EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax Administration
Value Added Tax Policy

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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 1107

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Italy**
REFERENCES:	**Articles 73 and 80**
SUBJECT:	**Taxable amount in the case of barter transactions**

1. INTRODUCTION

Italy wishes to consult the VAT Committee regarding the determination of the taxable amount in respect of supplies of goods or services made in return for other supplies of goods or services, that is where the consideration for a supply is not expressed in monetary terms but is rather in kind ('barter transactions').

The text of the questions and the explanation by Italy is annexed to this document.

2. SUBJECT MATTER

2.1. EU VAT law

Regarding the open market value, Article 72 of the VAT Directive[1] provides that:

'For the purposes of this Directive, "open market value" shall mean the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax.

Where no comparable supply of goods or services can be ascertained, "open market value" shall mean the following:

(1) in respect of goods, an amount that is not less than 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 of supply;

(2) in respect of services, an amount that is not less than the full cost to the taxable person of providing the service.'

As regards the general rule on the determination of the taxable amount for VAT, Article 73 of the VAT Directive lays down the principle that:

'In respect of the supply of goods or services, … the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

By way of exception to the above general rule, Article 80 of the VAT Directive provides that:

'1. In order to prevent tax evasion or avoidance, Member States may in any of the following cases take measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is to be the open market value:

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

(a) where the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction …;

(b) where the consideration is lower than the open market value and the supplier does not have a full right of deduction … and the supply is subject to an exemption under ..;

(c) where the consideration is higher than the open market value and the supplier does not have a full right of deduction ….

For the purposes of the first subparagraph, legal ties may include the relationship between an employer and employee or the employee's family, or any other closely connected persons.

2. Where Member States exercise the option provided for in paragraph 1, they may restrict the categories of suppliers or recipients to whom the measures shall apply.'

2.2. Issues raised by Italy

According to Italy, a particular legal tie arises between the parties of barter transactions compared to that arising from a contract with a monetary consideration so that, in practice, barter transactions generally concern cases where the contracting parties are connected to each other. By reason of the ties established between the parties, Italy is of the view that barter transactions may be a vehicle for tax evasion or avoidance when it comes to *(i)* self-produced (luxurious) goods whose value is considerably higher than the cost of the production factors used, or *(ii)* intellectual work services whose value may be lower or higher than the non-monetary consideration, which could be an indication of an additional hidden consideration.

Hence, Italy takes the view that this should be reflected in the determination of the taxable amount by applying Article 80 of the VAT Directive where the conditions listed under points (a) to (c) therein are fulfilled. Where it is not legally possible to resort to the open market value as defined in the first paragraph of Article 72, Italy points to the criteria under the second paragraph of Article 72, namely, in respect of goods, *'an amount that is not less than 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 of supply*' and in respect of services, *'an amount that is not less than the full cost to the taxable person of providing the service'*, which are used in the case-law by the Court of Justice of the European Union (CJEU) when it considers that the use of the open market value is not legally possible.

Italy refers to difficulties related to the way general costs, such as rent of premises, personnel, current expenses, financing costs, etc. are to be taken into account when use is made of the full cost criteria for determining the taxable amount in respect of self-produced goods and intellectual work services.

Regarding self-produced goods, Italy argues that production may not involve any or only a partial externalisation of costs as the supplier produces the goods exclusively by their own means. In such a case and in the absence of monetary consideration, Italy considers it useful to adopt indices to calculate the VAT taxable base or to resort to a comparison with the consideration generally applied on the market and/or compare the goods at issue with other goods with similar characteristics.

With regard to intellectual work services, Italy explains that laws or regulations often set parameters or tariffs for determining a fee deemed appropriate for the service which may be either binding or indicative. As Italy explains, the deviation from such parameters or tariffs is often regarded as an anomaly that would be considered relevant also for VAT purposes. Hence, in the presence of a significant deviation of the contractually agreed consideration in relation to intellectual work services provided within the scope of a barter transaction (or as compared to the cost incurred in carrying it out) and the value attributable to the same service based on the scale of charges laid down by a professional association of reference, Italy takes the view that the latter value may be subject to VAT. Finally, Italy raises the possibility that in the absence of such pre-established reference parameters or tariffs for a specific activity, it could be useful to use indices, i.e. timing and complexity of service, for determining the cost of the service.

2.3. Questions asked by Italy

Italy asks whether a Member State may equate barter, by reason of the consideration in the form of a supply of goods or services, with a legal tie pursuant to Article 80 of the VAT Directive, thus allowing the open market value to be used for levying the VAT on such transactions where the conditions in Article 80 are fulfilled.

By its second question, Italy asks which criteria may be used to determine the taxable amount in cases where it not possible to resort to the open market value and the cost criterion either does not adequately represent the value of the goods and services subject to the barter or is not immediately applicable as in the case of self-produced goods or intellectual work services. In addition, in these cases, Italy enquires about the possibility to use indices or parameters for calculating the incidence of general costs when determining the taxable amount where the cost of the self-produced good or the intellectual work services deviates significantly from their value as indicated on price lists or scale of charges.

3. COMMISSION SERVICES' OPINION

When a supply of goods or services is made in return for another supply of goods or services, the VAT due on the transaction is to be calculated on the basis of the monetary value of the goods or services supplied in consideration for that transaction, based on the general rule for determining the taxable amount laid down in Article 73 on the VAT Directive.

Indeed, it is settled case-law by the CJEU that barter contracts under which the consideration is by definition in kind, and transactions for which the consideration is in money are, economically and commercially speaking, two identical situations as regards the VAT Directive. Accordingly, the consideration for a supply of goods or services may consist of a supply of goods or services, and so constitute the taxable amount within the meaning of Article 73 of the VAT Directive. It is necessary, however that the supply of goods or services be carried out for consideration, that is to say, that there be a direct link between the goods or services traded and that the value of the goods or services provided in exchange may be expressed in monetary terms[2].

[2] CJEU, judgment of 8 May 2024, *Dyrektor Izby Administracji Skarbowej w Warszawie*, C-241/23, EU:C:2024:392, paragraphs 22 and 23 and the case-law cited.

Moreover, it is also settled case-law that the taxable amount for the supply of goods or services effected for consideration is represented by the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria. Where that value is not a sum of money agreed between the parties, it must, in order to be subjective, be the value which the recipient of the goods or services constituting the consideration for the supply attributes to the goods or services which he is seeking to obtain and must correspond to the amount which he is prepared to spend for that purpose[3].

As regards Article 80(1) of the VAT Directive, that provision explicitly permits Member States in certain specific cases, and in order to prevent tax evasion or avoidance, to take the open market value as the taxable amount in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State.

The Commission services consider that the existence of family or other close personal ties, management, ownership, membership, financial or legal ties, as referred to in Article 80(1) of the VAT Directive, between the parties to a barter transaction needs to be assessed on a case-by-case basis. Hence, such ties cannot be assumed to exist between the parties in all transactions for which the consideration is in kind, as suggested by Italy. That translates into deeming all parties to a barter transaction to be closely connected for which Article 80 of the VAT Directive provides no basis.

The application of the open market value under Article 80(1) presupposes that there is a risk of tax evasion or avoidance. Indeed, recital 26 of the VAT Directive clearly states that the possibility for Member States to intervene on the taxable amount of transactions between related parties is opened only 'in specific limited circumstances' to prevent loss of tax revenues through the use of connected parties to derive tax benefits.

These specific limited circumstances in which Member States may reassess transactions between related persons relate to situations where the consideration is lower than the open market value and either the recipient of the supply or the supplier does not have a full right of deduction or in situations where the consideration is higher than the open market value and the supplier does not have a full right of deduction.

In that regard, the CJEU has ruled that Article 80(1)(a), (b) and (c) comprise an exhaustive list of the circumstances in which a Member State may levy VAT on a transaction on the basis of its open market value rather than of the consideration actually paid. Consequently, Member States cannot on the basis of that provision provide that the taxable amount is to be the open market value of the transaction in cases other than those listed in that provision[4].

In the light of the above, the taxable amount of a barter transaction may be the open market value only where that barter transaction is actually effected between parties connected to each other within the meaning of Article 80(1) and where the consideration is lower than the open market value and either the recipient of the supply or the supplier does not have a full right of deduction or where the consideration is higher than the open market value and the supplier does not have a full right of deduction.

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3 *Dyrektor Izby Administracji Skarbowej w Warszawie*, paragraphs 27 and 28 and the case-law cited.

4 CJEU, judgment of 26 April 2012, *Balkan and Sea Properties and Provadinvest*, joined Cases C-621/10 and C-129/11, EU:C:2012:248, paragraphs 51 and 52.

In that case, according to Article 72, first paragraph of the VAT Directive the 'open market value' is the full amount that a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax. Only where the case-by-case analysis reveals that there is no comparable supply of goods or services, Article 72, second paragraph of the VAT Directive allows that the 'open market value' be an amount not less than 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 of supply, or the full cost to the taxable person of providing the service.

Alternatively, when a taxed transaction is effected in exchange for goods or services, the taxable amount corresponds to the monetary value of the goods or services supplied in consideration for that transaction. As the CJEU has held in its case-law, the taxable amount for taxed transactions in kind is the total costs of the goods or services supplied[5]. In *Bertelsmann*, the CJEU held that in accordance with the principle set out in *Empire Stores*, all the expenses borne by the recipient to obtain the supply in question, including the costs of incidental services (delivery costs in that case), connected with the supply of the goods must be included in the taxable amount.

Whilst determining the total costs involves a detailed examination of the various cost components to be taken into account, such assessment should not be impossible for the taxable person, in view also of the fact that a similar assessment of the cost price is equally required under Articles 74, 75 and 76 of the VAT Directive.

Pursuant to Article 74 of the VAT Directive, where a taxable person applies or disposes of goods forming part of his or her business assets, or where goods are retained by a taxable person, or by his or her successors, when his or her taxable economic activity ceases, as referred to in Articles 16 and 18 of that directive, the taxable amount is to be 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 application, disposal or retention takes place.

In this regard, the CJEU has ruled that the cost price within the meaning of Article 74 should be as close as possible to the purchase price and include, consequently, both direct production and manufacturing costs and indirect costs such as financing costs, whether or not those costs have been subject to input VAT[6].

4. DELEGATIONS' OPINION

Delegations are asked to express their opinion on the Commission services' opinion.

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[5] CJEU, judgments of 2 June 1993, *Empire Stores*, C-33/93, EU:C:1994:225, paragraph 19; and of 3 July 2001, *Bertelsmann*, C-380/99, EU:C:2001:372, paragraphs 24 and 25.

[6] CJEU, judgment of 25 April 2024, *Finanzamt X*, C-207/23, EU:C:2024:352, paragraph 58.

ANNEX

Question from Italy

VAT Committee – proposed question on how to determine the taxable amount in the case of barter contracts

Italy has doubts as to how to determine the taxable amount in the case of considerations (supplies) in kind.

According to settled case-law of the Court of Justice of the European Union, in fact, barter contracts, where consideration is by definition in kind, and transactions where consideration is in money are, from an economic and commercial point of view, two identical situations under the VAT Directive[1]; therefore, the consideration for the supply of goods or services may consist in a supply of goods or services and constitute the taxable amount thereof within the meaning of Article 73 of that Directive (in that sense, see judgment of the Court of 26 September 2013, *Serebryannay vek EOOD*, Case C-283/12, paragraph 39, upheld by judgment of 10 January 2019, A Oy, Case C-410/17, paragraphs 35 and 36 and more recently by judgment of 8 May 2024, *P. sp. z o.o.*, Case C-241/23, paragraph 22).

According to Article 73 of the VAT Directive, *'in respect of the supply of goods or services, (…) the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply'*.

The VAT Directive makes no express provision for determining of the taxable amount in the case of considerations (supplies) in kind, although it is common ground that such cases also fall within the scope of the tax.

By judgment of 19 December 2012, in preliminary ruling Case C-549/11, *Orfey Balgaria EOOD*, the Court ruled that *'in circumstances such as those of the main proceedings, where the transaction is not completed between parties having ties within the meaning of Article 80 of Directive 2006/112, which it is for the national court to verify, Articles 73 and 80 of that directive must be interpreted as precluding a national provision, such as that at issue in the main proceedings, under which, when the consideration for a transaction is made up entirely of goods or services, the taxable amount of the transaction is the open market value of the goods or services supplied'*.

[1] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

Article 80 of the VAT Directive allows Member States, in order to prevent tax avoidance or evasion, to take measures to ensure that the taxable amount is to be the open market value[2] in cases where the supply of goods or services takes place between parties involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, where the following conditions are met:

a) where the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177;

b) where the consideration is lower than the open market value and the supplier does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177 and the supply is subject to an exemption under Articles 132, 135, 136, 371, 375, 376, 377, 378(2), 379(2) or Articles 380 to 390c;

c) where the consideration is higher than the open market value and the supplier does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177.

While Member States benefit from a certain degree of discretion with regard to the identification and definition of the links between the parties considering the need to prevent tax avoidance or evasion, with regard to the conditions under which recourse to normal value can be envisaged, the conditions listed in points (a), (b) and (c) must be considered exhaustive, as expressly stated by the Court in its judgment of 26 April 2012, in Joined Cases C-621/10 and C-129/11, *Balkan and Sea Properties ADSITs* and *Provadinvest OOD*.

It should be noted at the outset that in the case of barter transactions, in view of the reciprocal supplies of services, a particular legal tie arises between the parties if compared to that arising from a contract with a monetary consideration. In practical operation, it is found, in fact, that the hypotheses of barter transactions generally concern cases in which there are ongoing, previous or personal relationships between the contracting parties.

Reference is made, by way of example, to the rental agreement, with regard to which the reduction of rent has been qualified as a barter transaction, in exchange for work carried out by the tenant on the leased property.

Moreover, it is noted that the VAT treatment provided for barter transactions is applied to the hypothesis of transfer in lieu of payment - in the form of transfers of goods or services - which represents an event extinguishing an obligation previously assumed between the parties.

It emerges, therefore, that the barter transactions that have as their object the supply of goods or services of a non-fungible nature often presuppose a personal choice underlying the contractual relationship, an expression of the so-called *intuitus personae*.

[2] The open market value is defined in Article 72 of the VAT Directive as 'the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax'.
In cases where no comparable supply of goods or services can be ascertained, 'open market value' shall mean the following:
1) in respect of goods, an amount that is not less than 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 of supply;
2) in respect of services, an amount that is not less than the full cost to the taxable person of providing the service.

In the cases described above, the barter transaction, by reason of the ties established between the parties, may be a vehicle for fraudulent behaviour[3], a circumstance that should be emphasised in the determination of the taxable base, by applying Article 80 of the VAT Directive[4], in cases where the conditions listed above from (a) to (c) are met.

In the event that, for factual reasons, it is not possible to resort to the open market value criterion set out in the first paragraph of Article 72, the second paragraph of the same Article identifies residual criteria, namely, in respect of goods, *'an amount that is not less than 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 of supply*' and in respect of services, *'an amount that is not less than the full cost to the taxable person of providing the service'*. In practice, these criteria are also used in the case law of the CJEU when it considers that the open market value criterion is not legally admissible.

However, these criteria encounter some difficulties of application, especially in the case of self-produced goods or the provisions of intellectual work services.

A first aspect, which affects both cases, concerns the difficulty of taking into account general cost items (rent of premises, personnel, current expenses, financing costs[5]).

With regard to the supply of self-produced goods, production may not involve any or only a partial externalisation of costs, since the supplier has produced the goods exclusively by his own means.

In these cases, in the absence of monetary consideration, it would be useful to adopt indices to calculate the VAT taxable base or to resort to a comparison with the consideration generally applied on the market and/or compare the service in question with sample services that have similar characteristics.

With regard to the provision of intellectual work services, laws or regulations (including those established by trade associations) often set parameters or tariffs for determining a fee deemed appropriate for the service, which may be either binding or indicative. In any case, the

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[3] Consider, for example, a luxury good or a provision of intellectual work services, the value of which is considerably higher than the cost of production factors used.

[4] The risk of tax evasion and avoidance is particularly evident, for instance, in cases of supply of self-produced goods (consider, for example, a luxury good, the value of which is considerably higher than the cost of production factors used) or provision of intellectual work services with a value that is evidently lower or higher than non-monetary consideration, which could be indicative of an additional hidden consideration.

[5] According to the case law of the Court of Justice of the European Union, *'Article 74 of Directive 2006/112 | must be interpreted as meaning that the cost price, within the meaning of that provision, includes not only direct manufacturing or production costs but also indirectly attributable costs, such as financing costs, whether or not those costs have been subject to input value added tax'* (see ECJ, Section VI, judgment of 25 April 2024, Case C-207/2023, *Finanzamt X vs Y KG*).
Indeed, according to the Court (paragraphs 56-58), *'(…) it is in no way apparent from the wording of Article 74 of the VAT Directive that the cost price should be based solely on the direct manufacturing or production costs or on the costs which have been subject to input VAT.*
57 Furthermore, Article 79 of the VAT Directive, which lists the items not to be included in the taxable amount, does not refer to indirect costs such as financing expenses.
58 Lastly, in so far as, as is apparent from the case-law cited in paragraph 51 above, it is only in the absence of a purchase price for the goods or similar goods that the taxable amount is the cost price, it must be held that that cost price should be as close as possible to the purchase price and include, consequently, both direct production and manufacturing costs and indirect costs such as financing costs, whether or not those costs have been subject to input VAT'.

deviation from the above parameters or tariffs is often regarded as an anomaly. In these cases, such anomaly would be considered relevant also for VAT purposes. Accordingly, in the presence of a significant deviation between the contractually agreed consideration in relation to a provision of intellectual work services rendered within the scope of a barter transaction (or between the cost incurred in carrying it out) and the value attributable to the same service based on the scale of charges laid down by the professional association of reference, it could be envisaged that the latter value may be subject to VAT.

If there are no such pre-established reference parameters or tariffs for the specific activity, it could be useful to use indices (*eg* timing and complexity of service) for determining the cost of the service.

Question:

The VAT Committee is asked whether it sees any contraindications to the fact that a Member State equates barter, by reason of the considerations (in the form of supply of services) involved, with a legal tie pursuant to Article 80 of the VAT Directive, thus allowing the open market value criterion to be used where the conditions indicated therein are met.

Moreover, it is also asked what criteria may be used in cases where it not possible to resort to the normal value criterion to determine the taxable amount and the cost criterion either does not adequately represent the value of the goods and services being the object of the barter or is not immediately applicable, such as in the case of self-produced goods or provision of intellectual work services. In these cases, is it acceptable to use indices or parameters also for determining the incidence of general costs? In the presence of a significant deviation between the cost of the self-produced good or the provision of intellectual work services and their value as indicated on price lists or scale of charges, do you agree with the possibility of referring to the latter for the determination of the taxable amount?

We thank the Commission Services to be able to address the question at the next VAT Committee.