States where VAT is due. This delegation also agreed with the conclusions of the second example provided in the Working paper but wondered whether a head office, member of a VAT group located in Member State X, could be registered in the OSS in Member State X if it is already registered within the VAT group in the same Member State, since its fixed establishment located in Member State Y is dealing with EU cross-border distance selling. This delegation also wondered whether the fixed establishment could be registered in the OSS in Member State Y, via its head office or on its own, given that the ties with its head office are broken. The delegation finally expressed its interest for guidelines to be drafted on the interactions between VAT groups and OSS.

The Commission services, in reply to some remarks made, recalled that since the introduction of MOSS the scope of the scheme has been extended and interactions with third countries have grown. With regard to the remark made on VAT groups in Norway, it was pointed out that other countries could also ask to be treated similarly and that current similar schemes may diverge over time should third countries' legislations be amended. The Chair added that there would be problems of legal certainty, audit and control with regard to third countries' VAT group schemes.

According to the Commission services, VAT groups, as any other taxable person, can make cross-border supplies and should be able to register where the VAT is due. Other than inviting delegations to provide in writing comments for the assessment of possible different scenarios, the Commission services took note of the remarks made with regard to the OSS identification details. Amendments will be made accordingly once a way forward would be agreed.

A delegation appreciated the attempt to find a unified solution but disagreed to treat a fiscal unity, which is meant to be a national VAT scheme only, as taxable person in other countries. Provisions on VAT groups (for national VAT payments) and OSS (for foreign VAT payments) should not influence each other. The delegation also disagreed with the criteria laid down in the Working paper to qualify a warehouse as fixed establishment (case-law and provisions of the VAT Implementing Regulation should instead be used). According to this delegation, all persons, including fixed establishments, should be treated as separate persons for OSS.

Another delegation expressed its interest in a common solution on OSS and agreed with the conclusions on the third example as regards warehouses which are not fixed establishments as otherwise a high administrative burden for members of VAT group would arise. As regards fixed establishments, where a platform deemed to be the supplier has a branch in another Member State and facilitates the sales of the goods transported from the branch, the platform should register in OSS and declare all the supplies for which it is the deemed supplier and mention the data of the branch (as also from Annex 1 of the Commission Implementing Regulation). However, if the platform is member of a VAT group, the delegation wondered who should be attributed the deemed supply (the platform, most likely, or the branch) and which data should be provided in the OSS return. Similar problems would arise if the branch was member of VAT group in a Member State with a platform facilitating the supply in another Member State.

The Chair concluded that his services would: (1) consider the preparation of guidelines on non-EU VAT grouping, which is the most urgent issue, in view of reaching a unanimous agreement; (2) consider whether to provide additional guidance on the interaction of VAT groups with OSS, on the basis of written comments that delegations were invited to send; (3) assess the interaction with platforms on which written comments from delegations would be welcomed; (4) consider whether amendments in relation to OSS (Commission Implementing Regulation, specifications and guidance) would be needed.

A last delegation stated it could not accept non-EU VAT groups presenting themselves as such and wondered whether a common definition of non-EU VAT groups would be needed to identify them since Article 11 of the VAT Directive cannot apply to them.

The Chair underlined that it is indeed the absence of such a definition in EU law that prevents the recognition of non-EU VAT groups. The Commission services added that the real issue is not having a legal basis allowing to treat non-EU VAT groups as single taxable persons (Article 11 of the VAT Directive refers to “each Member State” and not “each country”).

5. CASE LAW – ISSUES ARISING FROM RECENT JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

5.1 Origin: Commission
References: Articles 2(1), 9 and 11 of the VAT Directive
Subject: Case C-812/19, Danske Bank, Principal establishment and branch of a company situated in two different Member States
(Document taxud.c.1(2021)7398791 – Working paper No 1025)

The Commission services presented the Working paper on the CJEU case C-812/19 *Danske Bank* on VAT grouping, with the principal establishment of a company as a member of a VAT group and a branch of that company situated in two different Member States. Its aim was to assess whether the guidelines on VAT grouping agreed at the 105th meeting of the VAT Committee, could still be seen as valid and to look at the wider implications of the ruling in *Danske Bank*.

In their presentation, the Commission services recalled that in *Skandia America* (C-7/13) the head office of a company located outside the EU supplied services to its branch which was member of a VAT group in a Member State. According to the CJEU, the foreign head office had, for VAT purposes, to be seen as having supplied those services to the VAT group. In *Danske Bank*, a company had its head office in Denmark and carried on its activity in Sweden through a branch. The head office was part of a Danish VAT group, which did not include the branch as this was established in Sweden. That branch was not part of any Swedish VAT group either. With its question to the CJEU, the referring court outlined two possible interpretations: *(i)* on the basis of *FCE Bank* ruling, the Swedish branch, which was not independent of the Danish head office and was not part of a VAT group in Sweden, could be seen as part of the same taxable person as that head office, even if the latter was a member of a Danish VAT group; *(ii)* on the basis of the *Skandia America* ruling, by joining the Danish VAT group in question, the Danish head office could be seen, for VAT purposes, as separated from the taxable person which that head office and the Swedish branch were, in principle, deemed to constitute as regards the transactions carried out between them. In response, the CJEU ruled that *Article 9(1) and Article 11 of the VAT Directive must be interpreted as meaning that, for VAT purposes, the principal establishment of a company, situated in a Member State and forming part of a VAT group formed on the basis of Article 11, and the branch of that company, established in another Member State, must be regarded as separate taxable persons where that principal establishment provides that branch with services and imputes the costs thereof to the branch.*

The Commission services referred to the relevant rule governing VAT grouping within the EU (Article 11 of the VAT Directive) and the Commission's 2009 VAT Grouping Communication, and also mentioned the evolution of the CJEU case law on VAT grouping (C-162/07 *Ampliscientifica*, C-7/13 *Skandia America,* C-812/19, *Danske Bank*). The ruling in *Skandia America* had been followed by discussions in the VAT Committee with guidelines agreed by a large majority as not all delegations found that the decision handed down could necessarily be said to apply in cases where both entities were located within the EU (the scenario dealt with in *Danske Bank*). Those guidelines addressed the territorial scope of VAT grouping (point 1), the consequences for an entity of joining a VAT group (point 2) and the impact this has on supplies involving that entity and the VAT group it has joined (points 3 and 4).

The Commission services, in going through the different points of the guidelines, explained the remarks prompted by the *Danske Bank* case:

- Regarding point 1, the *Danske Bank* ruling confirmed the territorial limitation of the rules on VAT group by looking at the very wording of Article 11 of the VAT Directive. In particular, as also concluded at the time of the *Skandia America* ruling, only entities physically present in a Member State should be able to join a VAT group in reflection of a narrow territorial scope, otherwise *de facto* cross-border VAT groups would be possible. It was precisely because of the territorial limitation contained in Article 11, in *Danske Bank* that the CJEU stated that the Swedish branch could not be regarded as forming part of the Danish VAT group and that the VAT group to which the head office belongs and the branch could not be regarded as forming a single taxable person. The position taken in point 1 of the guidelines was thus confirmed by the ruling.

- Regarding point 2, the *Danske Bank* ruling confirmed that the treatment of a VAT group as a single taxable person precludes group members from submitting VAT declarations separately and from being identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations. Therefore, any group member must act with third parties, and for the filing of recapitulative statements, under the VAT identification number attributed to the VAT group and the invoice relating to supplies to or from third parties made or received by the group members must mention the VAT identification number of the group.

- Regarding points 3 and 4, in *Danske Bank* it was recalled that, in order for supplies of services made between entities of the same legal person to be taxable (and fall within the scope of VAT), there must be a legal relationship between those entities (head office and the branch) pursuant to which reciprocal performance is made. The CJEU with its ruling confirmed that the two entities (the head office part of the VAT group and the branch) had to be regarded as separate taxable persons resulting in the services having been supplied by the VAT group (and not by the head office) to the branch. Thus, the Member State of the receiving entity cannot disregard the existence of a VAT group in the other Member State, with this further emphasising the importance of using only the VAT number of the VAT group, nor should it be possible for the Member State of the supplying entity to disregard its membership of a VAT group.

The Commission services concluded by saying that the CJEU in *Danske Bank* confirmed that, upon joining a VAT group, a group member dissolves itself from any possible, simultaneously existing legal form to become, for VAT purposes, part of a new separate taxable person, namely the VAT group. In doing so, it remains that VAT grouping provisions are given precedence over the legal ties between the entities. They added that, after confirmation of the status of a VAT group as a separate taxable person, there should be no doubt that also "branch to head office" or "branch to branch" transactions will be taxable, if either of the entities involved is a member of a VAT group. With the stance taken by the CJEU in *Danske Bank* on territoriality, it should also be clear that membership of a VAT group is restricted to establishments of companies physically present in the Member State applying the VAT grouping scheme. Therefore, according to the Commission services' opinion, an approach whereby a VAT group is seen to absorb the foreign head office or branch of its members would not be consistent with the findings of the CJEU.

The Chair opened the floor to the delegations. Several delegations took the floor.

One delegation thanked for the Commission services' analysis but expressed a reservation on it since not all the scenarios were covered, such as the one in which, according to the application of Article 11 of the VAT Directive by a Member State, a person established in that Member State, in its entirety, is considered part of a VAT group in that Member State. As the CJEU, both in *Skandia* and in *Danske Bank*, had only considered a case where the Member States involved only recognise the establishment of a person in that Member State as part of the VAT group, rather than the person in its entirety, it is in this context that its decisions are to be seen (limited to the specific facts assessed and questions asked). Before moving forward, this delegation suggested that the VAT Expert Group be consulted for an opinion on *Danske Bank*.

The Commission services, while expressing understanding of the fact that a Member State applying the provision on VAT grouping based on the approach of the unicity of a taxable person, might see the entire taxable person as group member, noted that this would presume that only a head office could be member of a VAT group, with this running counter the taxing rights of Member States where the branch is established. If Denmark would have considered both the head office and the branch part of the Danish VAT group, then Sweden would have been prevented from taxing the service received by the branch under reverse charge (if the branch in Sweden, being a financial operator, did not have right of deduction). This approach could lead to the establishment of *de facto* cross-border VAT groups.

That delegation, in response, added that, if treating a person in its entirety as part of a VAT group caused issues, use could be made of anti-avoidance rules to avoid that that person forms part of two VAT groups (head office part of one VAT group and the branch part of another).

A number of delegations expressed their support for the guidelines and so shared the view and general conclusions of the analysis undertaken. Some of those delegations found these guidelines to be sufficient and saw no need for additional guidelines.

Finally, a delegation, while agreeing, still had reservations in regard to cases where no service is rendered, such as cost sharing for own personnel within the same entity, also having in mind the mention made of the *FCE Bank* case. According to this delegation, not every cost charge between entities of the same legal company would necessarily lead to taxable transactions, in the absence of a service rendered. As confirmed by the CJEU in *Danske Bank*, fiscal unity has cross-border consequences despite being intended as national facility (e.g. using one VAT number for cross-border transactions while fiscal unity is only meant to be national).

The Commission services, in reply to some of the comments made, observed that if each Member State considers the issue from its side, there could be non correspondence (e.g. if Denmark applied the principle of unicity, with the branch in Sweden included in the Danish VAT group, while the Swedish branch joined a VAT group in Sweden). As to fiscal unity, the CJEU in *Danske Bank* mentioned the *FCE Bank* ruling since this applies until an entity becomes member of a VAT group. Article 11 of the VAT Directive puts in place a fiction the use of which has consequences, including on VAT number to be used, invoicing to be made and supplies otherwise falling outside the scope of VAT which become taxable.

The Chair thanked for the very useful discussion and concluded that his services would consider the preparation of revised guidelines on VAT grouping in view of reaching unanimous agreement.

5.2 Origin: Commission
References: Articles 2(1) and 135(1)(b)
Subject: CJEU Case C-235/18 Vega International: Fuel cards
(Document taxud.c.1(2021)7229659 – Working paper No 1020)

The Commission services presented the Working paper on the CJEU case C-235/18 *Vega International* on the VAT treatment of fuel cards. In this case, giving the business community cause for concern, triggering comments from two delegations (Denmark and Latvia) and having also been raised by the VAT Expert Group, the CJEU was faced with the question whether the provision of fuel cards by a parent company to its subsidiaries, enabling those subsidiaries to refuel the vehicles they transport, could be classified as: i) a service of granting credit, exempt from VAT on the basis of Article 135(1)(b) of the VAT Directive or ii) giving rise to a chain transaction comprising successive supplies of goods (fuel) as defined in Article 14(1) of the Directive. The CJEU ruled in favour of the latter interpretation: Vega International had to be seen as financing in advance the purchase of fuel acting in the same way as an ordinary financial institution (principle of equal treatment of taxable persons). This had consequences in terms of right of deduction and the pro rata of the provider (Vega International) and in terms of entitlement to refunds of the VAT charged on the fuel, denied if the taxpayers do not qualify as the actual recipients of that fuel.

In their Working paper, the Commission services considered the qualification of the different supplies at stake and the scope of the judgment. The qualification as a supply of a financial service was a logical consequence of the finding that there was no supply of goods to Vega International. However, if the right to dispose of the fuel as owner was instead actually transferred to the supplier of the fuel cards, it could have been concluded that the latter supplied goods (fuel) to the card users. In this regard, the Commission services provided elements considered useful to assess to whom the right to dispose of the fuel as owner was transferred, such as: *(i)* who takes the final decision as to the choice of the service station where the fuel can be supplied, *(ii)* who takes the decision as to the quality, quantity and type of fuel to be used, *(iii)* who decides as to the time of purchase, *(iv)* how to use the fuel.

The Commission services also considered the supply in the context of a purchase or sales commissioner contract, a model used in fuel supplies with cards, not assessed by the CJEU in its judgment, pursuant to which the supply of fuel cards would have been qualified as a supply of goods and finally considered the role of the voucher rules, although the facts of the case dated back to 2012 while the Voucher Directive only applied in Member States as of 2019 (to vouchers issued after 31 December 2019). If a fuel card meets the conditions to be qualified as single purpose voucher, then each transfer of the voucher would have to be regarded as a supply of the goods (fuel) to which the voucher relates, while the actual supply of goods at the time the card was to be returned could not be treated as a separate supply of goods. The Commission services concluded that, in order to qualify the supply at stake, it should be considered: *(i)* to whom the right to dispose of the fuel as owner was transferred and if transferred to the issuer or supplier of a fuel card, the latter might be considered as supplying goods (fuel); *(ii)* whether the fuel card constitutes a mere instrument to structure a fuel supply under a purchase or sales commissionaire contract in which a commissionaire acts in its own name but on behalf of a principal as what is received and delivered by the commissionaire, in principle, should qualify as the supply of goods (fuel); *(iii)* finally, whether a fuel card could be qualified as a single purpose voucher, whose supply should in any event be regarded as a supply of fuel to which the card relates.

The Chair opened the floor, giving precedence to the two delegations having brought the subject to the attention of the VAT Committee.

The Latvian delegation thanked for the analysis, seen as a step forward towards a correct interpretation of the ruling, underlining the impact that the VAT treatment of fuel cards has on businesses. With regard to the elements to be accounted for when assessing whether a transaction qualifies as supply of goods, the delegation asked whether they referred to the terms of the contract between the owner of a petrol station and the issuer of fuel cards (and not between the card issuer and the customer). If consistent with the fact pattern in CJEU case C-48/20 *P. (Cartes de carburant)*, then that would be acceptable for the delegation, but guidelines should specify as much as possible these elements. With regard to who takes the decision (on the choice of service station, the quality, quantity and type of fuel and the time of purchase), the delegation asked whether it should be taken by the owner of the petrol station (and not by the fuel card issuer) in order to qualify the supply as supply of goods. The delegation also failed to understand the last element of assessment "how to use the fuel" and asked for more clarification. With regard to the nature of fuel cards, the delegation pointed out that these are mostly multi-purpose vouchers (e.g. fuel cards which can be used in different Member States).

Also the Danish delegation thanked the Commission services and hoped for a solution which would ensure legal certainty and a level playing field. Reference was made in particular to cases of companies issuing fuel cards that can also be used in petrol stations belonging to sister companies in other countries and to cases of "virtual" petrol companies which use EU petrol companies as sub-suppliers. This delegation would support the drafting of guidelines and asked whether the relevant businesses involved had been consulted.

The Commission services recalled that account had been taken of the submissions received, the results of a meeting held with stakeholders and the VAT Expert Group paper. It was noted that according to stakeholders the business model used by Vega International was atypical and that, as a result of the judgment, there might be a need to redesign business models to avoid non-deductible input VAT. With regard to the Latvian remark, the Commission services clarified that the approach taken aimed at looking at the substance of the supply, while listing elements considered helpful to assess how the supply should be qualified but without indicating who should be the one taking the decision since many different configurations are possible. Any other conclusion could be possible only after further analysis.

A delegation thanked the Commission services for their analysis, especially on the purchase or sales commissionaire contract, and stated that any guidelines should consider a typical business model, not an atypical one. It was noted that according to business fuel cards do not have payment purposes and that if a chain transaction could be identified, the "2020 quick fixes" would provide the necessary legal certainty.

A delegation disagreed with fuel cards being qualified as vouchers. This delegation urged finding a consistent treatment between fuel cards and e-mobility cards (discussed during the 113th and 118th meetings of the VAT Committee resulting in unanimous guidelines), the latter being treated as a chain transaction, since they share a similar economic reality.

These were views shared by another delegation.

According to another delegation, the *Vega International* judgment might not provide the most practical solution. With regard to the suggested elements to assess the right to dispose as owner, this delegation did not see the decision as to "how to use the fuel" as a necessary element. It was also noted that fuel cards should not be qualified as a single purpose voucher.

A delegation expressed its general agreement, apart from the part dealing with vouchers.

Another delegation stated its agreement with the Commission services' analysis, and in particular found it important to determine whether the conclusions of the judgment *Vega International* apply to transactions concluded in circumstances which differ from the fact pattern of the case.

The Chair concluded that his services would report on the outcome of this discussion to the VAT Expert Group with a view to receive their input to the discussion. His services would also reflect further on the need to draft guidelines or return to the VAT Committee for further discussion.

With regard to the remarks made on vouchers, the Commission services took note that the nature of fuel cards is such that they are mostly multi-purpose vouchers and clarified that the analysis made would be relevant only in the case of them being single-purpose vouchers.

5.3 Origin: Commission
Subject: Case-law – Recent Judgments of the Court of Justice of the European Union
(Document taxud.c.1(2021)7398317 – Information paper)

The Commission services drew delegations' attention to the Information paper with the overview of judgments handed down since the cut-off date for the previous meeting's overview paper (28 rulings covering the period from 18 March 2021 up until 21 October 2021). They also reminded that requests for discussion of a case in a future meeting need to be accompanied by the interested delegation's own analysis of the matter on the basis of which the Commission services will establish a Working paper.

No delegation asked for the floor and the Chair concluded the discussion.

6. ANY OTHER BUSINESS

6.1 Origin: Commission
Subject: Informing the VAT Committee of options exercised under Articles 80, 167a, 199 and 199a of Directive 2006/112/EC
(Document taxud.c.1(2021)7397945 – Information paper)

The Chair briefly drew delegations' attention to the Information paper regarding recently notified options exercised under Article 199a of the VAT Directive, thanked the delegation concerned and invited all delegations to notify in due time whenever necessary.

Conclusion

The Chair closed the meeting by thanking the delegations for their participation in the discussions. The Chair announced that the 120th meeting would probably take place end of March 2022 but that it was not possible at that point of time to say whether or not that would be a physical meeting, so no booking arrangements should be made beforehand.

ANNEX

LIST OF PARTICIPANTS

BELGIQUE/BELGIË/BELGIUM	Ministry of Finance Federal Public Service Finance
БЪЛГАРИЯ/BULGARIA	Ministry of Finance National Revenue Agency
ČESKO/CZECHIA	Permanent Representation Ministry of Finance
DANMARK/DENMARK	Ministry of Taxation Tax Agency
DEUTSCHLAND/GERMANY	Federal Ministry of Finance Länder Representative
EESTI/ESTONIA	Ministry of Finance
ÉIRE/IRELAND	Revenue Commissioners
ΕΛΛΆΔΑ/GREECE	Independent Authority for Public Revenues
ESPAÑA/SPAIN	Ministry of Finance Permanent Representation
FRANCE	Ministry of Finance
HRVATSKA/CROATIA	Tax Administration Permanent Representation
ITALIA/ITALY	Ministry of Economy and Finance Revenue Agency
ΚΥΠΡΟΣ/CYPRUS	Ministry of Finance
LATVIJA/LATVIA	Ministry of Finance State Revenue Service
LIETUVA/LITHUANIA	Ministry of Finance Tax Administration
LUXEMBOURG	Administration de l'enregistrement, des domaines et de la TVA
MAGYARORSZÁG/HUNGARY	Ministry of Finance

MALTA	Ministry of Finance and Employment
NEDERLAND/NETHERLANDS	Ministry of Finance
ÖSTERREICH/AUSTRIA	Federal Ministry of Finance
POLSKA/POLAND	Ministry of Finance
PORTUGAL	Ministry of Finance VAT department
ROMÂNIA/ROMANIA	Ministry of Finance
SLOVENIJA/SLOVENIA	Ministry of Finance
SLOVENSKO/SLOVAKIA	Ministry of Finance
SUOMI/FINLAND	Ministry of Finance Tax Administration
SVERIGE/SWEDEN	Ministry of Finance Tax Authority

EUROPEAN COMMISSION