



VAT on public sector activities

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23 November 2017**



Specific set of VAT rules

- Exceptions
 - List of taxable operations (Annex I of the VAT Directive)
 - Out of the VAT scope operations but taxable in case of « *distortion of competition* 'of a certain importance' » (Art. 13(1)al.2 VAT Directive)
 - List of VAT exempt operations (art. 132 to 137 of the VAT Directive)
 - Member States may opt to consider VAT exempt operations as out of the scope (art. 13(2) of the VAT Directive)
- General rule for public bodies
 - out of the VAT scope (art. 13(1) of the VAT Directive)
 - No right of deduction of input VAT

Economic studies

- Copenhagen Economics and KPMG « *VAT in the public sector and exemptions in the public interest* » [2011 and 2013]
 - Abolition of VAT exemptions (in sectors other than immovable property and financial services) would allow
 - a reduction of 10 % of all the VAT Rates
 - an increase of 0,34 of the GDP
 - Consequence: reduction of the public employment from 0,58 to 1.14 %
 - Why ?
 - Reduced incentive of public entities to outsource support services/ back office services
 - Competitive advantage of not charging VAT

Public consultation by the European Commission

- Public consultation (October 2013 – April 2014) and summary by the European Commission (18 December 2014)
- Key message of the ***Council of European Municipalities and Regions*** (representing 150 000 local and regional Authorities in Europe)
 - Current VAT rules are in general working quite well
 - Diversity of the tax regimes reflects the diversity of the EU Member States
 - *National VAT arrangements are beneficial and working well*
 - Further clarification concerning the criteria of the distortion of competition is necessary
 - Abolition of VAT exemptions is not necessary
 - We oppose to a full taxation model
 - « *we would like to remind the European Commission that the initial objectives of this VAT reform have been the prevention of fiscal fraud and tax evasion* »

Taxable persons v. public bodies

- Taxable person shall mean any person who, independently carries out in any place any economic activity, whatever the purpose or result of that activity (art 9(1) of the VAT Directive)
- States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even when they collect dues, fees, contributions or payments in connection with those activities or transactions (art. 13(1) first alinea of the VAT Directive)

Public bodies ≠ exercise of public functions

Example of private bodies performing public functions

- **Dutch Notaries** (Case 235/85, *Commission v. the Netherlands*)
 - Not integrated in a public administration
- **Spanish private tax collectors** (Case C-202/90 *Ayuntamiento de Sevilla*)
- **Slovakian bailiffs** (see Case C-456/07, *Karol Mihal*)
 - No subordination and integration in public administration
 - Exercise of activity in its own name and under its own responsibility
 - Freedom to organize its activity
 - Collects himself his fee

Public v. Private bodies (1)

- **Toll bridge on the Tage I** (Case C-276/98, *Commission v. Portugal*)
 - It is not a « taxable person » because it owned by a public authority and
 - Acces to roads is not listed in annex I of the VAT Directive
- **Toll bridge on the Tage II** (Case C-462/05, *Commission v. Portugal*)
 - It is a « taxable person » it is owned by a consortium of Portugese, French and British companies

Public v. Private bodies (2)

- Health Services in the Azore Island
(Case C-174/14 , *Saadaçor*)
 - 100 % of the shares are owned by the Region
 - Has only client: the Region
 - Created by law
 - Governed by public law
 - Control by the public authorities

Activities of public bodies

« taxable » / « VAT exempt » / « Out of the VAT scope »

- Taxable operations (+ *Right of deduction* of input VAT)
 - Activities listed in Annex 1 of the VAT Directive (art. 13(2) of the VAT Directive)
 - Significant distortion of competition (art13(3) of the VAT Directive)
 - This criteria may be determined by Ministry of finance if allowed by national constitutionnal order (*Case C-446/98, Camara Municipal de Porto*)
 - Is not the purely theoretical possibility of a private operator entering the relevant market (*Case C-288/07 Isle of Wight*)
 - there is no real possibility of a private operator entering the market in question (*Case C-344/15 National Roads Authority*)
- VAT exempt (and *no right of deduction* of input VAT)
 - Activities listed in Art. 132 and in annex X,B of the VAT Directive
- Out of the VAT scope (and *no right of deduction* of input VAT)
 - Activities of Public bodies engaged as public authorities
 - Public bodies performing VAT exempt operations (eg. art. 132), only when a MS has expressly opted for this solution (France, Spain, ...)

Public bodies activities

VAT exempt v. Out of the scope

VAT exempt

- No VAT on output
- Investments: no deduction
 - Prorata, direct attribution, others
 - Possible revision of input VAT
- Self supply with own personnel: VAT
- Acquisition of services abroad: reverse charge

Out of the VAT scope

- No VAT on output
- Investments: no deduction
 - Direct attribution, others
 - No revision of input VAT
- Self supply with own personnel: no VAT
- Acquisition of services abroad: no reverse charge

Deduction of input VAT on the building of public swimming pools (1)

- City of Ypres
 - « Company » owned by the City and exclusively financed by the City, but not treated as « public authority »
 - Distribution of « benefits » by the company to the City = distribution of profits (!)
 - Company has a profit purpose and charges VAT on the entrance fee to the public swimming pool at a reduced VAT rate
 - Right of deduction of input VAT on the construction of the swimming pool
 - Tax department in charge of fraud: this is fraudulent
 - City: we have copied other structures authorized by the Tax Authorities

Deduction of input VAT on the building of public swimming pools (2)

- the Commune of Grez-Doiceau had builded a swimming pool and had rented it with VAT to a company created by the commune and exclusively funded by the Commune . VAT had been deducted on the construction of the building and the company had deductted input VAT on leasing of the swimming pool because it argued that it was a profit making organisation
- According to the Court appeal of Brussels (22 June 2017), the VAT is not deductible by the company because
 - this is a foundation closely linked to the Commune: it is exclusively funded by the Commune
 - Transfer of the benefits (ie. excedents) from the company to the Commune is justified by the close links between the company and the city Commune ie a reduction of the public subsidies

Deduction of VAT on the roads tolls for trucks (3)

- Walloon Region owned company (*deduction of input VAT on investments*)
 - Company owned by the Region has adopted a private law structure
 - e-road toll : VAT
 - Former system: Region paid toll to the public company for the account of the users (whatever their place of residence) and therefore the company could deduct input VAT
- Flanders (*no deduction of input VAT on investments*)
 - e-road toll : VAT exempt

Example of a planning structure

Rechtbank Arnhem, 29 may 2012

- The commune of Wageningen had erected a building for a value of 18.000.000 EUR
- The commune supplies the building to a school for 440.000 incl VAT and had deducted the input VAT
- According to the Tribunal of Arnhem,
 - there is a supply because the price is not negligible
 - but the commune cannot deduct the input VAT, because there is « abuse of right »

Tax Planning

- Indemnities / price
- Non taxation of directors fees as individuals
- Deferral payment of the input VAT (eg. Leasing)
- Situations of non taxation
- VAT grouping
- Costs sharing groups (IGP's)
 - Case C-407/07, *Stichting Centrale Begeleidsingsorgaan voor Intercollegiale Toetsing* (VAT exemption when services are rendered to only one member of the Cost sharing group)
- Taxable when turnover of out the VAT scope activities exceed 25 000 Eur (!)
- Place of supply of services

Public authorities and international services

- Customer is a public authority abroad
 - that performs taxable operations ? *VAT MS Acquirer*
 - VAT exempt ? *VAT MS Acquirer*
 - VAT exempt but option for out of the scope operations ? *VAT MS Supplier*
 - **Fully** « out of the VAT scope » ?
 - But may receive a VAT identification number for the intra-EU acquisition of goods *VAT MS Supplier*

The public hospitals case ...

- The case: lessor established in Belgium rents TV to hospitals abroad
- Place of supply of services where the customer « Taxable person » identified for VAT is established
(Art. 44 Directive 2006/112) + « not identified for VAT » since the VAT package
- Lessee is a:
 - French private hospital (= taxable person): **French VAT (reverse charge)**
 - French public hospital (= non taxable person): **Belgian VAT**
(VAT exempt public bodies are out of the scope in France)
 - Luxembourg public hospital (taxable person): **Luxembourg VAT**
(VAT exempt public bodies are taxable person)
 - German public hospital: ??? **???**

Legal solutions ?

- Existing solutions
 - VAT on investments repaid by the tax authorities or “refund schemes” (AU, NL, FR, DK, FI, SW, UK, LU, PT, UK)
 - Independent Group of Persons (IGP’s)
- Possible solutions ?
 - Option to tax, possibly combined with a reduced VAT rate (??)
 - Zero rate (VAT exemption with deduction input VAT)
 - *Contrary to the “acquis communautaire” of the Second VAT Directive (?)*
 - Full taxation and reduced VAT rate ?

Purpose of the VAT scheme on public bodies

- According to the preparatory documents of the Sixth VAT Directive (1974-1977), the special scheme about the public authorities has been introduced for following reasons
 - Reduction of the price for consumers
 - Large number of entities to control
 - Technical difficulties of the control of public bodies
 - Political difficulties of controlling public bodies
 - Determination of own resources

Contributions to the EU budget

A missing element to the legal debate on VAT ?

- a uniform rate of 0.3 % is levied on the **“harmonized [theoretical] VAT base”** of each Member States
 - VAT is about 12 % of the EU budget!
 - gross reductions for UK, DK, DE, AU
 - transparent, fair, simple and democratically accountable?
 - Report Commission Monti December 2016:
 - VAT-based contributions to EU budget appears as expenditure in national budgets
 - **“This fact has no legal consequences but creates visibility and awareness breakdowns close to the national politics and citizens” (p. 53)**

A missing element in the legal debate ?

- Additional payments to the EU budget in case of exceptions to VAT exemptions and special scheme of public bodies (?)
- A missing question?
 - Tax authorities are collecting taxes
 - But at the same time are tax authorities trying to minimize their « contribution » to the EU budget ?



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