The implications of Ampliscientifica for VAT groups in the EU

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In this article the author discusses the implications of the ECJ Case Ampliscientifica[1] for VAT groups.

I. Introduction

VAT grouping schemes have, for quite some time now, offered advantages to certain taxable persons; advantages which *theoretically* run counter to the principle of fiscal neutrality and create fiscal competition between member states. Often, VAT leakage is a result. The FCE Bank case, the "force of attraction" principle and the lack of harmonisation of the deduction of input tax rules made non-taxation of services between a company's main office and its branches abroad possible and created distortions of competition. The Ampliscientifica case, however, clarifies some crucial questions relating to VAT groups, decreasing the possibility of VAT leakage. Ampliscientifica establishes that a VAT group allows persons within the group to be treated as a single taxable person for VAT purposes. Furthermore, the case establishes that cross-border VAT groups are not allowed; a supply of services from a company's main office (when the main office is part of a national VAT group) in one country to its permanent establishment abroad is a taxable supply.

II. Background

For many years, VAT leakage and other problems relating to VAT grouping have been discussed by practitioners[2] and the European Commission ("Commission"). FCE Bank,[3] the "force of attraction" principle and the lack of harmonisation of the rules on deduction of input tax made non-taxation of services between a company's main office and its branches abroad possible and created distortions of competition.

In summary, in the FCE Bank case the European Court of Justice ("ECJ") held:

1. that services between a company's main office in one country and its branches abroad did not fulfil the objective requirements for VAT liability and were thus outside the scope of VAT;
2. passing on of the costs to the permanent establishment was just an internal allocation of costs;
3. the supply of services from a main office in one country, to a permanent establishment in another country (which is not a legal entity distinct from the company of which it forms part) could not be treated as a taxable supply.

In FCE Bank the ECJ did not discuss the fact that FCE Bank was part of a VAT group in the United Kingdom thus missing an opportunity to resolve the fiscal competition problems that had arisen as a result of VAT grouping. The Commission eventually recognised the undesirable consequences that VAT groupings were creating, noting: FCE Bank and the divergences between member states in applying the "force of attraction" principle may result in fiscal competition between member states. The Commission found that the advantages offered by a VAT grouping system to certain taxable persons also ran counter to the principle of fiscal neutrality. The divergences between the national VAT grouping schemes involved a potential impact on the internal market and on the basic principles of the Community VAT system.

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III. Working Paper No 556

The advisory committee on value-added tax (the "VAT Committee") thereafter set out guidelines in a working paper for implementing the VAT grouping option. Working Paper No 556[4] ("Working Paper") was issued on October 30, 2007. In the Working Paper, the VAT Committee stated, for example, that only companies or permanent establishments physically present in the territory of the member state that has introduced the scheme may join a VAT group; cross-border VAT groups will not be allowed. The VAT Committee stated:

> "Such an approach is not at variance with the FCE Bank ruling which makes no reference whatsoever to a VAT group, which, in the opinion of the Commission departments, can exist only as a special form of taxable person set up on the sole initiative of the Member State concerned, subject to the limits of its territorial competence. Thus, all transactions between a VAT group and permanent establishments abroad are treated as transactions between two separate taxable persons. . ."

IV. Ampliscientifica

On May 22, 2008 the ECJ delivered its judgment in Ampliscientifica. This ruling clarified that when a member state applies VAT grouping provisions, the companies in the VAT group cease to be deemed as separate taxable persons. Instead, the companies in the VAT group are to be deemed to be one single taxable person with one single VAT number. The ruling also sets out the obligation of member states to consult with the advisory VAT committee if national provisions regarding VAT groups have not yet been introduced:[5]

> "It is to be observed, secondly, that the effect of implementing the scheme established in the second subparagraph of Article 4(4) of the Sixth Directive is that national legislation adopted on the basis of that provision allows persons, in particular companies, which are bound to one another by financial, economic and organisational links *no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person*. Thus, where that provision is implemented by a Member State, the closely linked person or persons within the meaning of that provision cannot be treated as a taxable person or persons within the meaning of Article 4(1) of the Sixth Directive (see, to that effect, Case C355/06 *van der Steen* [2007] ECR I0000, paragraph 20). *It follows that treatment as a single taxable person precludes persons who are thus closely linked from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations.*"

V. Communication

On July 2, 2009, the Commission issued a written statement commenting on how the rules for VAT groups should be applied and formed[6] (the "Communication"). The intention behind the Communication was to affect a more unified application of article 11 of the VAT directive as well as to constitute a guideline for member states when they introduce or amend VAT grouping rules. The Communication is founded on the same reasoning as that set out in the VAT Committee's Working Paper. Accordingly, the Commission states that a VAT group may only include such persons and permanent establishments within the borders of the same member state and that cross-border VAT groups are not permitted. A person's membership in a VAT group in one member state means that person's permanent establishment in another member state suddenly constitutes another separate VAT taxable person. Thus, in a VAT respect, the permanent establishment constitutes an individual taxable person separate from the VAT group.

In the Communication, the Commission states that its view does not conflict with the principle established in FCE Bank as a VAT grouping measure was not present in that case. It also sets out its support for the ruling in Ampliscientifica. The Commission agreed with the VAT Committee's conclusion that the companies in a VAT group cease to exist as separate taxable persons and that the persons in the group instead shall be treated as one entity and as a new taxable person. The Commission emphasised the importance of only permitting taxable persons and permanent establishments within one state's borders to be members of a VAT group and not to permit cross-border VAT groups.

> "the permanent establishment constitutes an individual taxable person separate from the VAT group."

VI. Conclusion

Ampliscientifica (2008) is a later case than FCE Bank (2006). The Ampliscientifica judgment was passed after the problems with tax evasion, in conjunction with VAT groups, had been identified and discussed at some length inter alia the Working Paper, but also in practitioner discourse. The judgment in the FCE Bank case remains silent as to the fact that FCE Bank was a member of a VAT group. After the Working Paper was issued, the Ampliscientifica judgment was issued in 2008. Thereafter, the Commission's Communication was issued, on July 2, 2009, with the same clear guidelines as those contained in the Working Paper. The Commission is very clear that in FCE Bank no reference was made to the VAT group situation and as such the Communication does not contradict FCE Bank. The Commission also expressed its support for the Ampliscientifica ruling. The rationale behind the Commission's statement is that tax competition between member states must be counteracted and tax evasion discouraged. A regulatory framework which allows cross-border VAT groups and an interpretation of FCE Bank in such a way that transactions between

a head office in one state and a branch office in another would fall outside the scope of VAT, can be abused and lead to significant tax leakage.

The problems which arise when VAT groups include companies with, for example, a head office in one country and a branch office in another were discussed at the 2010 IFA conference in Rome. Delegates discussed the problems which would likely arise if FCE Bank was applied so that transactions between the head office in one country and the permanent establishment in another were to fall outside the scope of VAT. It was clear from this discussion that it would be difficult to assess how the head office's transactions abroad would affect the deductible portion for input VAT. It would also be difficult for the Tax Agency abroad to assess the extent of the deductible portion if it is connected to the entire group's business located in another country. Furthermore, VAT leakage would be possible when the VAT group has restricted deductibility. The ECJ Case of Heerma,[7] January 27, 2000, was also discussed. In this case it was held that a natural person could be deemed to be two different persons in respect of VAT. This is in line with the assessment made in Ampliscientifica, in which one entity can be deemed to be two persons in respect of VAT; one is the VAT group and another is the branch or head office abroad.

Naturally, cases can always be interpreted in a number of ways. However, it is this tax practitioner's opinion that since:

1. There is probably a territorial limitation in article 11 of the VAT directive, the result of which is that a VAT group only can include entities in the Member State where the group is situated; and
2. Ampliscientifica establishes that the entities included in the VAT group cease to be treated as separate taxable persons and instead become absorbed into the group's only registration number, one can draw the conclusion that, e.g. a branch office abroad is not member of the group. This interpretation of Ampliscientifica, by the Commission, would also probably prevent leakage of tax from EU states, and counteract tax competition between EU states.

In 2010 practitioners discussed how the VAT grouping system could be improved.[8] It was proposed that it is surely possible to develop a VAT grouping system that may work better, that does not lead to VAT leakage and distortions of competition. In the meantime, while developing a better VAT Grouping system, Ampliscientifica should mean that when a company's main office or its branch abroad is part of a VAT group, transactions between the main office and its branch abroad fall within the scope of VAT and are treated as transactions between two separate taxable persons.

It will be very interesting to follow future developments within this field!

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NOTES

[1] May 22, 2008, ECJ C-162/07, *Ampliscientifica Srl and Amplifin SpA v. Ministero dell'Economia e delle Finanze and Agenzia delle Entrate*.

[2] Christian Amand, International VAT Monitor, July/August 2007, p. 237 – 249 and Kenneth Vyncke, International VAT Monitor, July/August 2007, p. 250 - 261.

[3] March 23, 2006, ECJ C-210/04, *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v. FCE Bank plc*.

[4] Value-added tax committee (article 398 of directive 2006/112/EC) Working paper No 556, October 30, 2007.

[5] Supra at 1, paragraph 19. Author emphasis added.

[6] COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax.

[7] January 27, 2000, ECJ C-23/98, *Staatssecretaris van Financien v. J. Heerma*.

[8] For example see Ruud Zuidgeest, International VAT Monitor, January/February 2010, p. 25 – 30 and Joep Swinkels, International VAT Monitor, January/February 2010, p. 36–42.