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Report

drawn up on behalf of the Committee on Economic and Monetary Affairs

on the proposal from the Commission of the European Communities to the Council (Doc. 158/79) for a tenth directive on the harmonization of the laws of the Member States relating to turnover taxes, supplementing Directive 77/388/EEC – Application of value added tax to the hiring out of movable tangible property

Rapporteur: Mr B. BEUMER

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By letter of 4 May 1979 the President of the Council of the European Communities consulted the European Parliament, pursuant to Articles 99 and 100 of the EEC Treaty, on the proposal from the Commission of the European Communities to the Council (Doc. 158/79) for a tenth directive on the harmonization of the laws of the Member States relating to turnover taxes, supplementing Directive 77/388/EEC - Application of value added tax to the hiring out of movable tangible property.

The President of the European Parliament referred this proposal to the Committee on Economic and Monetary Affairs as the committee responsible.

The Committee on Economic and Monetary Affairs appointed Mr Beumer rapporteur on 3 October 1979.

It discussed the proposal at its meetings of 11 and 12 October, 30 and 31 October and 20 and 21 November 1979.

On 21 November 1979 the Committee on Economic and Monetary Affairs adopted the motion for a resolution and explanatory statement with one abstention.

Present: Mr Delors, chairman; Mr Deleau, vice-chairman; Mr Beumer, rapporteur; Mr Collomb, Miss Forster, Mr Herman, Mr Hopper, Mr Lange (deputizing for Mr Walter), Mr Leonardi, Mr Moreau, Mr Notenboom (deputizing for Mr Schnitker), Mr Petronio, Mr Rogers, Mr Sayn-Wittgenstein Berleburg, Mr Tindemans.

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A

The Committee on Economic and Monetary Affairs hereby submits to the European Parliament the following motion for a resolution, together with explanatory statement:

MOTION FOR A RESOLUTION

embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a tenth directive on the harmonization of the laws of the Member States relating to turnover taxes, supplementing Directive 77/388/EEC - Application of value added tax to the hiring out of movable tangible property

The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council[1]
- having been consulted by the Council (Doc. 158/79)
- having regard to the report by the Committee on Economic and Monetary Affairs (Doc. 1-550/79),

1. Believes that the tenth directive amends rather than supplements the sixth directive;

2. Notes that there is a real danger that an excess of criteria in respect of the establishment of the place where services are supplied could create confusion and consequently cause problems as regards surveillance and implementation;

3. Concedes that the definition of the place where services consisting of the hiring-out of movable tangible property are supplied, as given in the sixth directive, has created surveillance difficulties, for instance in connection with the hiring-out of data-processing equipment which is moreover not given enough attention in the explanatory memorandum attached to the tenth directive;

4. Agrees with the Commission's conclusion that the addition to Article 9(1) contained in the tenth directive may help to solve this problem;

5. Continues to believe that the introduction of the tenth directive would not affect the need for a more detailed and thorough discussion of the operation of the concept of the place where survices are supplied to find a solution which is, as far as possible, both effective and simple;

6. Recommends that tax be imposed at the place of residence of the person to whom the goods are supplied, as proposed in the original Commission

[1] OJ No. C 116, 9.5.1979, p.4

proposal for a sixth VAT directive and approved by Parliament, in view of the clear advantages of, inter alia, the combination of the concept of the place of residence and the country of use;

7. Points out that the present directive does nothing to stop cases of double taxation and non-taxation in operations with third countries: calls on the Commission to submit at the earliest opportunity a proposal granting taxable persons established in third countries the right to refund of VAT;

8. Points out that the explanatory memorandum with this proposal is too summary and so, although intelligible to experts, it does not provide sufficient information for Parliament, which must ultimately adopt a political position; requests the Commission to provide more detailed information with future proposals for directives;

9. With the above reservations, approves the proposal for a directive.

B

EXPLANATORY STATEMENT

1. A question which arises repeatedly in connection with the supply of services from one Member State to another is that of where the transaction should be taxed. The place of supply of a service is defined in Article 9(1) of the sixth directive[1] as follows : 'the place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides'.

2. If this place were to be considered without exception as the place where the service is supplied, the impartiality of the turnover tax system as regards the origin of goods and services would not be guaranteed in the case of the hiring out of movable tangible property by a supplier who is established in a Member State other than that in which the property is used. Indeed, according to whether the VAT rate in the Member State in which the supplier is established is lower or higher that in the Member State where the property is used, the 'foreign' supplier will have a competitive advantage or disadvantage in relation to national suppliers.

3. In order to avoid this situation Article 9(2)(d) provides for an exception to paragraph 1 of the same article (see paragraph 1) for the hiring out of movable tangible property, with the exception of all forms of transport, which is exported by the supplier from one Member State to another. In this case the place of supply of the service is deemed to be the place of utilization. This provision also applies where the property is exported by a third party on behalf of the supplier.

4. However, this exception provided for in Article 9(2)(d) was included in the sixth directive to cover a specific case, i.e. the hiring of television sets to private persons in Denmark by foreign suppliers. The fact that these foreign suppliers transported the sets made it possible for them to avoid paying VAT on the hire charges in Denmark. To cover this single case a general derogation was provided for in Article 9(2)(d) which applies to hire both to private persons and to taxpayers. In view of the origin of this clause it is hardly surprising that it is not completely satisfactory in its application. It does not cover all the cases where the Member States in which the hired-out property is used and the place of establishment of the supplier are not identical. It is also possible for the supplier to purchase the movable tangible property himself in the Member States where it is hired out.

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[1] OJ No. L 145, 13.6.1977

5. The purchase of movable tangible property by the 'foreign' supplier in the Member State in which the property is hired out can give rise to a distortion of competition. This distortion of competition would be even greater if the eighth VAT directive were to be adopted in the meantime. The eighth VAT directive lays down the arrangements for the refund of VAT to taxable persons not established in the European Community.

The following example illustrates the problem: a supplier established in Member State A, who purchases movable tangible property in Member State B may, in application of the eighth directive, obtain a refund of the VAT paid in Member State B. If this property is hired out in Member State B, VAT must be paid on this hiring-out transaction, pursuant to the Sixth Directive, in Member State A where the supplier of services has established his business. However, since Member State A is unaware of the purchase of this property in Member State B, it is not difficult to avoid payment of VAT. In such a case the foreign supplier gains a competitive advantage over national suppliers, who have to pay VAT to Member State B. This competitive advantage does not arise, of course, if the customer is a taxable person within the meaning of the Sixth Directive, and is therefore entitled to the deduction of VAT paid by him. However, if the customer is tax-exempt (e.g. a bank or an insurance company), or is not a taxable person, and therefore cannot deduct VAT, the foreign supplier has a competitive advantage over national suppliers equivalent to the VAT rate applicable.

6. If the sixth directive were applied strictly by all the Member States the above situation would not be possible. Article 4 of the sixth directive defines economic activities; anyone who carries out an economic activity is a taxable person. Article 4 states: 'The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity'. This would normally include the hiring-out of movable tangible property in another country. Anyone who hires out movable tangible property in another country intends to obtain income from it on a continuing basis and is consequently taxable in that Member State. However, certain Member States maintain that as long as only one transaction is involved this cannot be regarded as an economic activity in their country. As a result of this divergent interpretation, the tenth directive is now being proposed to avoid either the payment of double taxation or the payment of no tax at all. The fact that a new directive has to be issued to put right an incorrect interpretation is, in your rapporteur's view, a questionable procedure. How many VAT directives will there ultimately be? There is, moreover, no unanimity about the question of whether this tenth directive is an addition to the sixth directive, as the Commission claims, or simply an amendment to it. Your rapporteur believes that it represents more of an amendment to the sixth VAT directive.

7. The purpose of the proposal for a tenth VAT directive is to remove this loophole in the sixth directive and guarantee identical conditions of competition. The proposal for a tenth VAT directive proposes the following addition to Article 9(1): 'In the case of the hiring-out of movable tangible property, other than forms of transport, the supplier shall be deemed to have established his business at the place where the property is at the time it is actually made available to the customer'. The effect of this addition is to create a legal presumption that the supplier of services is established in the same country in which he buys or into which he imports property hired out by him and in which that property is physically made available to the customer.

8. This addition broadly resolves the problem described above. It should be pointed out, however, that 'the place where the property is made available' (as proposed in the tenth VAT directive) is not always identical to the 'place of utilization', a point conceded by the Commission in its explanatory memorandum.

The place of utilization should, however, be the place where the tax is levied. In Article 9(2)(d) of the sixth directive the place of supply of the service is defined as the place of utilization. If and when the tenth directive applied, the transaction would be taxed at the place of utilization (sixth directive, Article 9(2)(d)) or at the place where the property was made available (tenth directive) depending on whether the supplier himself transported the property, or the customer. The Commission (for practical reasons) proposes the place where the property is made available because this is easier to establish than the place of utilization. Indeed, if the VAT on the hiring-out of property is not levied when it is made available because the property in question is intended for use in another place, there is a real danger that payment of tax in the country of use will be avoided, i.e. the property in question will not be declared when it is transported across the border.

On the other hand, one may naturally suppose that the customer, faced with the different VAT rates in the different Member States, will choose as 'the place where the property is made available' the Member State with the lowest rate of VAT. In such a case, however, he runs the risk of being asked by the Customs to pay VAT when he transports the movable tangible property across the border from the place where it was made available to the place of utilization and again when he returns the property to the supplier. This risk will tend to reduce the number of cases, although this does not mean that the possibility can be ruled out altogether.

9. The proposal for a tenth directive does nothing to solve cases of double taxation or non-taxation in connection with hiring-out transactions involving third countries. Here the situation remains unchanged. Member States may, if they wish, avoid this double taxation or non-taxation by applying Article 9(3). The European Parliament has already urged, in connection with the eighth directive, that rules should be formulated to avoid such cases of double taxation or non-taxation in respect of transactions involving third countries. However, no provision was made in the eighth directive for the refund of VAT to taxpayers from third countries since it was hoped that this refund could be tied to the acceptance of the same obligation by those countries. However, the Commission was recently asked by the Council to work out a proposal in this field. The Committee on Economic and Monetary Affairs calls on the Commission to submit as soon as possible a proposal making provision for refunds to firms from third countries.

10. With reference to the scope of the directive some consideration should be given to the fact that forms of transport are excluded. The reason given for this is the problems of control. To avoid these problems the place of supply of services with regard to the hiring-out of forms of transport is deemed to be the place of residence of the supplier of the service. Otherwise there would be increased customs inspections and this would prejudice the customs union. Moreover Article 28 of the sixth directive states that passenger transport shall ultimately be taxed in the country of departure for that part of the journey taking place within the Community. If the use of the means of transport takes place in a country with a lower rate there may still be a disadvantage for a foreign hirer.

11. In view of the abovementioned negative aspects of the present proposal for a directive it could be asked whether it might not be better to return to the proposal contained in the original proposal for a sixth directive, namely taxation of the customer in respect of the hiring of movable tangible property (as in Article 9(2)(e)), which was approved by Parliament in its report on the original proposal for the sixth VAT directive. This would represent a return to the concept of place of residence.

The advantages of customer taxation are:

- the customer's place of residence is the closest approximation to the place of utilization: one basic principle of VAT is that the place of utilization should be the place where the tax is due;

- there would no longer be any differences in taxation for transactions between entrepreneurs;

- the problems of control posed by the tenth directive would disappear; the customer would be the person liable to tax and he would be resident in the Member State where this tax was payable;

- the determination of the place of taxation would no longer pose any problems; legislation would be made clearer thus reducing opportunities for fraud;

- cases of double taxation and non-taxation could be avoided.

This only refers to taxable persons. In respect of non-taxable persons the place of residence of the supplier of the services can continue to be regarded as the place where the service is supplied. In its written answers to questions put by your rapporteur, the Commission concedes the good sense of taking the place of residence of the customer as the place of taxation. This would however mean a fundamental change to the sixth VAT directive and as a result national legislation would also have to be adjusted accordingly. This will not be possible in the short term. To avoid the cases of non-taxation and double taxation which arise now, the present proposal for a tenth VAT directive could be accepted for the time being, but on condition that a more detailed and thorough discussion should be launched on 'the place where services are supplied' with the emphasis on the place of residence of the customer in the case of movable tangible property. The concept of the place of residence and the country of use would thus be usefully combined.