Indirect Tax Services
Newsletter

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In brief

On 5 May 2017, the Court of Justice of the European Union (hereafter referred to as "CJEU") released its decision in the first of a series of cases on the interpretation of article 132(i)(f) of the VAT Directive, commonly referred to as 'cost sharing association' (hereafter "CSA") exemption . In Commission v Luxemburg (C-274/15), the Court looked at the rules implemented by Luxemburg for this specific VAT exemption. In its judgement, the Court upholds that the rules implemented by Luxemburg do not comply with the EU VAT Directive. There is still more to come with another three cases relating to this VAT exemption still pending with the Court, for which the Advocate General Opinions have already been released. Although the CJEU does not always follow the opinions of the AGs, there does not appear to be much room for optimism concerning the future of the CSA VAT exemption in particular in relation to its application in the financial services sector, although more certainty is expected to arise in relation to its application.

In detail the CJEU decision in the Luxemburg case (C-274/15)

Background

Article 132(1)(f) of the EU VAT Directive, transposed in Luxemburg VAT Law and clarified in two grand ducal decrees as well as in a Circular letter from the VAT Authorities was regarded by the European Commission as not compatible with the EU VAT legislation. Consequently the European Commission brought Luxemburg to the CJEU in June 2016. In her opinion handed down on 6 October 2016, the AG confirmed the position of the European Commission and invited the Court to rule that Luxemburg CSA exemption does not comply with EU Law.

The CJEU Decision

The Court confirms that there are three divergences from the provisions of the EU VAT Directive in relation to the Luxemburg CSA exemption:

(a) Treatment of services contributed by the members to the group

In Luxemburg, the contribution of services by a member of the CSA to the CSA (when it has no legal personality) is regarded as being outside the scope of VAT.

The Court considered that the CSA is a separate taxable person which provides services to its members. Therefore, any transaction between the CSA and one of its members must be treated as falling within the scope of VAT. Consequently, any re-imbursement by a member from the CSA for services or goods acquired in the member's name but on behalf of the CSA should be subject to VAT.

(b) Use of services by the members

Under the Luxemburg VAT rules, the services provided by the CSA to its members are exempt from VAT, provided that the members' taxed activities do not exceed 30% (or 45% under certain conditions).

The Court ruled that the exemption can only apply for the services provided by the CSA that are directly necessary for the exercise of the non taxable or exempt activities of its members.

(c) Deduction by the CSA's members of input VAT charged to the CSA by external providers

The Luxemburg rules provide that the CSA members are allowed to deduct VAT charged to the CSA on their purchases of goods and services from third parties, up to their respective VAT recovery ratio.

The Court ruled that the CSA is a separate taxable person and for this reason the members cannot deduct VAT in relation to goods and services acquired by the CSA.

Other ongoing case law in this area

In March 2017, the CJEU released two AG Opinions concerning the operation of the CSA exemption, in cases DNB Banka (C-326/15) and Aviva (C-605/15). In these cases the AG responded to a list of questions concerning the application of the CSA as follows:

- The CSA does not need to be a separate legal person but it must be a 'taxable person' in its own right
- the CSA exemption should only apply to services supplied to businesses whose activities fall under the exemptions listed for the public interest (i.e. not for financial services)
- the application of a transfer pricing 'mark-up' means that the 'exact re-imbursement' test is not met
- the CSA should not operate cross-border
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In addition to the above cases, the AG issued in April 2017 his opinion in relation to the infringement proceedings launched by the European Commission against Germany concerning Germany's narrow implementation of the CSA which is currently limited to entities operating in the health and welfare sector. The AG opined that neither the wording nor the objective, or the drafting history of the related article of the European Directive justifies the restriction imposed by Germany.

Implications and the future of the CSA exemption

With the decision of the Luxemburg case and on the expectation that the CJEU will follow the AG opinions in the DNB Banka and Aviva cases, the benefits of the CSA are likely to be reduced across the EU, especially as regards its application in the financial services sector. Having said this, the full implications for the future of CSA will only be known once the Court releases its decisions in the remaining three pending cases.

How can PwC assist:

If you are a business engaged in the financial services, education or medical care sectors and wish to assess whether the CSA would be of benefit to you, or if your business has already adopted the CSA exemption and you would like to assess the impact the CJEU decisions will have on its future operation, the dedicated team of VAT specialists at PwC is ready to meet with you and discuss the ways in which we can offer our support.

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