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**ARE THE SWISS FIXED ESTABLISHMENT
RULES A SOLUTION TO THE VAT GROUPING
ISSUES OF THE EUROPEAN UNION?**

BY

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HARN60 MASTER THESIS

MASTER'S PROGRAMME IN EUROPEAN AND INTERNATIONAL TAX LAW

2014/2015

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28 May 2015

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Abstract

The VAT grouping provision in Article 11 of the VAT directive is a recent source of problems for the European Union. Especially the area of cross border head office to branch transactions was in the centre of attention in the recent case law. This thesis investigates the source of these problems and why they appeared in the first place, by analysing the provision and the notions used in Article 11. One of the issues for cases like *Skandia* and *FCE Bank* is that the European Union applies the so called single entity principle for foreign branches. This means that a branch in another State is still considered as the same entity as the head office. Due to that, transactions between the head office and branches are usually regarded as internal transactions, and therefore as non-relevant for VAT purposes. Other States like Switzerland, Australia and New Zealand do apply a dual entity principle. Under this principle foreign branches which are not in the same State as the head office are considered as their own legal entities, which means that transactions between the foreign branch and the head office are treated in the same way as transactions between a head office and its subsidiaries.

After comparing the Swiss and the European approach the thesis tries to analyse what would happen if the European Union implements a dual entity principle comparable to the one which is applied in Switzerland. After looking at the advantages and disadvantages of such a change, the conclusion is that the advantage of the simplification of the system would be outweighed by the disadvantages, namely the significantly increased administrative burden as well as problems of determining the taxable amount.

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Index of abbreviations

AG	Advocate General
Commission	Commission of the European Union
CHF	Schweizer Franken
DBG	Bundesgesetz über die direkte Bundessteuer
ECJ	European Court of Justice
EU	European Union
HMRC	Her Majesty's Revenue and Customs
MWSTG	Mehrwertssteuergesetz
MWSTV	Mehrwertssteuerverordnung
NVATL	New Value Added Tax Law
OECD	Organisation of Economic Co-operation and Development
OR	Obligationenrecht
SAC	Scandia America Corporation
Second directive	Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax
Sixth directive	Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes-Common system of value added tax: uniform basis of assessment
TFEU	Consolidated version of the Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States of America
VAT	Value Added Tax
VAT directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
VATL	Value Added Tax Law
VATO	Value Added Tax Ordinance

1. Introduction

1.1. Background

The Value Added Tax ('VAT') grouping provision in Article 11 of the VAT directive provides Member States with the opportunity to regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links. The simplification of administration and the combat of abuse were the goals upon the implementation but like many other provisions in tax law, it also provided room for tax planning. Due to the fact that there was not much of additional guidance for implementing the provision and that the used notions were open for interpretation, VAT grouping was implemented in different national laws in different ways. As the VAT directive also works cross-border it was just a question of time until problems would appear with the difference in implementing of the VAT grouping provision in different Member States.

The problems got apparent in the *Skandia* case in the year 2014. Although the questions referred in the case itself did not directly concern the issue of different treatment of VAT groups in different Member States, but the treatment of a head office to a branch in another Member State which forms part of a VAT group in that Member State. However, the issue with the different treatment of VAT groups in different Member State came up because the Advocate General ('AG') questioned the decision of Sweden to allow a branch to join a VAT group without the head office joining the group. Other Member States like the United Kingdom ('UK') and the Netherlands agreed with the AG, as their national legislation only allows branches to join VAT groups if the head office joins the group as well. Unfortunately the European Court of Justice ('ECJ') did not bother to discuss this issue in the judgment and simply made a call under the assumption that the Swedish legislation is in accordance with the law of the European Union ('EU'). A situation of uncertainty about the VAT grouping provision was created and still exists.

One of the reasons for cases like *Skandia*, but also *FCE Bank* to emerge in the first place is that the EU uses the so called single entity principle. This means that even though a branch is located in another country than the head office itself the branch and the head office are considered to be one and the same entity. Other nations like Switzerland, Australia and New Zealand use the dual entity principle in which foreign branches form an own entity.

1.2. Research question

The purpose of this thesis is to examine the VAT grouping provision in Article 11 of the VAT directive with a focus on the meaning of the notions ‘person’ and ‘established in the territory of the Member State’ as used in the provision. A further question that the thesis seeks to answer is, if a dual entity principle comparable to the one in Switzerland would solve the problem that the VAT grouping provision provides the possibility to avoid taxes as well as the problem that the provision is implemented differently in different Member States.

1.3. Material and method

For answering the above mentioned question a legal dogmatic method has been chosen. Materials used were the jurisprudence of the ECJ, relevant primary and secondary law of the EU, Switzerland and to a lesser extent Germany¹. In addition to that relevant articles and further academic materials were reviewed, to enlarge the insight in the relevant field of knowledge. The opinion of the AG of certain cases were also looked at, as they provide an additional angle to the case. Furthermore a comparative analysis of the European VAT directive and the Swiss VAT law regarding the treatment of fixed establishments was conducted.

1.4. Delimitations

The focus of this thesis are cross border head office to branch transactions and their treatment for VAT purposes. For doing the research ECJ judgments, the relevant primary EU law as well as Swiss law have been analysed. National legislation from Member States was not in the focus of the research and only used when really necessary.

The hypothetical assumptions made in chapter five are only analysed in regards to relevant provisions of this research and fundamental ideas. There is no in-depth analysis what these changes would do for provisions which are considered to be non-relevant for this research.

In addition to that so called ‘independent groups of persons’ and their special treatment for VAT purposes (which is not the same as VAT groups) as mentioned in Article 132(1)(f) of the VAT directive are not discussed.

¹ German law was not analysed or compared to other legislation, but was only used to provide the reader with the necessary information about the roots of the VAT grouping provision as well as the foundation in an example in Chapter 3.2.1.

1.5. Outline

The first chapter looks at the background of the VAT grouping provision in the VAT directive will. Then an in-depth analysis of the used notion will be discussed in the second chapter to create a foundation for the subsequent chapters. The second chapter ends with a basic explanation of how the VAT grouping provision can be used for tax planning. The third chapter three focuses on the judgment in the *Skandia* case as well as the opinion of the AG. The treatment of fixed establishments in Switzerland and the difference to the European Systems will be explained in the fourth chapter and the fifth chapter is researching what a similar system to Switzerland would mean to the EU. The sixth chapter concludes the research.

2. The background of the VAT grouping provision

This chapter should give a general overview over the development of the VAT grouping provision in the VAT directive and an attempt to interpret the meaning of the different notions used in the provision. At the end of the chapter the focus will shift to possible tax planning opportunities due to Article 11 of the VAT directive.

2.1. History and purpose of the VAT group provision in the VAT directive

The second directive was the first time a VAT grouping possibility was regulated in the legislation of the EU. Point 2 of Annex A gave Member States the possibility not to

‘[...] consider as separate taxable persons, but as one single taxable person, persons who, although independent from the legal point of view, are, however, organically linked to one another by economic, financial or organizational relationships [...]’.

The Commission proposed for the sixth directive to implement the provision in the directive itself. The goals for this provision were described by the Commission as:

‘[...] in the interests of *simplifying administration* or of *combating abuses* (e.g. the splitting up of one undertaking among several taxable persons so that each may benefit from a special scheme)

Member States will not be obliged to treat as taxable persons those whose ‘independence’ is purely a legal technicality.²

In 1977 the concept was implemented in the new sixth directive in Article 4(4). To avoid unfair results for Member States arising from the provision, Article 4(4) was importantly amended and a new paragraph was added by the Council Directive 2006/69/EC in 2006, which provides Member States with the option to adopt any measures needed to prevent tax evasion or avoidance.³

The recast of the sixth directive only moved the provision from Article 4(4) to Article 11 but did neither alter the field of application nor the formal requirements.⁴ In the next subchapter the focus will be on determining the scope of the VAT grouping provision as well as the interpretation of the words used in it.

2.2. Analysis the VAT grouping provision in Article 11 of the VAT directive

The VAT directive never introduced any detailed rules for implementing the provision or definitions for the used expressions in the Article. These expressions have to be discussed which means that the meaning of what a financial, economic and organisational link is has to be discussed. In addition to that the expressions ‘legally independent’, ‘person’ and ‘established in the territory of that Member State’ as used in Article 11 of the VAT directive have to be interpreted.

2.2.1. The notion ‘financial, economic and organisational link’

One of the necessary requirements to form a VAT group and be regarded as a single taxable person is that there exists a financial, economic and organi-

² Proposal for a Sixth Council Directive on the harmonization of legislation of Member States concerning turnover taxes-common system of value added tax: uniform basis of assessment (COM(73) 950), [1973], page 8.

³ Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations, OJ L 221, [2006].

⁴ Commission of the European Communities, 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, COM(2009) 325 final, [hereinafter Commission Communication], [2009], page 3.

sational link between the involved parties. As a general guidance the Commission Communication⁵ can be looked at. For the Commission it is clear from the word ‘and’ used in the requirement that all three links have to exist. According to the Communication, a percentage of more than 50% of the participations in the capital (or in the voting rights), have to be met to establish a financial link. As a definition for an economical link the Commission proposed several situations of economic cooperation which can be regarded as such a link. The situations that they mentioned were, if a principal activity of the group members is of the same nature, or if the activities of the group members are complementary or interdependent, or if one member of the group carries out activities which are wholly or substantially to the benefit of the other members. Finally the organisational link was defined in the Communication as the existence of a shared management structure.⁶

For example the German legislation, has requirements almost in conformity with the requirements defined by the Commission.⁷ For a financial link a participation which is bigger than 50% is required (unless the percentage of the participation is not equal to the percentage of voting rights, in such a case the percentage of voting rights is determining).⁸ The definition for the economical link is, compared to the Communication⁹, less restrictive. In accordance with German case law¹⁰ it is enough, in a case with mutual supplementary and supporting activities, to have a more than negligible economical relationship as long as the other two links (financial and organisational) are existent. The organisational link requires the organisational implementation into one structure (which is comparable to a shared management).¹¹ It is obvious that the German VAT grouping provision has similar requirements as proposed by the Commission. In fact the EU VAT grouping provision stems from the German system of ‘Organschaft’ (of which the above described legislation forms part of).¹²

But there are also legislations which did not follow the propositions that narrowly. As an example, there is the UK legislation which did not follow the Commissions proposition as precise as the German legislation. Concerning the financial, economic and organisational links the UK simply requires that the so called ‘control test’ has to be satisfied. To satisfy this test a controlling

⁵ Commission Communication, COM(2009) 325 final, [2009].

⁶ Commission Communication, COM(2009) 325 final, [2009], page 9.

⁷ Compare Section 2.8 of the Umsatzsteuer-Anwendungserlasses [2015], paragraph 5 to 10 to the Commission Communication, COM(2009) 325 final, [2009].

⁸ Section 2.8 of the Umsatzsteuer-Anwendungserlass [2015], paragraph 5.

⁹ Commission Communication, COM(2009) 325 final, [2009].

¹⁰ BFH-Urteil, V R 63/01, BstBl. II 2004, [2003], page 434.

¹¹ J. Patschureck, Kritische Vorteilhaftigkeitsanalyse von Organschaftsverbindungen im Konzern, [2008], page 18-19.

¹² S. Pfeiffer, ‘Written Comment to the keynote paper ‘taxable persons’ in ECJ - Recent Developments in Value Added Tax: Schriftenreihe IStR, volume 84, [2014], page 97.

circumstance has to be present which is the case if it either meets the requirements to be the controlling holding company (within the meaning of the Companies Act 2006 e.g. 51% voting rights) or if it is empowered by statute to control the company.¹³

2.2.2. The notion ‘legally independent’

In case law the notion ‘independent’ was discussed in detail in the *FCE Bank* case. In the case the head office of FCE Bank located in the UK provided services to one of its branches located in Italy. The question arising in the case was if these transactions from the head office in one Member State to the branch in another Member State fell within the scope of VAT. Surprisingly the ECJ used Article 10 of the VAT directive to support their view that the branch in Italy is not a taxable person.¹⁴ Article 10 excludes contracts of employments and other legal ties creating an employer-employee relationship from the scope of Article 9.¹⁵ It is questionable to apply this provision to a relationship between a head office and a branch as their relationship is not comparable to an employer-employee relationship nor should there exist an employment contract between the two parties. The court continued and referred to its case law (*Tolsma*¹⁶, *Kennemer Golf*¹⁷) and that it is required for a taxable provision of service that there exists a legal relationship in which there is a reciprocal performance between the provider and the recipient. For establishing if this is the case, it has to be analysed if the Italian branch may be regarded as an independent bank. Particularly the bearing of economic risk was mentioned by the ECJ. The ECJ shared the same opinion with the AG as they both agreed that the branch does not bear any of the economic risks of a bank and neither does the branch have any endowment capital. That is why the branch has to be dependent on its head office and constitute one single taxable person together with it.

2.2.3. The notion ‘person’

Similar to the uncertainties about the scope of the notion ‘legally independent’ the notion ‘person’ is not strictly defined either. The Commission argued that the notion ‘person’ should be used in the same way as it is used in Article 9(1). They did not see any reason to derogate from the definition in Article 9(1) as both Articles are part of Title III of the directive (‘taxable person’) and that the notion ‘person’ is only used in Article 11 to avoid repetition. For

¹³ S. Beusch, Back to basics: VAT and groups of companies, Tax Journal, [2011].

¹⁴ C-210/04 *FCE Bank* [2006], paragraph 32.

¹⁵ C-210/04 *FCE Bank* [2006], paragraph 33.

¹⁶ C-16/93 *Tolsma* [1994], paragraph 14.

¹⁷ C-174/00 *Kennemer Golf* [2002], paragraph 39.

them any other interpretation of that notion under these circumstances could lead to a possibility to circumvent the requirements to constitute a taxable person.¹⁸

The ECJ did not agree with such a narrow interpretation. In 2013 it ruled in the case *European Commission v. Ireland*¹⁹ that there is not enough evidence that the appearance of the notion is only a way to avoid repetition. The ECJ pointed to the fact that the expression was changed from clearly making the provision available to taxable persons only in the Second directive, to making it available to ‘any person’ in Article 4(4) of the Sixth directive. Thus it seems to be an intentional change.²⁰

Whatelet, the AG in the *Skandia* case (the opinion will be discussed in the next chapter), thoroughly discussed the interpretation of the notion ‘person’. For him Article 11 has to have a more restrictive scope than Article 9 has.²¹ Interestingly enough his interpretation does not make sense in the same way as in the English language version as in the original French or the German version. The AG makes the point that Article 9 has to be interpreted much broader than Article 11 due to the wording of the Articles. In the English version the difference in the wording is minimal and it is hard to make out the point of the AG. The wording of Article 9 defines the scope of this Article and includes ‘[...] any person who [...]’ and the wording of Article 11 states that ‘[...] any persons [...]. The only difference is the word ‘who’ which is included in Article 9.

It can be assumed that the translator of the AG opinion (which is French in the original language) recognised this issue as the French expressions were included in the English translation.²² The French wording of Article 9 is ‘Est considéré comme «assujetti» quiconque exerce, [...]’. The important word is ‘quiconque’ which can be translated to anybody or whoever. In contrast in Article 11 the French wording still talks about ‘personnes’. The difference between the expressions ‘quiconque’ (anybody) and ‘personnes’ is much clearer than the difference between ‘any person’ and ‘any person who’.

Other language versions use a similarly clear wording to the French wording. The Spanish version refers to ‘quienes’ (anybody), the Italian version refers to ‘chiunque’ (anybody), the German version uses the expression ‘wer’ (who) and the Dutch version talks about ‘eenieder’ (anybody).

In Article 11 on the other hand the expression ‘person’ is consistently used throughout the checked language versions of the VAT directive (English,

¹⁸ Commission Communication, COM(2009) 325 final, [2009], page 4-5.

¹⁹ C-85/11 *European Commission v. Ireland* [2013].

²⁰ C-85/11 *European Commission v. Ireland* [2013], paragraph 37-38.

²¹ Opinion of Advocate General Whatelet, C-7/13 *Skandia* [2014], paragraph 45.

²² Opinion of Advocate General Whatelet, C-7/13 *Skandia* [2014], paragraph 45.

French, Spanish, Italian, German and Dutch). The AG interpreted the difference in the wording of these Articles as the notion ‘personne’ in Article 11 should only include persons with legal personalities and the notion ‘quiconque’ in Article 9 on the other hand includes anybody. Unfortunately the ECJ did not discuss any of these points brought up by the AG and simply ignored this discussion in the judgment in the *Skandia* case. Therefore the opinion of the ECJ concerning the difference of the scope of these Articles remains uncertain.

A future case which hopefully will clear up some of the uncertainty is the *Marenave Schiffahrts* case (combined case with the *Larentia + Minerva* case)²³. One of the referred questions concerns Article 11 and the possibility for so called ‘Personengesellschaften’ (a type of company without legal personality) to join a VAT group (which is not possible under current German law²⁴). The case was submitted in March 2014 but the judgment is still outstanding and it remains to be seen if the court will provide a sufficiently clear answer.

In 2015 AG Mengozzi delivered his opinion to these joined cases. For him there is no sign in the VAT directive to permit the exclusion of partnerships and other bodies without a legal personality from participating in a VAT group.²⁵ He follows his assessment from the generic wording of Article 4(4) of the Sixth directive (now Article 11 of the VAT directive) for which he referred to AG Jääskinen in the *Commission v. Ireland* case, who said that he sees the justification for such an interpretation in the change of the wording from the Second directive to the Sixth directive.²⁶ The Second directive was talking of: ‘not to consider as separate taxable persons, but as one single taxable person [...]’, in the Sixth directive Article 4(4) was not referring to ‘taxable persons’ anymore but only to ‘persons’.²⁷ This change was even clearer in other languages in which the words used were completely different. As an example he mentioned the French language version in which the word ‘assujetti’ (taxable person) was replaced by ‘personne’.²⁸ Supporting his point of view is the fact that the Sixth directive uses in other provisions, such as 28a to 28c, the specific term ‘legal person’ which they did not in Article 4(4) (or Article 11 of the VAT directive), the AG took the view that the scope

²³ Joined cases C-109/14 *Marenave Schiffahrts* and C-108/14 *Larentia + Minerva* [2014].

²⁴ J. Patschureck, *Kritische Vorteilhaftigkeitsanalyse von Organschaftsverbindungen im Konzern*, [2008], page 17.

²⁵ Opinion of Advocate General Mengozzi, joined cases C-109/14 *Marenave Schiffahrts* and C-108/14 *Larentia + Minerva* [2014], paragraph 59.

²⁶ Opinion of Advocate General Mengozzi, joined cases C-109/14 *Marenave Schiffahrts* and C-108/14 *Larentia + Minerva* [2014], paragraph 60.

²⁷ Opinion of Advocate General Jääskinen, C-85/11 *Commission v. Ireland* [2013], paragraph 30-31.

²⁸ Opinion of Advocate General Jääskinen, C-85/11 *Commission v. Ireland* [2013], paragraph 32.

rationae personae of the second subparagraph of Article 4(4) (which is now Article 11 of the VAT directive) of the Sixth directive should not be limited to any specific person or only persons with legal personalities.²⁹

It is quite clear that AG Mengozzi does not share the opinion of AG Whatelet. Mengozzi thinks that persons without an own legal personality should be able to join a VAT group. As the court did not comment on the opinion of Whatelet and the judgment in the case of Mengozzi is still outstanding, there is no official answer to the question. In the opinion of the author Mengozzi has better arguments to support his point. The comparing of minor language differences as Whatelet did, may make sense in some cases but here it almost seems as if he was looking for a reason to prove his point. Furthermore the whole approach of only relying on only one language version is questionable. The ECJ made clear in its case law that every language version is of the same importance.³⁰ Mengozzi on the other hand brings more solid proof to support his argumentation that the notion ‘person’ has to include persons without an own legal personality.

Another point which has to be mentioned is that the ECJ stated in the case *Commission v. Sweden*³¹ that Article 11 of the VAT directive has to be given a uniform and autonomous interpretation throughout the EU due to the need for a uniform application of European law and from the principle of equality.³² The Commission claimed in the case that the restriction of the VAT grouping provision in Sweden to the financial and insurance sector was against Community law. The ECJ continued its judgment with stating that there is no sign of any possibility to add additional conditions to the applications of Article 11 in addition to the ones mentioned in the provision.³³ Therefore it can be said that in principle it should not be possible to restrict the provision to certain sectors. According to the Swedish government, the reason for having such a restriction was to prevent tax evasion and avoidance.³⁴ Unfortunately the Commission did fail to bring up any relevant arguments and to prove their point that the restriction was contrary to European law and therefore the Commission’s request for declaring the Swedish law as an infringement to Community law had to be dismissed by the ECJ.³⁵

²⁹ Opinion of Advocate General Mengozzi, joined cases C-109/14 *Marenave Schiffahrts* and C-108/14 *Larentia + Minerva* [2014], paragraph 55.

³⁰ In 238/81 *CILFIT* [1982], paragraph 18 the ECJ noted that all language versions are equally authentic and in C-455/05 *Velvet & Steel Immobilien* [2007], paragraph 19 it stated that the wording used in one language version cannot serve as a sole basis.

³¹ C-480/10 *Commission v. Sweden* [2013].

³² C-480/10 *Commission v. Sweden* [2013], paragraph 33.

³³ C-480/10 *Commission v. Sweden* [2013], paragraph 35.

³⁴ C-480/10 *Commission v. Sweden* [2013], paragraph 39.

³⁵ C-480/10 *Commission v. Sweden* [2013], paragraph 40-41.

2.2.4. The notion ‘established in the territory of the Member State’

For applying the Article 11 of the VAT directive a ‘person’ has to be established in the territory of the Member State. However same as for the other expressions the meaning of ‘established in the territory’ has to be interpreted by the Member States themselves and even though it sounds like it might be a straightforward application, different Member States are applying different rules concerning the ‘established in the Member State’ requirement. If you look at the national legislation it can be noticed that for example Member States like Germany, Austria and Sweden only allow ‘persons’ actually located in the Member State to form a VAT group within the Member State. But there are also States like the UK, Ireland and the Netherlands in which persons are deemed to be located in the Member State due to the fact that they have a fixed establishment located there. In these countries the head offices are given the opportunity (or even an obligation) to form part of the same VAT group as their fixed establishment.

In the opinion of the Commission the expression includes only those businesses with their seat of economic activity in the territory of the Member State, but not those situated outside the Member State. For them, businesses with their seat of economic activity, their fixed establishments or foreign businesses, physically present in the territory of the Member State are included.³⁶ They support their interpretation due to the wording of the Article, the fact that the territorial scope coincides with the VAT jurisdiction which makes it easier to manage and control the application of the provision and finally they argue that the meaning of the word ‘established’ has to be interpreted in the same way as in other provisions of the VAT directive.³⁷

In the *Skandia* case, the AG provided another angle on the question. Other than the Commission the AG takes the view that it has to be possible for foreign businesses with a head office located in another Member State to join a VAT group in the Member State of their branch.³⁸ The reason for his assumption is the *Crédit Lyonnais*³⁹ judgement.⁴⁰ The raised question, which is relevant to this thesis was if a company in one Member State is allowed to take into account turnover of branches in other Member States for calculating the deductible proportion of VAT of the head office located in another Member State.⁴¹ In the opinion of the ECJ the turnover of a foreign branch may not be

³⁶ Commission Communication, COM(2009) 325 final, [2009], page 7.

³⁷ Commission Communication, COM(2009) 325 final, [2009], page 7.

³⁸ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 56.

³⁹ C-388/11 *Crédit Lyonnais* [2013].

⁴⁰ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 55.

⁴¹ C-388/11 *Crédit Lyonnais* [2013], paragraph 19.

included in the deductible pro rata calculation for a VAT deduction.⁴² The wording the ECJ used (and which is relevant to the argumentation of the AG in the *Skandia* case) is the following:

‘[...] a company which has its principal establishment in one Member State and a fixed establishment in another Member State must be considered, by virtue of that fact, as being established in the last-mentioned Member State for the activities carried out there [...]’⁴³

In these words the AG saw the reason why it should be possible for head offices with a fixed establishment in another Member State to join a VAT group in the Member State where the fixed establishment is located. In his opinion this is the case as a head office would have to be seen as established in the Member State of the fixed establishment simply due to the fact that the fixed establishment is located there.⁴⁴

Before the restructuring of the Sixth VAT directive in 2010, Article 43 defined the general rule for the ‘place of supply of services’ to be deemed at 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. From the fact that Scandia America Corporation (‘SAC’)⁴⁵ has a branch in Sweden, the AG stated that it should be possible to regard SAC as established there for the purpose of Article 11.⁴⁶ The fact that SAC was constituted on US territory does not change that fact.⁴⁷ In the next subchapter a possible use of the VAT grouping provision of the EU, other than the intended simplification of administration and the avoidance of evasion and abuse, will be discussed.

2.3. Tax planning possibilities

The result of the introduction of the VAT grouping provision was not only the simplification of the administration and the combat of abuse as mentioned by the Commission in their proposal for the Sixth directive⁴⁸ but also created tax planning possibilities. One of these possibilities is used in connection with

⁴² C-388/11 *Crédit Lyonnais* [2013], paragraph 33.

⁴³ C-388/11 *Crédit Lyonnais* [2013], paragraph 33.

⁴⁴ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 56.

⁴⁵ One of the parties of the case.

⁴⁶ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 67.

⁴⁷ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 68.

⁴⁸ Proposal for a Sixth Council Directive on the harmonization of legislation of Member States concerning turnover taxes-common system of value added tax: uniform basis of assessment (COM(73) 950), [1973], page 8.

providers of exempt services which incur non-recoverable VAT. For illustrating how a reduction in non-recoverable VAT costs can be achieved, four possible situations will be examined in regard to the effectiveness of a VAT group in reducing the total non-recoverable VAT costs.

For the first two situations a transaction between a provider of taxable services (e.g. an IT service supplier) and a provider of exempt services (e.g. a bank) will be analysed. For simplification purposes the assumption is made, that the service providers in the examples provide exclusively exempt, respective taxable services (even though in reality this is seldom the case). In the *first situation* the taxable service supplier provides the exempt service provider with services. Other than the taxable supplier, the exempt supplier is not able to recover any of the input VAT invoiced to him as he does not provide any taxable services.⁴⁹

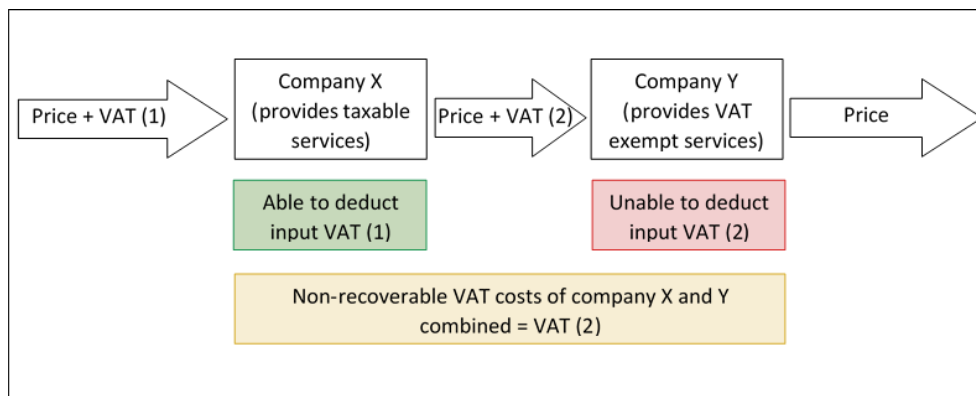


Figure 1: Situation 1 - Transaction from a taxable service provider to an exempt service provider without a VAT group

For the *second situation* the exempt supplier forms a VAT group together with the taxable supplier with the aim to reduce its non-recoverable VAT costs. The result will be that the transactions between the taxable and exempt supplier are regarded as transactions within one and the same entity and therefore as non-existing for VAT purposes. On the other hand the supplies to the previously taxable supplier would be made to the VAT group as a whole. As the group provides only exempt services to third parties, the group is not able to recover any VAT from transactions made to it. This is because the right to deduct VAT for the taxable supplier is no longer determined on the basis of transactions between it and the exempt supplier but on the basis of the transactions of the group with third parties.⁵⁰ The result would be that the total non-recoverable VAT costs of the situation would change from the input VAT of the exempt supplier (VAT [2]) as seen in situation one

⁴⁹ As Article 168 of the VAT directive states that only services used for the purpose of taxed transactions are in the scope of the right to deduct.

⁵⁰ Opinion of Advocate General Mengozzi, C-109/14 Marenave Schiffahrts and C-108/14 Larentia + Minerva [2014], paragraph 49.

to the input VAT of the taxable supplier (VAT [1]) as it is the case in situation two. Under normal circumstances this should result in a reduction of the non-recoverable VAT costs as the exempt supplier is situated before the taxable supplier in the supply chain. Normally the value of the supply increases with every step the input VAT of a later member of a supply chain (in our case the exempt supplier) is higher than the one of the previous member of the supply chain. Therefore the swapping of the input VAT costs of a later member of a supply chain (VAT [2]) for the input VAT cost of the previous member in the supply chain (VAT [1]) should result in a cost reduction.

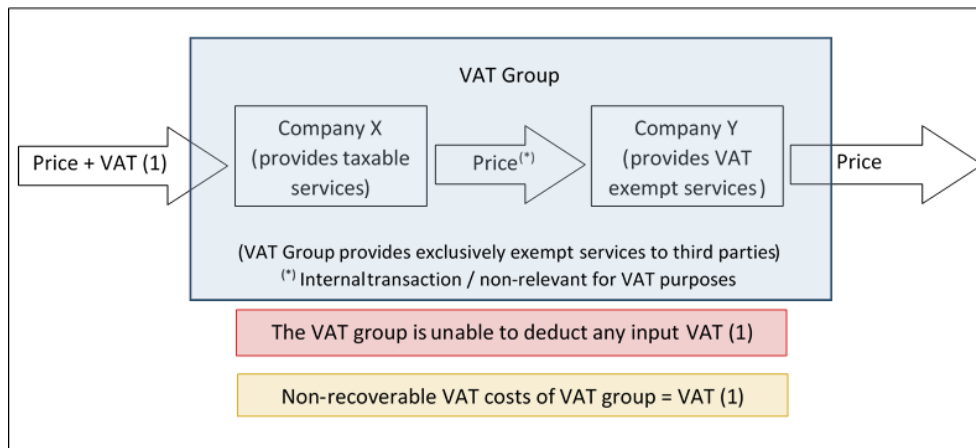


Figure 2: Situation 2 - Transaction from a taxable service provider to an exempt service provider in the same VAT group

For situations three and four the initial situation will be the other way around. The provider of exempt services is supplying services to a supplier of taxable services. In *situation three* the supplier and the recipient are not part of any VAT group. Like last time the exempt supplier is unable to deduct any input VAT. The situation for the recipient is unproblematic as he acquires exempt services, which means that he does not have to pay any VAT on these acquisitions and does not have any VAT to recover. Therefore the total VAT costs of the whole situation will be the non-recoverable VAT costs arising for the exempt service provider.

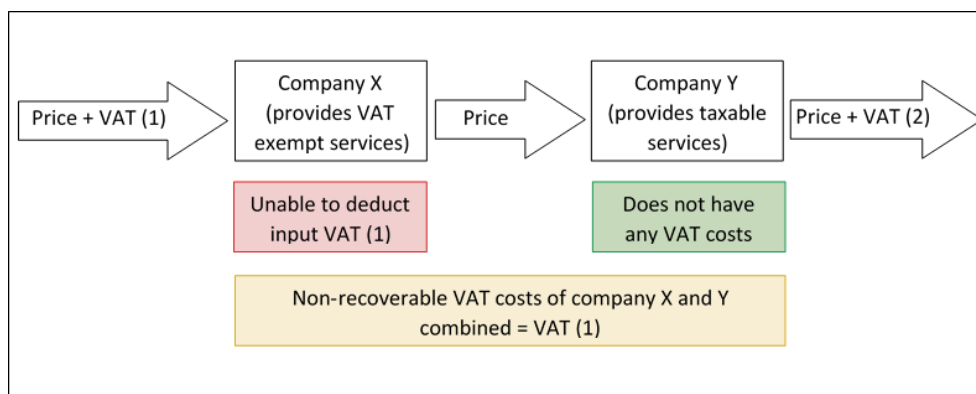


Figure 3: Situation 3 - Transaction from an exempt service provider to a taxable service provider without a VAT group

In *situation four* the supplier and the recipient are part of the same VAT group. Supplies made to the exempt service provider are now considered to be made to the VAT group as a whole. As seen previously the relevant transactions for recovering input VAT are only the transactions between the group and third parties. As the VAT group itself exclusively makes taxable supplies to third parties, the whole input VAT arising at the end of the exempt supplier will be deductible. The result of a company structure like that would be that no non-recoverable VAT costs will arise.

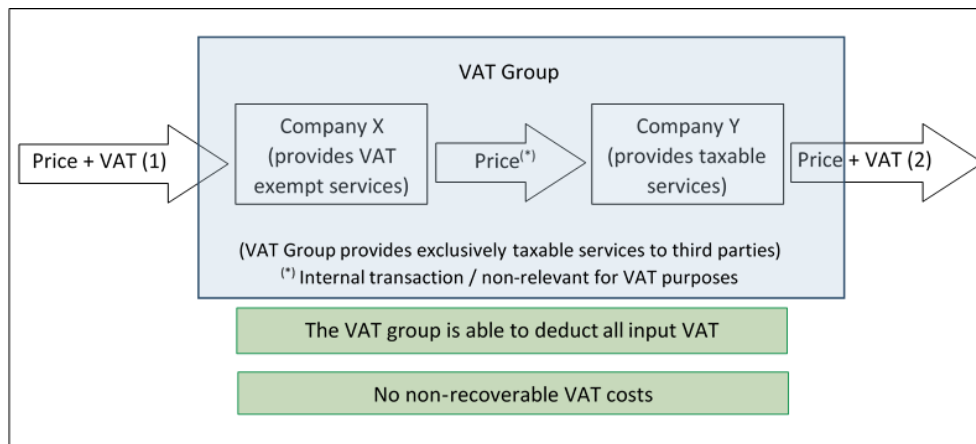


Figure 4: Situation 4 - Transaction from an exempt service provider to a taxable service provider in the same VAT group

Another way to achieve the same results as with a VAT group would be to merge Company X and Company Y. A possibility to avoid taxes which is not possible with a merger is the use of the difference between the European and Swiss treatment of fixed establishments for VAT purposes. This topic will be discussed in Chapter 4.2.2.

3. The Skandia Case

A particularly interesting case which will be relevant throughout the thesis is the *Skandia* case. This chapter should give a good foundation and an introduction to all relevant points of the case as well as the opinion of the AG. As the second question in the case is of no real relevance for our centre of interest it will only be briefly discussed.

3.1. The facts

The principal parties involved in the case was on one side the Scandia America Corporation ('SAC') as well as Skandia Sverige (the Swedish branch of SAC) and on the other side Skatteverket (the Swedish tax authorities). The point of dispute in the case was a supply of IT services of SAC to its Swedish branch. The Swedish branch then processed the IT services further and supplied these services to other companies. At the same time the Swedish branch forms a VAT group with some of the recipients of the IT services (however, not with all

of them).⁵¹ In the view of the Swedish authorities there was VAT payable on the transaction between SAC and its Swedish branch⁵² but SAC claimed that following the *FCE Bank* judgement, head office to branch transactions have to be seen as non-relevant for VAT purposes.⁵³ The *FCE Bank* judgment could not be applied directly as the Swedish branch of SAC was part of a VAT group in Sweden. The Swedish court decided to refer the following two questions to the ECJ for a preliminary ruling.

‘(1) Do supplies of externally purchased services from a company’s main establishment in the third country to its branch in a Member State, with an allocation of costs for the purchase to the branch constitute taxable transactions if the branch belongs to a VAT group in the Member State?’⁵⁴

‘(2) If the answer to the first question is in the affirmative, is the main establishment in the third country to be viewed as a taxable person not established in the Member State within the meaning of Article 196 of the [VAT directive], with the result that the purchaser is to be taxed for the transactions?’⁵⁵

3.2. The opinion of the Advocate General

Wathelet, the AG on the case, had an interesting opinion about the case. Even though the ECJ did not follow his opinion in the judgment, the AG discussed some interesting points which the ECJ unfortunately decided to ignore in their judgment. In this chapter only the opinion of the AG of the first question will be discussed as firstly the second question of the *Skandia* case is mostly irrelevant for the research and secondly the ECJ did share and also follow the proposal of the AG for the second question, but not for the first question.

The main point of discussion by the AG was the question if a branch can join a VAT group independently from its head office. The AG did not believe that the sole fact that non-taxable persons may join a VAT group is enough to allow a branch to join a VAT group alone.⁵⁶ As discussed in chapter 2.2.3. the AG had the opinion that the concept of the notion ‘person’ in Article 11 has to be interpreted as everybody, who has an own legal entity.⁵⁷ That is why, according to him, it should not be possible for a branch to join a VAT

⁵¹ C-7/13 *Skandia* [2014], paragraph 17.

⁵² C-7/13 *Skandia* [2014], paragraph 18.

⁵³ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 27.

⁵⁴ C-7/13 *Skandia*, [2014], paragraph 20.

⁵⁵ C-7/13 *Skandia*, [2014], paragraph 20.

⁵⁶ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 42.

⁵⁷ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 45.

group without the head office. He therefore supports the position of the UK, which are claiming the same thing.⁵⁸

For supporting his argument the AG referred to the opinion of AG Léger in the *FCE Bank* case. Léger notes that if the wording of the VAT grouping provision is read *a contrario*, then one legal entity can constitute one, and only one, taxable person.⁵⁹ The Commission and the official Swedish parties disagreed with this argumentation and claimed that, as a member of a VAT group, the Swedish branch in the *Skandia* case can no longer be regarded as a part of the same taxable person as the head office but is now part of the new taxable person in form of the Swedish VAT group. The point, which the disagreeing parties missed though was, that their argumentation already assumed that the Swedish branch was part of the VAT group in Sweden and therefore started their argumentation based on that. However, the whole point of the discussion in the first place was if the Swedish branch should be able to join this group at all.

Another important point which the AG brought up was already discussed in chapter 2.2.4. is the explanation of the AG to the question why a head office present in another Member State should be able to join a VAT group in a Member State in which its fixed establishment is located. The reason for that, as mentioned previously, is the *Crédit Lyonnais* case in which the court held that a company in one Member State has to be considered as established in the Member State of the fixed establishment for the activities carried out there.⁶⁰ This means that a head office is established in the Member State of its fixed establishment and the joining of the head office of a VAT group in this Member State would still be in line with Article 11 of the VAT directive.⁶¹

The conclusion of the AG was that the Swedish branch should not have been able to join the VAT group in Sweden in the first place. For resolving this issue the AG proposed four practical solution which could lead to an acceptable resolution of this issue.⁶²

⁵⁸ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 46.

⁵⁹ Opinion of Advocate Léger, C-210/04 *FCE Bank* [2006], paragraph 56.

⁶⁰ C-388/11 *Crédit Lyonnais* [2013], paragraph 33.

⁶¹ Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 56.

⁶² Opinion of Advocate General Wathelet, C-7/13 *Skandia* [2014], paragraph 60.

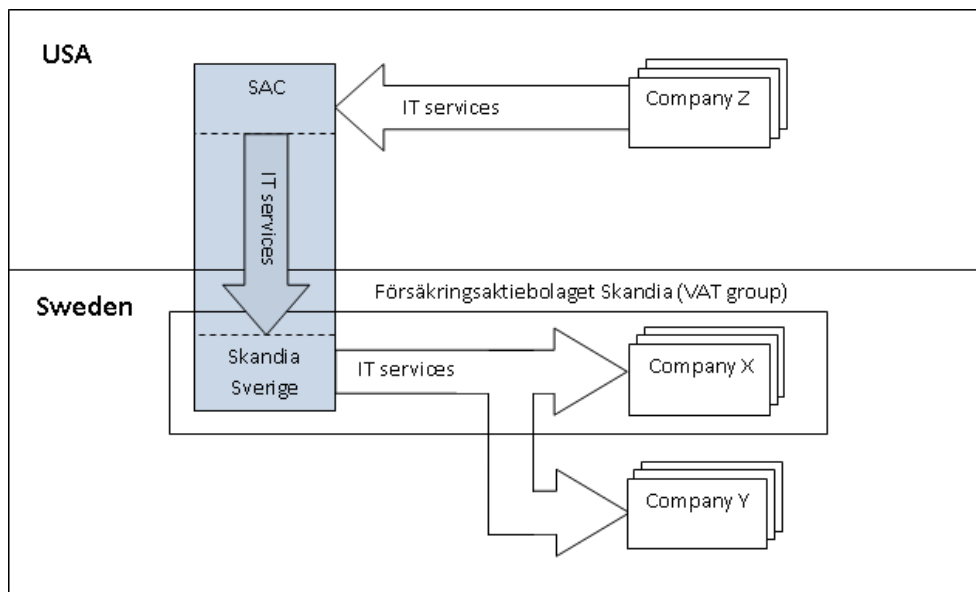


Figure 5: Situation in the Skandia case

3.2.1. Four proposals made by the Advocate General

The *first proposal* was built around the idea to reverse the decision of allowing the Swedish branch to join the VAT group.⁶³ The result of such a procedure would be that the transaction between a head office and a branch which is part of a VAT group would be transformed in a head office to branch transaction without any specialities and therefore the *FCE Bank* judgement could be applied. It has to be born in mind that in a case where this proposal will be applied without granting the branch any opportunity to join a VAT group in Sweden, the result might be an infringement of the fundamental freedoms. Namely the freedom of establishment, found in Article 49 of the TFEU, which forbids any restriction on the setting-up of agencies, subsidiaries and branches of establishments of a Member State in the territory of another Member State. The reversal of the decision to include the Swedish branch in the VAT group without providing any other possibilities to join such a VAT group would create a situation which would be less advantageous than the situation for local establishments. Following the case law of the ECJ a permanent establishment of a foreign company within the territory of a Member State has to have the same advantageous group tax benefit treatment as a local establishment.⁶⁴

⁶³ Opinion of Advocate General Wathelet, C-7/13 Skandia [2014], paragraph 60.

⁶⁴ M. Helminen, 'Chapter 2: Non-Discrimination and Basic Freedoms' in EU Tax Law – Direct Taxation – 2013, [2013], page 29.

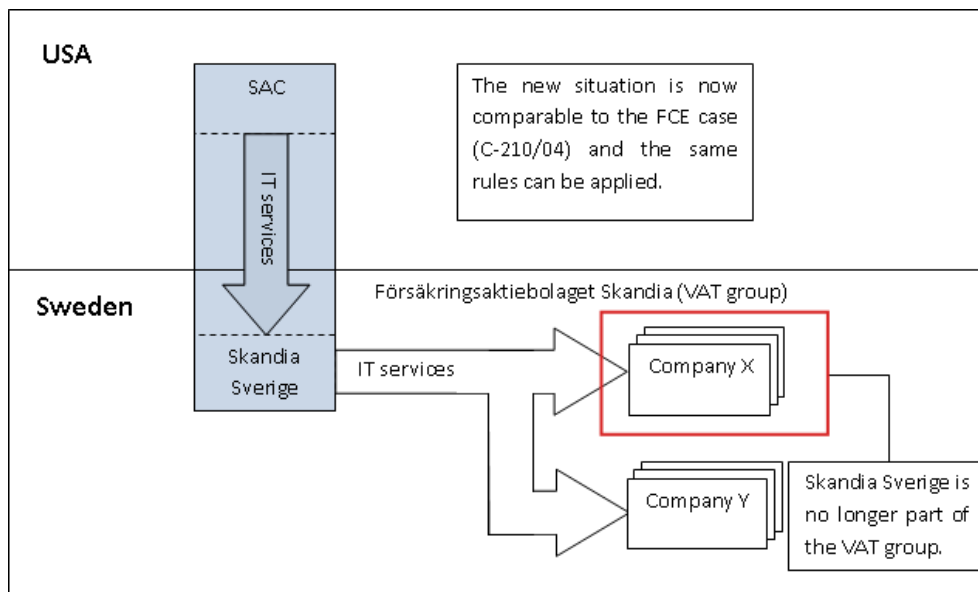


Figure 6: First Proposal

His *second proposal* was intended to make the assumption that the application to join the Swedish VAT group did not come from the branch but from the head office in the first place. Although mentioned by the AG, the fact that this could lead to potential conflicts with other Member States and their legislation, was not discussed by him.⁶⁵ This newly arising issue was one of the reasons why the Commission did not want to allow Member States to include foreign entities to join a VAT group which they mentioned in their Communication to the European Parliament.⁶⁶ For them an inclusion of foreign entities would endanger an infringement of the principle of territoriality and the fiscal sovereignty of other Member States.⁶⁷ Also there would be a risk that one entity would be included in two VAT groups which would not be in line with the Common System of VAT nor would it be manageable simply at a national level.⁶⁸ The result of including the head office into the VAT group would be, that the transaction between the head office and the Swedish branch would be considered as intra group transactions and therefore not be relevant for VAT purposes. Nevertheless there still would be taxable transactions within the Swedish territory as SAC is now a member of the VAT group. This means that all transaction supplied to SAC are now supplied to the VAT group in Sweden instead (and therefore liable to VAT in Sweden).

⁶⁵ Opinion of Advocate General Wathelet, C-7/13 Skandia [2014], paragraph 65.

⁶⁶ Commission Communication, COM(2009) 325 final, [2009], page 7.

⁶⁷ Commission Communication, COM(2009) 325 final, [2009], page 7.

⁶⁸ Commission Communication, COM(2009) 325 final, [2009], page 7.

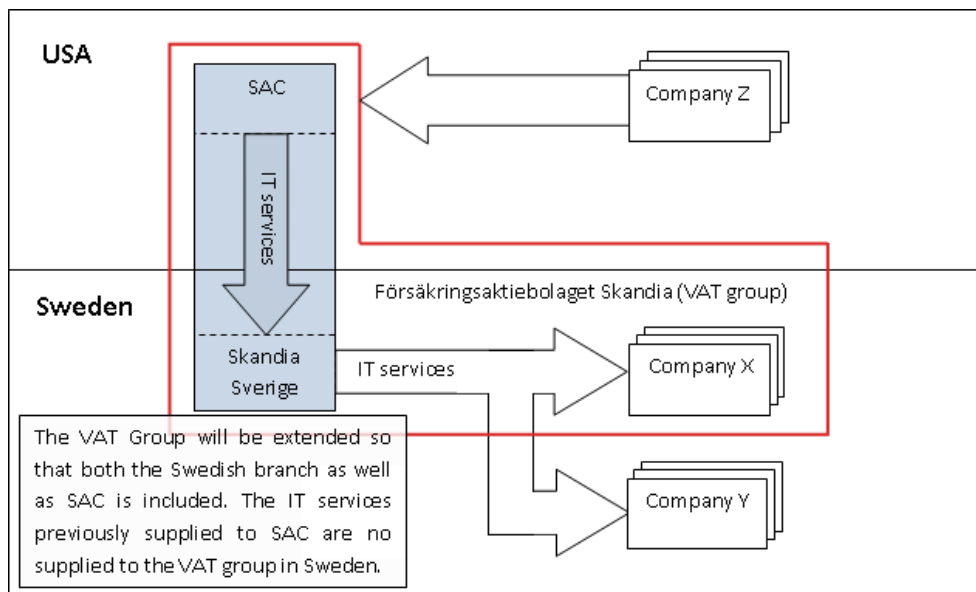


Figure 7: Second Proposal

To illustrate the issue with including head offices located in foreign countries in VAT groups, a situation can be assumed in which the head office of a group of companies is located in Germany. They have fixed establishments in Germany as well as Sweden. Furthermore the assumption has to be made that Sweden adapted their national VAT legislation to the second proposal of the AG which means that for a branch to join a VAT group the head office has to join the VAT group as well. The problem which is now arising has to do with a speciality in the German VAT grouping legislation. Following Article 2(2) of the German VAT law the creation of a VAT group is not an optional choice but an automatic procedure if certain criteria are met. If the German company group meets these requirements in Germany they would form a VAT group there. But for the Swedish branch to join a VAT group in Sweden the head office of the fixed establishment would also have to join this group. The problem arising would be that as the head office is already part in a VAT group in Germany the entering of its Swedish branch in a VAT group would only be possibly if the head office would join two VAT groups at the same time and therefore creating a conflict between two national legislations.

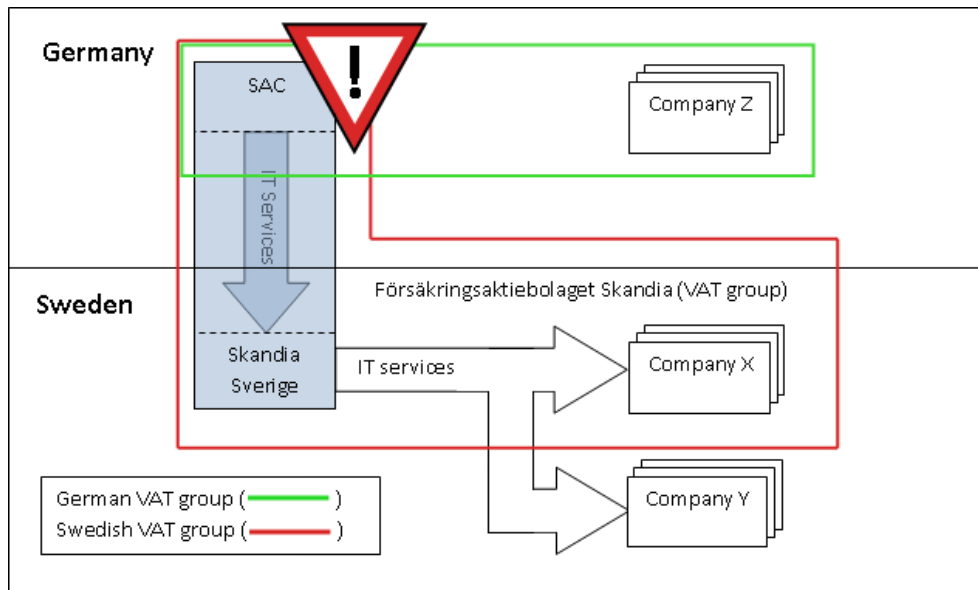


Figure 8: Issue with the second proposal

The AG combined proposal one and two in his *third proposal*, as the Swedish government brought up the issue that the joining of a VAT group still should be an optional choice and therefore the court should not make a decision which chanches the status of the VAT group treatment of SAC and its branch in Sweden without involving them in the decision. That is why SAC should be able to choose if they want to be part of the VAT group as a whole (as in proposal two) or if they want to forego to join the VAT group in the first place (as in proposal one). The AG agreed with this view and therefore made proposal three to combine proposal one and two.⁶⁹

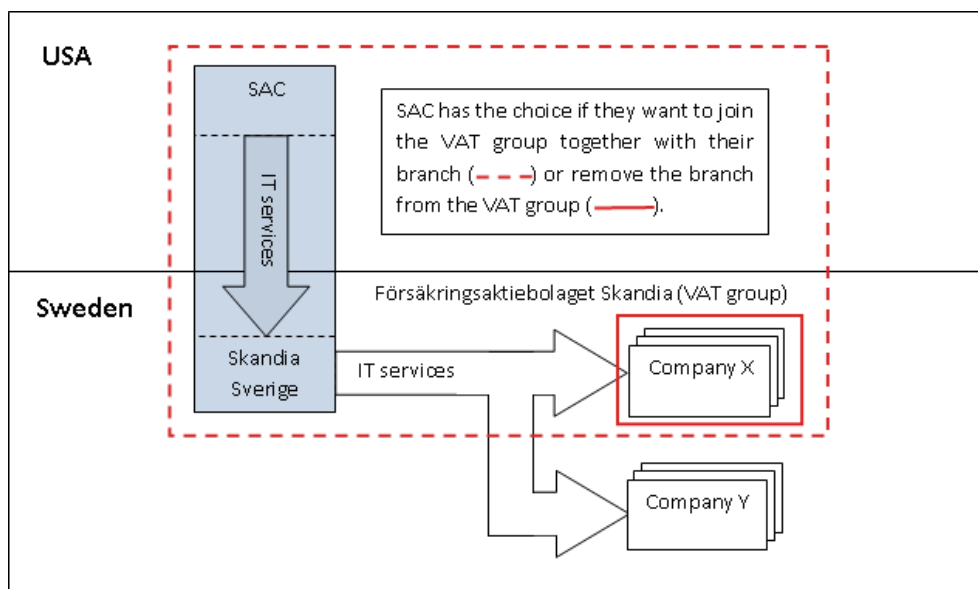


Figure 9: Thrid proposal

⁶⁹ Opinion of Advocate General Wathelet, C-7/13 Skandia [2014], paragraph 73.

The *fourth* and last proposal was more a solution to the issue if the other three proposals cannot be applied. The solution for the issue for the authorities in this case would be to rely on Article 11(2) which authorises Member States to adopt any measures needed to prevent tax evasion or avoidance through the use of this Article.⁷⁰ The AG thought that in the case SAC was right and could apply the *FCE Bank* case judgement to their situation (even though the Swedish branch was part of a VAT group), that this would lead to a situation in which neither the transaction between SAC and the branch nor the transactions between the Swedish branch and the members of the VAT group would be liable to VAT. As the subsequent situation of non-taxation of these transactions can clearly not be the intention of Community law, Member States should be able to make the transaction between SAC and the Swedish branch liable to VAT.⁷¹

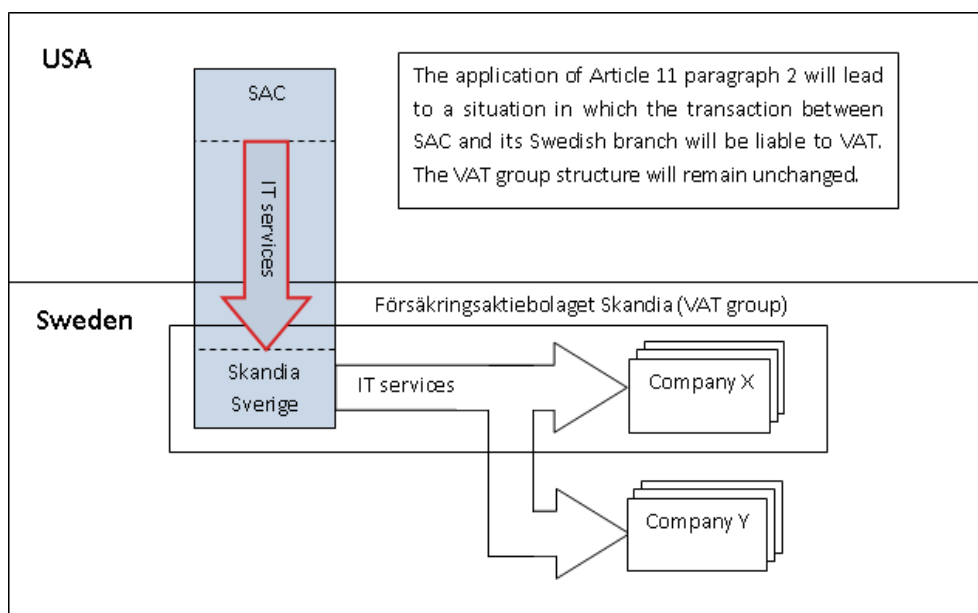


Figure 10: Fourth proposal

3.3. Judgement

For the first question the ECJ took the view that the Swedish branch itself cannot be regarded as an own taxable person. For that, they referred to the already mentioned *FCE Bank* case. Following the argumentation brought up in the case, they referred to Article 9 which states that a taxable person has to carry out independently an economic activity. Furthermore following the case law of the ECJ there has to exist a legal relationship between the recipient and the supplier of a service.⁷² Therefore the ECJ decided that for the existence of a legal relationship between the head office and its branch, the branch has

⁷⁰ Opinion of Advocate General Wathelet, C-7/13 Skandia [2014], paragraph 75.

⁷¹ Opinion of Advocate General Wathelet, C-7/13 Skandia [2014], paragraph 76-77.

⁷² C-16/93 Tolsma [1994], paragraph 14.

to carry out an independent economic activity.⁷³ For determining the independence the ECJ checked in particular if the branch bears the economic risk on its own or if the risk is covered by the head office.⁷⁴ They used the same criteria in the *Skandia* case and came quite clearly to the conclusion that, as the branch of SAC does neither operate independently, nor does it bear any economic risk on itself and furthermore does not have any endowment capital or owned assets, it cannot itself be characterised as a taxable person.⁷⁵

The ECJ proceeded with recognising the fact that the Swedish branch is part of a VAT group in Sweden and therefore forms a single taxable person with the members of the VAT group. Following the wording of Article 11 of the VAT group and case law, members of a VAT group are no longer considered as a taxable person on their own but as a new taxable person all together in the form of the VAT group.⁷⁶

These two points were enough for the ECJ to come to the following conclusion for the first question:

‘Having regard to all the foregoing considerations, the answer to the first question is that Articles 2(1), 9 and 11 of the VAT directive must be interpreted as meaning that supplies of services from a main establishment in a third country to its branch in a Member State constitute taxable transactions when the branch belongs to a VAT group.’⁷⁷

For the second question the ECJ made a reference to Article 196 of the VAT directive. Article 196 stated at the time of the referral of the question that VAT shall be payable by any taxable person to whom the services referred to in Article 56 are supplied or by any person identified for VAT purposes in the Member State in which the tax is due to whom the services referred to in Articles 44, 47, 50, 53, 54 and 55 are supplied, if the services are supplied by a taxable person not established in that Member State. No involved party contested that the supplied service were among the services mentioned in Article 56 and applying Article 196 therefore the VAT group is liable to pay the VAT. In the latest version of the VAT directive the same conclusion could be made by applying Article 44 (in which the mentioned Article 56 was implemented in) and Article 196.⁷⁸

Even though the actual result in terms of which transaction will be taxed is the same for the judgment of the ECJ and the fourth proposal of the AG it can

⁷³ C-210/04 FCE Bank [2006], paragraph 35.

⁷⁴ C-210/04 FCE Bank [2006], paragraph 35.

⁷⁵ C-7/13 Skandia, [2014], paragraph 26.

⁷⁶ C-162/07 Ampliscentifica and Amplifin [2008], paragraph 19.

⁷⁷ C-7/13 Skandia [2014], paragraph 32.

⁷⁸ C-7/13 Skandia [2014], paragraph 38.

be said that the ECJ did not follow the opinion of the AG in general. It can be assumed that one of the major reasons for that was the fact that the ECJ completely ignored the issue arising from the question if a branch can join a VAT group independently or if they only can join if their head office joins the VAT group together with them. In their judgment they went directly from discussing that the Swedish branch is not an own taxable person as they are dependent to discussing that members of a VAT group are to be considered as a single taxable person and therefore supplies made to VAT group have to be considered as being made to the group and not the member of the group.

3.4. Reaction from Member States and further comments

Not surprisingly the UK did not agree with the ECJ that a branch should be unable to join a VAT group on its own, which is also reflected in their national legislation. A revenue and customs brief was published by the HMRC (the UK tax authorities) on the 10 February 2015. In this brief the HMRC made clear that no changes to their national legislation are required as the ECJ did not consider the different VAT grouping rules of the UK. Nevertheless they acknowledged that the judgement will affect UK VAT accounting. They made clear that oversea establishments of UK established entities are part of a separate taxable person if the overseas establishment is part of a VAT group in a Member State that operates similar VAT grouping provisions as used by Sweden.⁷⁹ The answer from the Dutch Ministry of Finance was shorter. They consider the *Skandia* judgment as a whole is completely non-applicable in the Netherland as the Dutch VAT grouping rules are different from the VAT grouping rules of Sweden.⁸⁰ It can be assumed that more Member States will release statements about their opinion as soon as the Commission will further discuss the *Skandia* case, which is planned for the future.⁸¹

A significant issue arising is the fact, which still remained unclear after the judgment, is the determination of the taxable amount of the transaction between the Swedish branch and the head office. As it is made clear in the judgement that the cost sharing agreement does not hold any significance for this purpose there is no basis on how to determine the value of the transaction.⁸² Even though an *a contrario* interpretation of the statement seems to be the solution (i.e. as the transaction is now made between the head office and the VAT group, it is made between two independent parties and therefore the cost sharing agreement is relevant) the ECJ is generally very reluctant to use an

⁷⁹ HMRC, Revenue and Customs Brief 2 (2015): VAT grouping rules and the *Skandia* judgment, [2015].

⁸⁰ PWC, Developments regarding Dutch and UK view on ECJ case *Skandia*, [2015].

⁸¹ PWC, Developments regarding Dutch and UK view on ECJ case *Skandia*, [2015].

⁸² C-7/13 *Skandia* [2014], paragraph 27.

a contrario interpretation in its reasoning⁸³ and therefore another solution has to be found.

The feeling one might have after comparing the different views of the involved parties, the AG and the final judgment was described by Richard Straton in the British Tax Review.⁸⁴ He compared the situation to an exam session in school. The AG would be the teacher preparing his students with a mock exam for the final exam. In the mock exam the students had four choices which represent the four possibilities the AG made in the *Skandia* case. After the final result the UK, the student who did best in the mock exam and brought up all points the teacher was interested in, fell apart in the final. Sweden, the student who had contradictory and illogical answers in the mock exam, triumphed in the finals. For him the teacher has to have been left flabbergasted because all the theory built up over years was ignored by the final examiners.⁸⁵ Of course it has to be born in mind that this comparison was made in a British tax journal and therefore it is very likely that it has a bias to support the British view of the case.

A possible solution which will not be discussed in depth in this thesis, however at least is worth mentioning is the internal supply of services provision in Article 27 of the VAT directive and the definition of the taxable amount in such cases in Article 77 of the VAT directive. The Article states that, Member States are allowed to treat, as supply for consideration, the supply by a taxable person of a service for the purposes of his business, where the VAT on such a service, were the service is supplied by another person, would not be wholly deductible. Applying this provision would make it possible to tax supplies made in VAT grouping schemes like the one in the UK and the Netherlands. Supplies made internally could simply be seen as taxable supplies and tax evasion and avoidance set-ups could be prevented by this.

4. Switzerland

The Swiss VAT system is similar to the system of the EU. Like the European system the Swiss system is a multistage consumption tax levied at every stage of production or distribution on the value added to taxable supplies.⁸⁶ The system was first introduced in Switzerland in 1995 on the basis of the VAT Ordinance⁸⁷ (VATO). In 2001 the VATO was replaced by federal tax law (the

⁸³ H. Schermers / D. Waelbroeck, *Judicial Protection in the European Union*, Fifth edition, 1992, page 12.

⁸⁴ R. Straton, *Skandia America Corporation USA, 'Filial Svergie v Skatteverket: VAT grouping and intra entity supplies'* in *British Tax Review*, Volume 1, [2015].

⁸⁵ R. Straton, *Skandia America Corporation USA, 'Filial Svergie v Skatteverket: VAT grouping and intra entity supplies'* in *British Tax Review*, Volume 1, [2015], page 24.

⁸⁶ X. Oberson / H. Hull, *Switzerland in International Tax Law*, [1996], page 20.

⁸⁷ Le Conseil fédéral, *Ordonnance régissant la taxes sur la valeur ajoutée du 22 juin 1994*, [1994], RS 641.201.

VATL⁸⁸). The VATL was, even more than the VATO, influenced by the Sixth Directive and the case law of the ECJ. As a reaction to criticism of the VATL for being too complex an expert group started to work on a simpler and more competitive model. The result of this work was, that the Federal Council published a Message in the simplification of the VAT system in 2008 with two possible projects.⁸⁹ One project planned to restrict the tax rate to one unique rate and the other project was maintaining the three-tax-rate system. The second project with the three-tax-rate system was later approved by the parliament and the New Federal Tax Law on Value Added Tax (NVATL⁹⁰) entered into force in 2010 and is still in force. Nevertheless the project with the unique tax rate is not yet abandoned and might be tackled in the future.⁹¹ The important difference which will be relevant for our research is the treatment of foreign fixed establishments which will be discussed in the following subchapter.

4.1. Treatment of fixed establishments in Switzerland

In Swiss law the definition of a fixed establishment is inspired by the OECD Model Convention.⁹² The definition can be found in Article 5 of the VAT regulation (‘Mehrwertssteuerverordnung’ or in short ‘MWSTV’) and describes a fixed establishment as a fixed place of business which performs partially or totally the activities of a business. In addition to the definition the Article provides a non-concluding list of types of fixed establishments (inter alia branches, factories etc.). According to the accepted legal doctrine a Swiss fixed establishment is defined as a commercial business which is a dependent part of a main establishment with its own premises and own activities of similar type. In the most recent procedure to register a fixed establishment the criteria for independence and autonomy (which were previously required) have been dropped and are no longer requirements to establish a fixed establishment in Switzerland. As this was a recent change most of the currently existing case law is outdated.⁹³ The definition for foreign fixed establishments is defined almost identical to local fixed establishments as a business with own premises and personnel which operates on his own account and in its own name.⁹⁴

Switzerland follows the dual entity principle for the treatment of fixed establishment. In the Swiss law some of the foundation for this principle can be

⁸⁸ Le Conseil fédéral, Loi fédérale régissant la taxes sur la valeur ajoutée du 2 septembre 1999, [1999] RS 641.20, FF 1999 6752.

⁸⁹Le Conseil fédéral, Message sur la simplification de la TVA, [2008], FF 2008 6277.

⁹⁰ Loi fédérale régissant la taxes sur la valeur ajoutée, RS 641.20.

⁹¹ X. Oberson / H. Hull, Switzerland in International Tax Law, [1996], page 20.

⁹² D. Wiederkehr / T. Arnet, ‘Schweizer Betriebsstätten von ausländischen Unternehmen’ in Der Schweizer Treuhänder, Volume 9, [2011], page.763.

⁹³ Honsell et al, Basler Kommentar: Obligationenrecht II, [2014], page 2199.

⁹⁴ Honsell et al, Basler Kommentar: Obligationenrecht II, [2014], page 2200.

found in the Obligationenrecht ('OR'). Following Article 935 OR every fixed establishment has to register itself at the place of creation (in the respective canton) into the register of companies. This obligation is true for Swiss as well as foreign fixed establishments. A registration in the register of companies leads to the creation of an own legal personality (see articles 643, 779 and 838 depending on the legal form of the fixed establishment).

For VAT purposes Swiss fixed establishments can rely on Article 10(3) of the Swiss VAT law ('MWSTG') meaning that a Swiss head office and all local branches are regarded as one tax subject for VAT purposes. Foreign branches cannot do so. The MWSTV only mentions in Article 7 that all Swiss branches of a foreign head office are regarded as one tax subject but this does not apply for the head office. One of the reasons for the possibility to consider all branches (for foreign entities) or all branches and the head office (for Swiss entities) only for VAT purposes but not for other taxes is a speciality in the Swiss tax system.

Switzerland collects taxes on four levels: federal, cantonal, municipal and church. For simplification purposes church taxes will be ignored (which affect only direct taxes) and the cantonal and municipal level will be regarded as the same (which is not too much of a simplification as in most cantons the cantonal tax offices are also responsible for collecting the municipal taxes). Other than direct taxes, indirect taxes are the sole competence of the federal tax authorities and therefore the same for the whole country. That is why it is possible for simplification purposes to regard branches in different locations within Switzerland as one tax subject for VAT purposes but not for direct tax purposes. Another reason is to avoid abuse as, similar to the VAT directive, the Swiss legislation has a minimum threshold of revenue which has to be met to be liable to pay VAT.⁹⁵ Without the provision that all branches are considered to be one entity there would be the possibility to split up a business in multiple businesses which are below the minimum threshold and therefore not liable to pay VAT.

4.2. Double taxation and non-taxation possibilities

The previously mentioned differences between the Swiss and European treatment of fixed establishments can lead to both, a situation with double taxation and a situation with non-taxation. For understanding purposes the situations will be illustrated with the help of a situation in which a head office supplies IT services to one of its branches which processes these services to the end

⁹⁵ Article 10(2)(a) of the MWSTG states that businesses whose turnover is below CHF 100'000 a year are exempt from VAT.

product and supplies the services back to the head office. To make the example easier to understand the assumption is made that the *Crédit Lyonnais* case does not exist.

4.2.1. Situation of double taxation

A situation in which double taxation can arise if a branch located in the EU provides services to a head office in Switzerland which provides exempt services. Due to Article 45 MWSTG the transaction from the branch to the head office in Switzerland is liable to the so called ‘Bezugssteuer’. Affected by the ‘Bezugssteuer’ are, according to Article 45(1) MWSTG, among other things transactions from businesses located outside the Swiss territory (and therefore not registered in the Swiss registry for taxable persons) to businesses located within Switzerland. Liable to pay this form of Swiss VAT is, following Article 45(2) MWSTG, the recipient of the service in Switzerland. This system can somewhat be seen as comparable to the reverse charge mechanism in the EU. As the head office provides exempt services in Switzerland (for example in the banking⁹⁶ or insurance sector⁹⁷) the Swiss head office will be unable to deduct any input VAT. The Swiss legislation in terms of deduction of input VAT is comparable to the one in the EU, as Article 28 MWSTG grants the right to deduct any paid input VAT provided that the services are not used for exempt or non-relevant transactions for VAT purposes.⁹⁸ The issue arising is that from a European view the transaction from the branch to the head office is non-relevant for VAT purposes and therefore has to be regarded as a non-supply. This means for the branch that it will be unable to deduct any input VAT. In the end neither the Swiss head office nor the branch can deduct any input VAT.

⁹⁶ Article 21 paragraph 17 MWSTG.

⁹⁷ Article 21 paragraph 18 MWSTG.

⁹⁸ Which is clarified in Article 29 MWSTG.

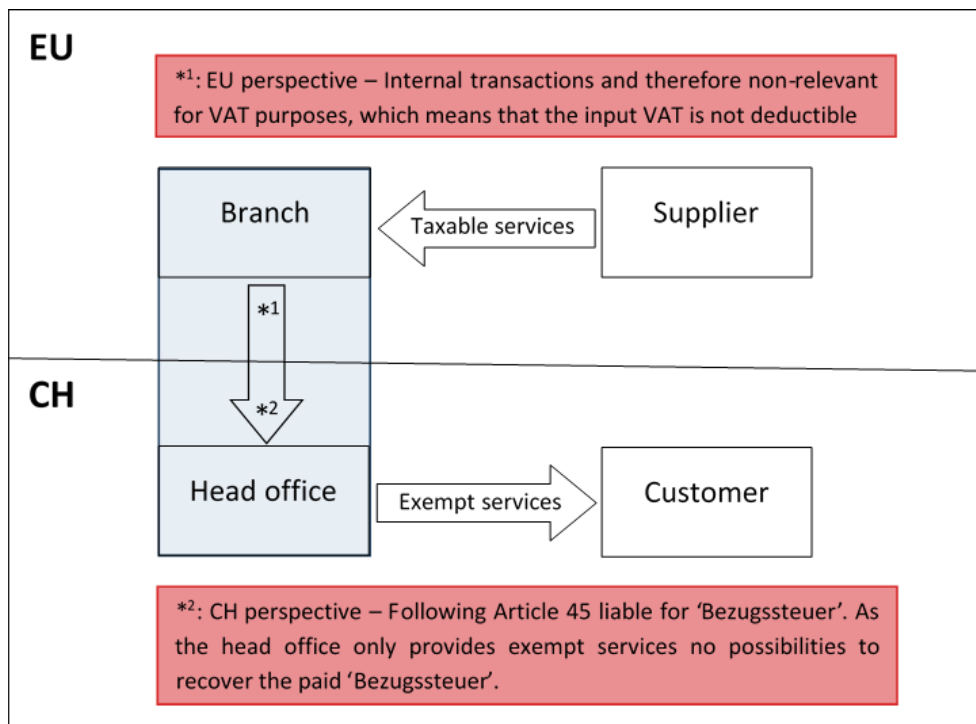


Figure 11: Situation of double taxation

4.2.2. Situation of non-taxation

A situation with non-taxation may arise for companies which are generally exempt from VAT (e.g. banks, insurance companies or hospitals). Under normal circumstances these companies are unable to deduct input VAT from their purchases as the goods and services are not used for VAT liable transactions. One of the possibilities to avoid this issue is to integrate the companies in a VAT groups (as mentioned in chapter 2.3.) or opt for taxation (which is not possible for everyone) and therefore be able to avoid non-recoverable VAT costs. Another possibility for them is to use the differences in the Swiss and European legislation. This can be especially interesting if services are acquired from providers which are themselves part of a VAT group and will therefore be unable to join another group. An example for this might be an IT company as IBM, Microsoft or Apple but also other mainly larger provider of services which are already part of a VAT group themselves.

To illustrate that it can be assumed that a branch is located in Switzerland. The branch acquires services and recharges them to the head office and other branches (probably mainly companies which will perform exempt business activities) within the EU. Following Article 60 MWSTV the Swiss branch is able to deduct the VAT invoiced as long as that the input VAT would have been deductible under Article 28 MWSTG if it would have been supplied to a business in Switzerland. As long as the acquisition and recharge of services is not an exempt activity there should not be any problems with deducting the

input VAT. From a European perspective the transaction from the branch in Switzerland to the head office and other branches will not be seen as VAT relevant transactions as the supply is made within one and the same entity. The head office and branches in the EU would therefore receive services without any payable input VAT. Therefore they will not face the problem that they are unable to recover any input VAT due to their exempt business activities.

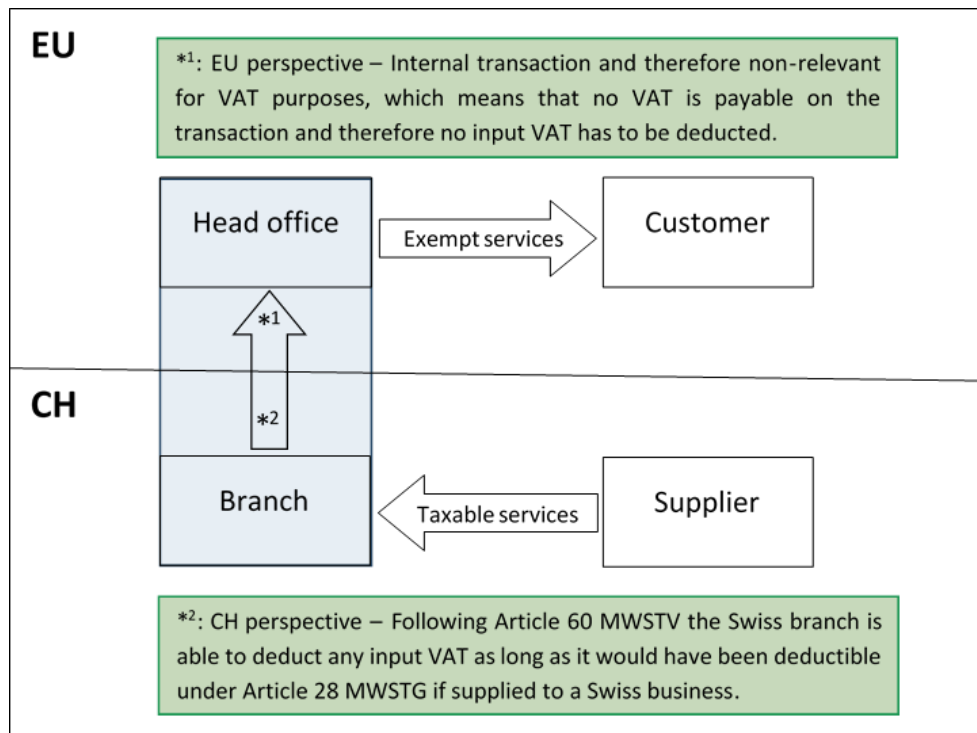


Figure 12: Situation of non-taxation

5. Application of the Swiss treatment of fixed establishments to the EU

The purpose of this chapter is to analyse, what would happen and what would be necessary to change the treatment of fixed establishments in the EU from a single entity principle to a dual entity principle.

5.1. Application of the dual entity principle to the case law of the EU

For making the effects and the differences of the change to a dual entity principle easier to understand, two cases can be used to show what it would mean. These cases are the *FCE Bank* case and the *Skandia* case. But before the focus can be moved to the cases, it has to be established how such a change of system could be implemented in EU legislation. The change from a single to a dual entity principle will not be an act of a simple change of practice but also

a change of provisions within the VAT directive. First and foremost the definition of a taxable person. Article 9 of the VAT directive clearly states that a requirement to be regarded as a taxable person is independence. Comparing that to the Swiss MWSTG, which applies a dual entity principle, an independence requirement for taxable person does not exist. Article 10 of the MWSTG defines a taxable person as any who, independently from the legal form, purpose and goal, operates a business, and who is not exempt according to paragraph two. There are some more details about the definition of what is to be considered as operating a business and the exempt persons but there is no sign of an independence requirement in order to be classified as a taxable person. With the removal of the independence criteria, it is possible to see a fixed establishment (e.g. a branch) as an own taxable person and treat it as an own entity. Therefore the start of the change from the single entity principle to a dual entity principle will be the removal from the independence requirement from Article 9 of the VAT directive.

If the *FCE Bank* case will be analysed with the change of Article 9 in mind, the whole case appears much more trivial. As a quick reminder a head office located in the UK supplied IT services to its Italian branch. The ECJ decided that these transactions are not to be regarded as relevant for VAT purposes as they are internal supplies within one and the same entity. The first argument of the court that the branch cannot be seen as a taxable person due to an employee-employer relationship (Article 10 of the VAT directive) will not be further discussed as, in the opinion of the author, the whole argument is more than questionable. Looking at the next argument of the ECJ there is the requirement of a legal relationship with a reciprocal performance between supplier and recipient. For that reason, the ECJ checked if such a relationship existed between a non-resident company and one of its branches they checked if the branch had an independent economic activity and thus could be regarded as an independent bank.

With the change from the single to the dual entity principle and the necessary step of taking out the independence criteria from the definition of a taxable person in Article 9 a review of the independence of the branch in Italy is no longer required. Nevertheless following the case law of the ECJ (*Tolsma*⁹⁹, *Kennemer Golf*¹⁰⁰) a reciprocal performance is still required for a taxable transaction. In *FCE Bank* the head office provided services to the branch which decided to remunerate the head office through a cost sharing agreement for it. As the ECJ correctly noted in its judgement this cost sharing agreement has not much of a relevance as it is not an agreement between two independent parties.

⁹⁹ Tolsma C-16/93 [1994], paragraph 14.

¹⁰⁰ Kennemer Golf C-174/00 [2002], paragraph 39.

This issue makes it clear that the simple removal of the independence criteria alone cannot be done without adjusting or even implementing new provisions to support the change. The current issue could be solved by adding a new provision which concerns the determination of the taxable amount concerning transactions between dependent parties (this problem will be addressed in subchapter 5.2.1. which concerns the topic of transaction between dependent parties and connected issues). With the removal of the independence requirement in Article 9 of the VAT directive and the implementation of a good working provision which specifies rules about the taxable amount for transactions between related parties most of the issues in the *FCE Bank* case are rendered to be non-problematic. The result for the *FCE Bank* case would be that the transaction between the UK head office and the Italian branch are no longer regarded as internal transactions, but as transactions between two separate taxable persons.

With the results from the *FCE Bank* case in mind the focus will now be switched to the *Skandia* case. As a quick reminder the case was about SAC which is established in the US and supplied services from the US to one of its branches in Sweden. The Swedish branch processed these services and re-charged them to other companies. The difference from the *FCE Bank* case was, that the Swedish branch was, independently from its head office, part of a VAT group in Sweden. The question referred was if the transaction between the head office and the branch had to be regarded as irrelevant for VAT purposes due to the *FCE Bank* judgement or if the transaction is liable to VAT. The ECJ came to the conclusion that the transaction was taxable due to the fact that it was not a transaction between a head office and a branch but a transaction between a head office and a new taxable person in the form of the VAT group.

The considerations made by the AG will not be in the centre of this hypothetical situation. The court started its argumentation by referring to the *FCE Bank* case and the fact that a legal relationship with a reciprocal performance is required for the supplied service to be taxable. Next it followed the *FCE Bank* case in trying to elaborate if the branch has to be regarded as an independent entity or as a part of the same entity. As it was proven by discussing the *FCE Bank* case under the amended regulations previously, the examination if the branch is independent, is no longer required as the independence criteria would have been dropped out of the taxable person definition of Article 9. Even though the AG opinion will be ignored, it can be said that there should not be any problem with a branch to join a VAT group independently from its head office. The reason for this is that the only argument questioning that, as noted by the AG, is that the branch is no legal entity on its own. Under the amended regulations this would no longer be the case as the branch, as an own taxable person, can be seen as an own legal entity for VAT purposes.

Therefore there would not be any reason to reject an application for joining a VAT group by a branch alone. From here on the ECJ judgment can be followed, no matter what entity principle is followed. The reason for that is that the question if the branch is an own entity or part of the same entity as the head office, is no longer relevant as the branch is clearly able to be part of a VAT group on its own and therefore of a new taxable person. This means the branch ceases to exist for VAT purposes and forms part of the taxable person of the VAT group.¹⁰¹

5.2. Possible problems and other findings

This subchapter will focus on possible issues of implementing a dual entity principle in the EU by removing the independence requirement from the taxable person definition in Article 9 of the VAT directive.

5.2.1. Transactions between dependent parties

An issue which has to be solved is that a previously internal transaction within one and the same entity would be considered as a transaction between two entities under the dual entity principle. The issue in this case is that the taxable amount of these transactions has to be determined even though the transactions are obviously not made between independent parties. As seen in *FCE Bank* a cost sharing agreement alone is not enough exactly because of the fact that it is not made between two independent parties.¹⁰² Under normal circumstances the subjective value of the transaction would be used to determine the taxable amount. The subjective value is the value the parties have agreed upon as being the price¹⁰³, which was also confirmed by the ECJ in the *Naturally Yours Cosmetic*¹⁰⁴ case where the ECJ held that the basis of assessment of the taxable amount is the subjective and not the objective value.¹⁰⁵ The problem is that for transactions between related parties the subjective value alone, as a way to determine the taxable amount would open the door for tax avoidance by constructing artificial arrangements to manipulate the final VAT charge and the VAT recovery rate.¹⁰⁶ For that reason the open market value was introduced in the VAT directive. The introduced provisions gave Member States the opportunity to adjust the taxable amount if certain

¹⁰¹ C-162/07 *Ampliscientifica and Amplifin* [2008], paragraph 19.

¹⁰² C-210/04 *FCE Bank* [2006], paragraph 40.

¹⁰³ U. Jablonska, 'Linkage between Valuations for Transfer Pricing, Customs and VAT on Cross Border Transactions' in *Tax Policy Challenges in the 21. Century: Schriftenreihe IStR* Volume 86, page 346.

¹⁰⁴ C-230/87 *Naturally Yours Cosmetic Ltd* [1988].

¹⁰⁵ C-230/87 *Naturally Yours Cosmetic Ltd* [1988], paragraph 16.

¹⁰⁶ U. Jablonska, 'Linkage between Valuations for Transfer Pricing, Customs and VAT on Cross Border Transactions' in *Tax Policy Challenges in the 21. Century: Schriftenreihe IStR* Volume 86, page 347.

requirements are met and the value differed from the open market value. The open market value is defined in the VAT directive by Article 72 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.’

If no comparable supply can be found the VAT directive provides further guidance. In addition to that Article 80 allows Member States to take necessary measures to use the open market value as the taxable amount to avoid tax evasion and avoidance in cases of supplies involving family, close personal ties, ownership, management and financial or legal ties. But this is only allowed in one of the following three cases:

- (a) the consideration is lower than the open market value and the recipient of the supply does not have the right of full deduction;
- (b) the consideration is lower than the open market value and the supplier does not have the full right of deduction or the supply is exempt; or
- (c) the consideration is higher than the open market value and the supplier does not have the right for full deduction or the supply is exempt.

The problem which still would have to be solved is that the VAT directive does not give any guidance which procedure has to be used to calculate the open market value.¹⁰⁷ Even though some countries have solved this issue by relying on solutions on a national level¹⁰⁸, a uniform application throughout the EU should be met to avoid any kind of harmful tax competition. A possibility would be to adopt common rules in the whole territory and take the OECD Guidelines (as already done by Spain¹⁰⁹) as a common basis. The OECD Model convention deals with the issue of relationships of associated enterprises 9. One of the possibilities to determine an objective value (i.e.

¹⁰⁷ The VAT directive gives a definition of the open market value in Article 72, which shall be 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 case that no comparable supply can be found the amount has to be not less than the full cost. Nevertheless no further guidance is given on the meaning of what an arm’s length transaction is and how to determine if the transaction price is actually at arm’s length.

¹⁰⁸ U. Jablonska, Linkage between Valuations for ‘Transfer Pricing, Customs and VAT on Cross Border Transactions’ in *Tax Policy Challenges in the 21. Century: Schriftenreihe IStR* Volume 86, page 347.

¹⁰⁹ L. Mas, *Transfer Pricing for VAT in Spain* in *International VAT Monitor*, [2008].

open market value) would be to apply transfer pricing rules or at least use the OECD Transfer Pricing Guidelines¹¹⁰ as a guidance for new and uniform rules. An example of a systems which already uses methods comparable to transfer pricing rules to calculate the value of transactions are the GST systems of New Zealand and Australia.

A possible issue with transfer pricing rules could be that the foundation of Articles like Article 9 of the OECD Model convention rely on nothing else than an allocation of profits.¹¹¹ The issue arising is that in the case law of the EU the ECJ decided that a dividend distribution (which is also nothing else than a profit distribution and therefore an allocation of profits) can never be regarded as consideration.¹¹² Nevertheless under the circumstances of the newly amended Article 9 of the VAT directive it might be the simplest and probably the most efficient way to solve the issue.

Even though the Swiss approach is better explained in the law, it has the same issue as the approach of the EU has. The Swiss solution can be found in Article 24(2) of the MWSTG. The Article defines that the taxable amount, in cases where the supply is made between related parties, has to be equal to the amount as if the supply was made to an independent third party. Furthermore Article 3 MWSTG defines a related persons as owners of significant participations as defined by Article 69 DBG or persons with a high level of personal relationship (e.g. family members). According to Article 69 DBG the threshold values for a related party is met if one of the following is true:

- (a) Holding at least 10 percent of the share capital of a company;
- (b) beneficial owner of at least 10 percent of the revenue and the reserves of a company; or
- (c) owner of shares of at least CHF 500'000 of a company.

Same as in the EU there is a lack of a guidance how to determine the taxable amount of a transaction which has to be considered as if it would be made to a third party.

There already exists a situation for goods only, which is comparable to the situation that would be present after the implementation of the dual entity principle. This is due to so called fictitious intra-community acquisitions. Article 21 of the VAT directive deals with these fictitious intra-community acquisitions, which are nothing else than entity internal cross-border supplies of goods. To avoid a distortion in the VAT system such internal supplies shall be treated in the same way as normal intra-community acquisitions (or intra-

¹¹⁰ OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010.

¹¹¹ J. Wittendorf, Transfer Pricing and the Arm's Length Principle in International Tax Law, [2010], page 7.

¹¹² C-333/91 Sofitam [1993], paragraph 13.

community supplies) between two separate entities. This provision would of course be rendered obsolete under a dual entity principle as fixed establishments in other Member States would no longer be considered as the same entity as their head office but as own entities, which means that the transactions would no longer be seen as fictitious but as real intra-community acquisitions. In the case of a fictitious intra-community acquisition the definition of the taxable amount can be found in Article 83 of the VAT directive. According to this Article the taxable amount in such a case shall be the purchase price of the goods or similar goods, or in the absence of such a price, the cost price, determined at the time of supply. An interesting thing to think about is what would happen if a similar provision to this is implemented in the EU, which will treat services as internal supplies as soon as all the requirements found in Article 80 of the VAT directive are met. This possible solution will not be further discussed in this thesis but should prove that there are various ways how the problem could be solved.

5.2.2. Increased administrative burden for involved parties

Another disadvantage of an amendment of the VAT directive for adapting the dual entity principle is the significantly increased administrative burden for all affected parties. One of the affected areas is the recovery of VAT. As seen previously in chapter 2.2.4. a head office with a branch in another Member State has to be seen as established in the Member State of its branch. For VAT recovery this means the head office can apply Article 168 of the VAT directive and is entitled to deduct his input VAT (as long as the input VAT is entitled to be deducted) from the payable VAT in this Member State. Under the dual entity principle the whole situation needs more work from the head office as the branch is no longer considered to be the same entity as the head office for VAT purposes. Therefore the head office can no longer be seen as established in the Member State and Article 168 can no longer be applied for recovering input VAT arising for the head office in the Member State of the branch. Instead the head office has to use Article 170 which grants the head offices a right for refund.

To illustrate the issue a company which centralised the acquisition of IT services for all branches at the head office and recharges them from the head office to all its branches (for simplification purposes the assumption is made that both the head office and all branches exclusively supply taxable services which means that they are entitled to a full deduction of any input VAT) can be used. Under the application of the single entity principle the head office can simply transfer the IT services internally to its branches without any VAT consequences as the transfers are considered to be entity internal transactions

and therefore non relevant for VAT purposes.¹¹³ The occurred input VAT of the head office can be fully deducted from the payable VAT in the Member State of the branch.

Following Article 44 of the VAT directive the service shall be taxable at the place where the person has established its business or if the service is provided to a fixed establishment, at the place of the fixed establishment. As the head office acquires the services for the branch the place of supply will be the place of the branch. Nevertheless the head office will be able to benefit from Article 168 of the VAT directive, which grants the head office the right to deduct its input VAT from its VAT liabilities as the head office is established in the country of its branch. In the case of a dual entity principle the head office would still acquire the IT services on behalf of the branch. Continuing with the same procedure as before Article 44 will be applied and the service will be taxable at the place of the branch as seen before. The issue is that the head office is no longer established in the Member State as the branch forms an own entity, which means that Article 168 can no longer be applied and instead the head office would have to rely on Article 170 through which the head office has to ask for a refund of the paid VAT by the authorities of the Member State of the branch. Even though the cumbersome paper-based procedure was replaced by an electronic procedure in 2010¹¹⁴ the refund procedure is still more cumbersome than the simple deduction from the input VAT, from the VAT liability. In addition to the above specified problem, there will be an increasing number of taxable transactions due to the fact the previously non-relevant internal transactions are not considered to be taxable transactions and have to be accounted for in the VAT accounting of all involved parties. So overall the administrative burden would increase for both the involved businesses and the tax authorities.

6. Conclusion

The future of VAT grouping treatment after the *Sakndia* case is still uncertain and depends now on the further decisions of the ECJ and the EU as a whole. The beginning of at least some clarification might be the *Marenave Schiffahrts and Larentia + Minerva* cases which will hopefully at least clarify the possibilities of joining a VAT group of persons without an own legal personality. Nevertheless this can only be seen as the beginning and much more effort will have to be put into the fixing of the whole uncertainty. One of the reason for these issues in the first place was, as we have seen, that the used

¹¹³ See FCE Bank (C-210/04) [2006].

¹¹⁴ B. Terra, *Series of International Indirect Tax*, University of Lund, *The case of value added tax in the European Union*, Volume 5, [2014], page 150.

notions in the VAT grouping provision in Article 11 of the VAT directive can, and are, interpreted in different ways depending on how they are looked at.

At first glance the implementation of a dual entity principle comparable to the one implemented in Switzerland seems to be a great idea. Cases like *FCE Bank* and *Skandia* would no longer be problematic and possibly would not even be necessary to discuss on an ECJ level. Overall the complexity of cross border head office to branch transactions will decrease as they would have to be treated the same as transactions between the head office and its subsidiaries. The whole internal supply issue would be considerably less problematic. Unfortunately it would also lead to new difficulties. First of transactions between the head office and its branches cannot be seen as transactions between independent parties as they are clearly dependent. Therefore the subjective value could no longer be relied on to determine the taxable amount as doing so would open the door for tax evasion and avoidance. A possible solution for that could be the reliance on the open market value as defined by Article 72 of the VAT directive and already used for certain transactions (e.g. Article 80). The disadvantage of this is that although there is a definition of the open market value in the VAT directive. As there would not be any guidance on how to calculate the open market value, the application would again not be uniform across the EU and therefore have the potential to create new conflicts between different Member States. The use of transfer pricing rules could solve this issue. Another issue with the dual entity principle in an environment of a subnational union is the increased administrative burden for all involved parties. To make a final decision about the question if it makes sense to implement a dual entity principle in the EU it comes down to the valuation of simplification, administrative burden and the creation of the issue with the determination of the taxable amount.

In the opinion of the author simplification should not be valued higher than the increased administrative burden and the pricing difficulties. In addition to that a dual entity principle seems to be contrary to facilitating cross-border trade (which was one of the goals of the internal market in the first place) as the treatment of local and foreign branches would no longer be treated the same. Therefore the author thinks that the EU should not implement a dual entity principle solely to simplify possible problems with head office to branch transactions, but should look for more appropriate solutions for a supranational union.

The result also shows a weakness of a simple comparative analysis as simply copying of the legislation of one country and implement it into the legislation of another country alone, is rarely enough to achieve a suitable result. In the case of the research of this topic we have seen that the Swiss system clearly

improves certain areas of the European system, but without amending it heavily and adapting it to the European system it also brings a lot of new problems with it.

List of Literature

EU legislation and cases

238/81 CILFIT [1982].

C-230/87 Naturally Yours Cosmetic Ltd [1988].

C-333/91 Sofitam [1993].

C-16/93 Tolsma [1994].

Opinion of Advocate General Cosmas, C-23/98 Heerma [1999].

C-174/00 Kennemer Golf [2002].

C-210/04 FCE Bank [2006].

Opinion of Advocate General Léger, C-210/04 FCE Bank [2006].

Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations, OJ L 221, [2006].

C-455/05 Velvet & Steel Immobilien [2007].

C 162/07 Ampliscentifica and Amplifin [2008].

C-388/11 Crédit Lyonnais [2013].

C-480/10 Commission v. Sweden [2013].

C-85/11 European Commission v. Ireland [2013].

Opinion of Advocate General Jääskinen, C-85/11 Commission v. Ireland [2013].

Joined cases C-109/14 Marenave Schiffahrts and C-108/14 Larentia + Minerva [2014].

Opinion of Advocate General Mengozzi, joined cases C-109/14 Marenave Schiffahrts and C-108/14 Larentia + Minerva [2014].

C-7/13 Skandia [2014].

Opinion of Advocate General Wathelet, C-7/13 Skandia [2014].

Other materials

BEUSCH S., Back to basics: VAT and groups of companies, Tax Journal, [2011], retrieved from: <http://www.taxjournal.com/tj/articles/vat-and-groups-companies>, last visited 07 May 2015.

COMMISSION OF THE EUROPEAN COMMUNITIES, 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, COM(2009) 325 final, [2009], page 3.

HELMINEN M., Chapter 2: Non-Discrimination and Basic Freedoms in EU Tax Law – Direct Taxation – 2013, [2013], page 29.

HONSELL ET AL, Basler Kommentar: Obligationenrecht II, [2014], page 2199-2200.

HMRC, Revenue and Customs Brief 2 (2015): VAT grouping rules and the Skandia judgment, [2015], retrieved from: <https://www.gov.uk/government/publications/revenue-and-customs-brief-2-2015-vat-grouping-rules-and-the-skandia-judgment/revenue-and-customs-brief-2-2015-vat-grouping-rules-and-the-skandia-judgment>, last visited 07 May 2015.

JABLONSKA U., Linkage between Valuations for Transfer Pricing, Customs and VAT on Cross Border Transactions in Tax Policy Challenges in the 21. Century: Schriftenreihe IStR Volume 86, page 346-347.

LE CONSEIL FÉDÉRAL, Ordonnance régissant la taxes sur la valeur ajoutée du 22 juin 1994, [1994], RS 641.201.

LE CONSEIL FÉDÉRAL, Loi federal régissant la taxes sur la valeur ajoutée du 2 septembre 1999, [1999] RS 641.20, FF 1999 6752.

LE CONSEIL FEDERAL, Message sur la simplification de la TVA, [2008], FF 2008 6277.

MAS L., Transfer Pricing for VAT in Spain in International VAT Monitor, [2008].

OBERSON X./ HULL H., Switzerland in International Tax Law, [1996], page 20.

PATSCHURECK J., Diplomarbeit: Kritische Vorteilhaftigkeitsabalyse von Organschaft verbindungen im Konzern, page 17-19.

PFEIFFER S., ‘Written Comment to the keynote paper ‘taxable persons’ in ECJ - Recent Developments in Value Added Tax: Schriftenreihe IStR, volume 84, [2014], page 97.

Proposal for a Sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes - Common system of value added tax: uniform basis of assessment (COM(73) 950), [1973], page 8.

Proposal for a Council Directive amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations, COM(2005) 89 final, [2006] page 15.

PWC, Developments regarding Dutch and UK view on ECJ case Skandia, retrieved from <https://actueel.pwc.nl/en/belastingnieuws/btw/english-developments-regarding-dutch-uk-view-ecj-case-skandia/>, [2015], last visited 07 May 2015.

SCHERMERS H./ WAELBROECK D., *Judicial Protection in the European Union*, Fifth edition, 1992, page 12.

STRATON R., *Skandia America Corporation USA, Filial Sverige v Skatteverket: VAT grouping and intra entity supplies in British Tax Review*, Volume 1, [2015], page 24.

TERRA B., *Series of International Indirect Tax*, University of Lund, *The case of value added tax in the European Union*, Volume 5, [2014], page 150.

WIEDERKEHR D./ ARNET T., *Schweizer Betriebsstätten von ausländischen Unternehmen in Der Schweizer Treuhänder*, Volume 9, [2011], page.763.

WITTENDORF J., *Transfer Pricing and the Arm's Length Principle in International Tax Law*, [2010], page 7.