

The Field of Application of the Cost-sharing exemption in Art. 132 (1)(f) of the EU VAT Directive and the Swedish implementation

Giuliano Lino Heiven

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Supervisor; Assoc. Proff. Oskar Henkow



LUND UNIVERSITY
School of Economics and Management

Abstract

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ABBREVIATIONS

AG	Advocate General
Art.	Article
Commission	Commission of the European Communities
ECJ	The Court of Justice of the European Union
EVD	Council Directive 2006/112/EC of 28 November 2006 on 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	The Treaty on the Functioning of the European Union
VAT	Value Added Tax

1. Introduction

1.1 Background

The economic structure of VAT is outlined in Art. 1(2) of the EU VAT Directive (EVD), which states that VAT is a general tax on consumption. VAT is a general broad based tax, with the objective to tax the personal private expenditure on consumption of goods and services.¹ According to Art. 1(2) EVD, VAT is structured to flow in the whole supply chain from manufacturing, production to the distribution of goods and services to the final consumer. This is achieved by VAT is levied on each transaction exactly proportional to the price of the goods and services.²

Since the character of VAT is a general tax on the private expenditure on consumption, taxable persons³ who carry on economic activities⁴ are relieved of VAT by the right to deduct. According to main rule provided for by Art. 168 EVD, the right to deduct VAT is linked in that way that to the VAT paid on the purchase (input VAT) on goods and services entitles a taxable person the right to deduct the input VAT if that taxable person carries on a taxable transaction. The right to deduct input VAT preserves the neutrality of VAT.⁵

However, the EU legislators' have derogated from the general character of VAT as a broad based tax by exempting some certain activities in the public interest. The exempt activities are outlined in Title IX of the EU VAT Directive, in Art. 131 to Art. 166 EVD. Further, there is a distinction between those exempted activities which entitles a right to full, partly or no deduction.⁶

The exempted activities dealt with are those listed in Art. 132 and Art. 135 EVD, which gives no right to deduct. Reasons for exempting activities listed in Art. 132 EVD are due to both socio-economic and political reasons and the intention to lessen the price for consumers. Reasons for exempting activities listed in Art. 135 are due to both the technical difficulties in assessing the taxable amount and the intention to lessen the price for consumers as concerns credit and insurance.⁷

However, the effort to lessen the price to final consumers by exempting certain activities implies to give rise to disturbances, and complexity, in the supply chain. VAT exemptions have been pointed out as being probably the most complex aspects of the EU VAT system and one of the reasons attributable to the complexity of VAT exemptions are the listing of exempt activities in Title IX of the EU VAT Directive and that exemptions must be interpreted strictly.⁸ Exemptions are contrary to the general economic structure and principle of the EU VAT system as a broad based tax⁹. First, exemptions are contrary to the economic structure by the fact that the supplied services are not subject to VAT. Secondly, exemptions are contrary to the principle of fiscal

1 Terra/Kajus, Introduction to European VAT (Recast), Chapter 7 – Introduction to VAT as a Fiscal Phenomenon.

2 In this regard see recital 5 in the preamble.

3 Art. 9 EVD defines a taxable person and economic activity

4 See Art. 9 and Art. 2 EVD as regards that a taxable transaction is the supply of a good or a service for consideration.

5 Recital 30 in the preamble.

6 Terra/Kajus, Commentary - A Guide to the Recast VAT Directive, Chapter 9 – Exemptions.

7 Terra/Kajus, Commentary – A Guide to the Recast VAT Directive, Chapter 9 – Exemptions.

8 Amand, C., Are VAT exemptions compatible with primary EU law?, IVM Nov/Dec 2010, p.409

9 COM(2010)695; section 5.1.2

neutrality¹⁰ inherent in the EU VAT system which strongly is advocated by the right of deduction of input VAT. In this regard VAT exemption are called the cancer of VAT¹¹

The most significant consequence of carrying on an exempt activity is the loss of neutrality in the tax, which is held to be an obstacle to overall efficiency.¹² The loss of neutrality leads to that VAT borne on the inputs of goods and services cannot be recovered. This in turn implies that irrecoverable VAT becomes a charge and hence a part of the costs which must be absorbed by the business. Irrecoverable VAT affects the price structure when the cost of VAT is absorbed by the operational costs of the business and is passed on further in the supply chain.¹³

Undertakings which carry on an exempt activity face an overall higher operational cost due to the non-recovery of input VAT. This is a factor that discourages outsourcing of services to specialist suppliers, rather instead inclines to supply taxable services in-house.¹⁴ Comparing the VAT consequences between producing in-house and purchasing (outsourcing), there is a strong incentive to insource functions since the immediate effect is that VAT is at least eliminated on the labour costs and profit elements of the non-deductible VAT. In one way, this is argued to be contrary to the fundamental principal of neutrality that VAT should not effect the economic decisions of economic operators.¹⁵

However, there is a difference in the VAT treatment between the chose to externalise activities and to keep these activities in-house. This difference in treatment is a normal consequence of the application of the common system of VAT and of the natural contradiction that the existence of exemptions implies for the principles of neutrality and equal treatment.¹⁶

1.2 Subject

In order to circumvent the above contradiction to attract irrecoverable VAT on the outsourcing of certain services, undertakings which carry on exempt activities may enter into a cost-sharing agreement under Art. 132 (1)(f) EVD. According to Art. 132(1)(f) EVD, the provision provides an exemption for:

the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition.

10 For a general overview of the principle of neutrality of VAT, see Terra/Kajus, Introduction to European VAT (Recast), section 7.3 Neutrality.

11 Amand, C., Treaty of Lisbon and B2B VAT Exemptions, IVT 2012 July/August, p.243

12 SEC(2007) 1554

13 SEC(2007) 1554

14 SEC(2007) 1554

15 Eskildsen, Insourcing and Outsourcing in a VAT Context, INTERTAX, Volume 40, Issue 89 p. 444

16 Opinion of the AG Ruiz-Jarabo Colomer in Case C- 2/95, SDC, para. 54; Judgment in the Case C-108/99, Cantor Fitzgerald International, para.33; Opinion of the AG Poiares Maduro in C-472/03, Arthur Andersen, para.39

The Commission has emphasised the positive effects of making use of the cost-sharing exemption, especially, for financial and insurance services.¹⁷ In TAXUD/2414/08 the Directorate General (DG) acknowledges that financial and insurance service operators are working in a complex regulatory environment putting these operators in making investments that involves amounts and risks that are much higher than in other sectors. The two dominant cost factors for this industry are personnel and information technology (IT) costs.¹⁸

The benefits of making use of the cost-sharing exemption which the Commission highlights are twofold. Accordingly, in the framework of a cost-sharing group, the members to the group outsource certain internal services to be provided by an independent entity in the group. By doing this, the members enhance their competitiveness by achieving economics of scale and by making available internal resource to immerse themselves to its core activity. Competitiveness is achieved for small and medium sized enterprises compared to big enterprises which have the financial strength to conduct these services in-house with internal resources.¹⁹ The VAT consequence of Art. 132 (1)(f) EVD is that the supply of certain services to the members do not attract VAT, which otherwise under normal circumstances would be the implication of purchasing those services by a third party.

Although the efforts by the Commission in advocating and identifying the cost-sharing exemption as a source of competitive advantage, it is not widely used. And there are reasons for that. One reason is due to legal uncertainty surrounding this provision and another reason is due to a wide use of VAT-grouping.

1.2 Purpose

As concerns the legal uncertainty, even though Article 132(1)(f) EVD is a mandatory provision allowing Member States no choice in the matter, the manner in which this provision has and is applied varies from Member States to Member State.²⁰ The issue is not only that Member States have applied Art. 132 (1)(f) EVD differently but even in contradictory ways, where some Member States do not apply this provision in practice because they consider it “unmanageable”. Some Member States have the view that an application would always cause competitive distortions. Other Member States apply this provision liberally while yet others apply it selectively, limiting its use to certain economic operators or specific services.²¹ In a study report conducted by the PwC, economic operators carrying on exempt activities raised the issue of hesitation to apply the cost-sharing exemption due to confusion to different applications by Member States.²²

17 Commission proposal for a Directive COM/2007/747 and the impact assessment SEC(2007)1554. DG Taxation and Customs Union, Background Paper Requested by the Council Presidency TAXUD/2414/08. Commission Staff Working Paper accompanying document to the GREEN PAPER on the Future of VAT SEC(2010)1455.

18 TAXUD/2414/08, p. 14.

19 The effects are highlighted in SEC(2007)1554. TAXUD/2414/08. SEC(2010)1455.

20 SEC(2007)1554, see 4.3.5.3 Cost sharing arrangements.

21 The Commission Working Paper 654, section 1.4, reproduced in in Terra/Kajus, Commentary – A guide to the Recast VAT Directive, sect. 9.2.6.3. For Commission infringement proceedings see Commission Press Release IP/11/428, Commission Press Release IP/12/63

22 PwC Report TAXUD/2005/AO-006-Final report, section 7.3.1. The same hesitation is raised in PwC study “How the VAT Exemptions impact the Banking Sector, 18 October 2011, section 3.6.5.; VAT in the Public Sector and Exemptions in the Public Interest. Final Report for TAXUD/2011/DE/334, 10 January 2013, pages 65-66.

In context to the legal uncertainty, the purpose of this research is to provide for an in-depth analysis of Art. 132(1)(f) EVD, in order to bring some clarity in this matter and to determine the field of application. As is mentioned above there exists deviations in the application of the provision in several Member States. In this research, the application of the Swedish cost-sharing provision is assessed.

1.3 Methodology

The methodology used is the traditional legal method. One reason to the legal uncertainty surrounding Art. 132 (1)(f) EVD is that the concepts and conditions of the provision are not explicitly defined to give a comprehensive understanding and guidance of the application.²³ Further to enhance this effect, there are so far only three ruled cases by the Court of Justice of the European Union (ECJ) referring to Art. 132(1)(f) EVD.²⁴ In this research, several documents submitted by the Commission which deals with the cost-sharing exemption provision are used as a source of law to define and evaluate the field of application and the scope of this provision. The views of the Commission do not constitute hard law, i.e. having a binding force, like regulations and directives do.²⁵ Instead they constitute soft law, legal instruments which are made available to use as guidance and to base arguments against.²⁶ In context to the cost-sharing exemption, this provision has manifested a substantial uncertainty of Member States and of economic operators on how to implement and apply this provision, which has entailed that the Commission have developed and communicated a consistent view on the application of the provision.²⁷ It is against this background, the view of the Commission is presented in this research.

The legal methodology of interpretation of the ECJ is governed by text, context and purpose (telos), where the Court has to interpret “the spirit, the general scheme and the wording” of the legal provision.²⁸

In order to define the scope and field of application of Art. 132(1)(f) EVD, the provision has to be assessed in context to the economic structure of VAT. The legal approach is to look at the legal intention of the EU legislators to find out the rationale of the provision and what the purpose is of the provision. In respect to the assessment in context to the economic structure of VAT, exemptions derogates from the general character of VAT which puts the interpretation in a further dimension.

Exemptions are outlined under Title IX in the EU VAT Directive, and according to the introductory provision provided in article 131 EVD Member States shall lay down the conditions for exemptions in order to ensure the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse. However, as the ECJ has reiterated, those conditions laid down by each Member State cannot affect the definition of the subject-matter of the exemptions envisaged. From

²³ Eskildsen, p.454.

²⁴ The cases are discussed in chapter 2. The cases are C-348/87, SUFA ; C-8/01, Taksatorringen; C-407/07, Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing v Staatssecretaris van Financiën.

²⁵ Article 288 TFEU

²⁶ See inter alia Craig and De Búrca, EU Law, Text, Cases and Materials, Chapter 4 Instruments and The Hierarchy of Norms, fifth edition, Oxford.

²⁷ In this regard, the view of the Commission is elaborated in Working paper No 450, SEC(2007) 1554, TAXUD/2414/08 and Working paper 654.

²⁸ Miguel Poiars Maduro, (2007), Interpreting European law – judicial adjudication in a context of constitutional pluralism, European Journal of Legal Studies, 2007, Vol. 1, No. 2, p.4. See even the following Cases; Case 26/62 Van Gend & Loos and Case 283/81, CILFIT.

that point of view, the subjection to, or exemption from, VAT of a specific transaction cannot depend on its classification in national law.²⁹

The ECJ has stated on several occasions that, the exemptions from VAT constitute independent concepts of Community law which should be placed in the context of the common system of VAT of the common VAT Directive and whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another.³⁰

The first case that dealt with the cost-sharing provision was *SUFA*, where the ECJ stated that the preliminary observation must be made that the common EU VAT Directive confers a wide scope on value-added tax comprising all economic activities of producers, traders and persons supplying services. With regard to the exemptions provided for by the VAT Directive, it is evident from the preamble that the exemptions constitute independent concepts of Community law which should be placed in the general context of common system of VAT. Further the ECJ held that it is clear that the terms used to specify the exemptions envisaged by now Arts. 132 - 135 EVD are to be interpreted strictly since they constitute exceptions to the general principle that turnover tax is levied on all services supplied for consideration by a taxable person.³¹

Following the case *SUFA* and the methodology of strict interpretation in respect to the cost-sharing exemption, in the case *Taksatorringen*, the ECJ observed that although the exemption must be construed strictly, however, not strictly in that sense to impose an interpretation that virtually would make the practical use of the exemption impossible.³² Following this line of reasoning of the ECJ, in the following case *CBO*, the ECJ observed that strict interpretation, nevertheless, the interpretation of the terms must be consistent with the objectives pursued by the exemption and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Accordingly, the ECJ held that the requirement of strict interpretation does not mean that the terms used to specify the exemption should be construed in such a way as to deprive the exemption of its intended effect.³³

From the jurisprudence of the Court it can be derived that strict interpretation of the terms and conditions laid down in Art. 132(1)(f) EVD have to be consistent with the purpose attained by the provision. And in this respect, the provision has to be placed in context to the purpose made available by the EU VAT Directive to exempt certain transactions supplied within a cost-sharing framework.

In line with the reasoning of Maduro, the teleological reasoning could be raised one dimension further, where the telos of the cost-sharing may even be interpreted against the telos of the Treaties and therein the concepts of enhancing competitiveness and distortion to competition from an EU constitutional perspective. This kind of extensive teleological interpretation is not in-depth analysed in this research, however, it is kept in mind underlying the assessment of the cost-sharing provision.

Maduro states that teleological interpretation is the best solution that best fits the underlying goals and requirements of the EU legal order and its particular context of

29 Case C-8/81, *Becker v. Finanzamt Münster-Innstadt*, paras. 31 - 34; C-76/99, *Commission v. France*, para.26; C-150/99, *Lindöpark*, para. 22

30 See for example C-348/87, *SUFA*, para.13

31 C-348/87, *SUFA*, paras.10 to 13

32 C-8/01, *Taksatorringen*, paras. 61 - 62

33 C-407/07, *CBO*, para.30

application.³⁴ Accordingly, teleological interpretation is the more appropriate form of guarantying a uniform application of EU law at national level. Maduro observes that teleological interpretation does not exclusively refer to the relevant legal provision, rather refers to a particular systematic understanding of the EU legal order that permeates the interpretation of all its rules. Consequently the ECJ does not only concern with ascertaining the aim of a particular legal provision, rather instead puts the rule in a broader context, interpreting it in the light of the EU constitutional telos. Maduro observes that there is both a teleological and a meta-teleological reasoning of the Court when both the telos of the rules are interpreted and the telos of the legal context in which those rules exists are interpreted.³⁵

In respect to assess and interpret the Swedish provision, a teleological approach is to be understood as, and in line with direct effect, that the outcome is that the EU law scope and application of the cost-sharing exemption overrules the national.

1.4 Delimitations

Accordingly, in order to evaluate the field of application of Art. 132 (1)(f) EVD, and for the practical reasons for making use of a cost-sharing group, it is of importance to have in mind of the possibility of VAT-grouping, as provided for by Art. 11 EVD. This due to that another reason, apart from legal uncertainty (see above 1.2), why the cost-sharing exemption is not widely used is due to that several Member States have opted to implement Art. 11 EVD.³⁶ According to Art. 11 EVD, persons that are closely bound to one another by financial, economic and organisational links may be regarded as a single taxable person for the purposes of transactions between the persons. This provision, forming a VAT group, provides that all intra-Group transactions are considered as being transactions within the same legal entity, regarded to be outside the scope of VAT and thus not subject to VAT.³⁷

Similarity exists between a cost-sharing group and a VAT group in respect to the effect achieved, that (certain) transactions are not subject to VAT. However, there are several differences, which for the reason of this research not all will be dealt with.³⁸ In context for this research, the following distinctions will be mentioned.

Contrary to VAT groups, which encompass all transactions supplied within the group, the cost-sharing exemption is of a specific nature. The cost-sharing provision is to be applied by specific sectors, for a specific kind of services for specific situations. Another difference is that, contrary to VAT groups which are geographically limited to persons established in the territory of that Member State. In this context, the cost-sharing exemption is thus not limited to be applied in the territory of a specific Member State. This in fact makes the provision interesting for cross-border transactions, especially for the financial and insurance sector.

34 Miguel Poiars Maduro, (2007), p.7

35Miguel Poiars Maduro, (2007), p.5

36 Vyncke. Cost Sharing Associations as an Alternative to VAT Grouping in Belgium, IVM, Sept/Oct. 2006, p. 345

37 VAT Groups and art. 11 EVD see COM(2009) 325, Communication from the Commission to the Council and the European Parliament on the VAT Group option provided for in art. 11, Brussels 2.7.2009

38 For a comparison see Grambeck, Hans-Martin, Outsourcing in the EU Financial Sector – Where Are We Heading? IVT, Nov/Dec 2009. See also Vyncke, Cost Sharing Associations as an Alternative to VAT Grouping in Belgium, IVM, Sept/Oct. 2006.

Sweden has implemented Art. 11 EVD to be applied only by financial and insurance institutions.³⁹ Since this option is widely applied by financial and insurance institutions in Sweden, it is presumed that cost-sharing in a Swedish perspective is very rare.

Finally, delimitation is made to the *EDM*⁴⁰ case which concerns a situation of cost-contribution and is not brought up for discussion in this context. Cost-contribution and cost-sharing are two different kinds of arrangements, due to that a cost-contribution arrangement has not the same purpose and aim as a cost-sharing arrangement. Cost-contribution is an arrangement where businesses are going together to cover the cost among each other under the arrangement to make an investment, such as to invest in to explore land, new technology, R&D, etc. Cost-sharing has a different purpose which is to set up a “cooperative self-supply of services”. Further, it should be mentioned and taking into consideration that if the EDM case would be applicable to the cost-sharing exemption, then the provision would be obsolete.⁴¹

1.5 Disposition

Chapter 2 discusses Art. 132 (1)(f) in the EU VAT Directive.

Chapter 3 discusses the Swedish implementation and the Swedish provision.

Chapter 4 Concluding remarks

³⁹ See further in Case C-480/10, *Commission v Sweden*

⁴⁰ C-77/01, *Empresa de Desenvolvimento Miniero SGPS SA (EDM) v Fazenda Publica, Ministerio Publico*.

⁴¹ Vyncke. *Cost Sharing Associations as an Alternative to VAT Grouping in Belgium*, IVM, Sept/Oct. 2006, p. 346

Chapter 2 Article 132 (1)(f) EVD

Introduction

In this chapter an in-depth analysis of Art. 132 (1)(f) EVD is conducted. First the legal history and the EU legislators' intention is discussed. Further, Art. 132(1)(f) EVD sets out five material conditions which all have to be fulfilled. In the analysis below the material conditions of the provision are outlined in the headings, starting from 2.2.1 to end with 2.2.5. Subsequently, this chapter is wrapped up with a conclusion.

2.1 Legal history

The cost-sharing exemption first appeared in the Proposal for the Sixth Directive.⁴² The exemption was proposed to be applied in a limited form to only services supplied by independent professional group, of a medical or similar nature, to their members for the purposes of their exempt activities.⁴³ Notwithstanding the limited application by the Proposal, the cost-sharing exemption was adopted in article 13(A)(1)(f) of the Sixth Directive⁴⁴ with a broader scope, which was not restricted to independent professional groups in the medical sector. Art. 13(A)(1)(f) also covered services rendered in other exempt and even non-taxable sectors.⁴⁵

2.1.1 The legal intention and function of the cost-sharing exemption

The legislators' intention of the cost-sharing exemption has not been explained in the preparatory works to the Sixth Directive. In this regard, in the Opinion of Advocate General (AG) Mischo in *Taksatorringen*⁴⁶, AG Mischo started the analysis first to consider the reason why the cost-sharing exemption was introduced and the markets conditions created by the presence of an entity which provides services to its members while only claiming exact reimbursement of its share of the joint expenses.⁴⁷

AG Mischo observed that;

It appears that the exemption was introduced in order to avoid a situation where the cost of providing services which the Community legislature had intended to exempt for legitimate and diverse reasons was none the less burdened with a charge to VAT because in order to provide them the operator, probably because the size of its undertaking required it to do so, found it necessary to enter into arrangements with other organisations making available the same services by means of jointly owned entity set up to undertake certain activities essential to the provision of the service.⁴⁸

Further, AG Mischo observed that the thought was that the fiscal treatment of the services supplied from the independent group to its members should be the same as of

42 Proposal for a sixth Council Directive on the harmonization of Member States concerning turnover taxes – Common system of value added tax . Uniform basis of assessment, COM 73(950) of 29 June 1973.

43 Art. 14(A)(1)(f) in the Proposal (above) page 41.

44 The Sixth VAT Directive – Sixth Council Directive of 17 May 1977.

45 In the Case C-8/01, *Taksatorringen*, the Commission points out this difference, paras. 108 to 111 in the Opinion of Advocate General Mischo.

46 C-8/01, *Taksatorringen*.

47 Opinion of Advocate General Mischo in Case C-8/01, *Taksatorringen*, para. 117.

48 Opinion of Advocate General Mischo in Case C-8/01, *Taksatorringen*, para. 118

transactions carried out using internal resources.⁴⁹ Accordingly, “the purpose of the cost-sharing exemption is to unify conditions of competition in a market, where large undertakings are capable of offering their services through the use of their internal resources alone, and other smaller undertakings which have to call upon external assistance in order to offer the same services”.⁵⁰

The ECJ concurred with AG Mischo’s assessment of the legislature’s intention, and which also the Commission confirms with that the cost-sharing exemption was introduced to provide smaller operators with some measure of equity in their economic treatment.⁵¹ Larger undertakings are more equipped to use internal resources in a manner which avoids the creation of unintended VAT between the different parts of an enterprise, while smaller undertakings or new entrants often do not have the capacity to provide essential support services from their own internal resources. The access to cost-sharing arrangements allows smaller operators to sustain competitiveness in a VAT neutral way.⁵² The typical example that is envisaged is that smaller undertakings can manage a support service through sharing staff resource and by this way achieve a measure of efficiency of scale, i.e. scale of economics.⁵³

In the Green Paper on the future of VAT, the Commission observes that the cost-sharing provision gives rise to a structure that is called ‘cooperative self-supply’. A structure which enables business to come together under a framework where the business have emancipated the resources to conduct the activity in-house to be rendered from one entity in the framework without incurring any VAT on those transactions.⁵⁴ Accordingly, the legislators intended to mitigate the burden of VAT for taxable persons engaged in exempt activities when outsourcing services to third party service providers. The Commission explains that the rationale behind the concept of the cost-sharing exemption is that in the first stage, the independent group by using economies of scale first pays the costs, then breaks down the cost among its members, reducing the cost for each individual member and consequently also the hidden VAT and irrecoverable VAT buried in these costs.⁵⁵

Cost-sharing is perceived as being more interesting for smaller and medium sized operators who have difficulties in achieving economies of scale unless they combine without facing a VAT cost.⁵⁶

2.2 The conditions

The provision in Art. 132(1)(f) EVD lays down the following five conditions that has to be met, which are discussed below (in the headings 2.2.1 to 2.2.5);

- i) the supply of services by independent groups of persons
- ii) who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons,

49 Opinion of Advocate General Mischo in Case C-8/01, Taksatorringen, para 119

50 Opinion of Advocate General Mischo in Case C-8/01, Taksatorringen, para 120

51 SEC(2007) 1554, section 4.3.5.3

52 SEC(2007) 1554, section 4.3.5.3

53 SEC(2007) 1554, section 4.3.5.3

54 SEC (2010) 1455. Section 12.2.3

55 TAXUD/2414/08, page 15.

56 SEC(2007) 1554, section 5

- iii) for the purpose of rendering their members the services directly necessary for the exercise of that activity,
- iv) where those groups merely claim from their members exact reimbursement of their share of the joint expenses,
- v) provided that such exemption is not likely to cause distortion of competition.

2.2.1 'the supply of services by independent groups of persons'

The first ECJ case that dealt with the cost-sharing exemption concerned the organisational structure and how the supplies of services are to be done within this framework. The circumstances of this first case, *SUFA*,⁵⁷ were the following.

SUFA (the Stichting Uitvoering Financiële Acties) was a foundation which, against reimbursement of expenses actually incurred, organised and held lotteries on behalf of *ALN* (the Stichting Algemene Loterij Nederland) which distributed the proceeds amongst a certain number of social and cultural institutions. *ALN* and the institutions affiliated to it constituted already a cost-sharing group where *ALN* were the umbrella organisation. In this case the ECJ refers to umbrella organisation as the entity providing services to its members. The activities of *ALN* and its members were not subject to VAT. *ALN* had outsourced activities, which have earlier been done in-house, to be done by *SUFA* and these service in issue were directly necessary for the exercise of those activities of *ALN* and its members.

The legal question raised was whether such supplies of services carried out by one foundation on behalf of another foundation are carried out by an "independent group of persons", in which case they must be exempt, and if not whether they must nevertheless be exempt on the ground that they are supplied exclusively to a person which does constitute such a group and enjoys an exemption for the services which it supplies to its members.⁵⁸

AG Mischo emphasised that article 13(A)(1)(f) of the Sixth Directive refers expressly only to independent groups of persons supplying services to its members, and by this concluded that an independent group must necessarily have at least two members, whether they be natural or legal persons. A foundation which supplies services exclusively to one other foundation is not such a case. *ALN* is not a member of *SUFA* and even if it were, *SUFA* would then have one single member. *SUFA* cannot, therefore, enjoy an exemption for the services which it supplies on behalf of *ALN*.⁵⁹

SUFA argued that it should in fact receive exemption because it continues, in fact, to organise lotteries on behalf of the institutions affiliated to *ALN* and would therefore qualify for the exemption if *ALN* had not been set up, and also because the activities which *SUFA* performs would certainly be exempt if they were performed by *ALN*.⁶⁰ The arguments of *SUFA* was not accepted on basis of strict interpretation that the aforesaid activities are exempt only if they are carried out by particular bodies which, in the case of indent (f), must be "independent groups of persons".⁶¹ AG Mischo, which

⁵⁷ Case C-348/87 Stichting Uitvoering Financiële Acties (*SUFA*)

⁵⁸ Opinion of AG Mischo in Case C-348/87, *SUFA*, para 8

⁵⁹ Opinion of AG Mischo in Case C-348/87, *SUFA*, para.12

⁶⁰ Opinion of AG Mischo in Case C-348/87, *SUFA*, para.13

⁶¹ Opinion of AG Mischo in Case C-348/87, *SUFA*, para.15

was confirmed by the ECJ,⁶² referred to Case 107/84 *Commission v. Germany*, where the Court held that;

Although it is true that the exemptions (provided for under Article 13(A)(1)) are granted in favour of activities pursuing specific objectives, most of the provisions also define the bodies which are authorised to supply the exempted services.⁶³

The ECJ stated that Article 13(A)(1)(f) makes express reference only to the independent groups of persons supplying to its members. The ECJ emphasised that since the conditions for exemption are precisely formulated, any interpretation which broadens the scope of Article 13(A)(1)(f) of the Sixth Directive would be incompatible with the objectives of that provision. That is not the position where one foundation supplies services exclusively to another foundation, neither of the foundations being a member of the other.⁶⁴

AG Mischo recognised the situation that SUFA may be regarded as constituting such a group of persons working directly on behalf of the members of ALN only if ALN is to be regarded simply as a screen between SUFA and the social and cultural institutions affiliated to ALN.⁶⁵ However, ALN and the affiliated institutions constituted already a cost-sharing group.

It is concluded from the case *SUFA* that an independent group of persons must at least consist of two members. Further that the legal form of the independent group is not important, that the independent group can be a foundation which is of a legal form which cannot have members.⁶⁶ Under a cost-sharing agreement, the two members form an legal independent entity, the umbrella organisation, and within this framework, the members have entered into an arrangement with the effect that specific common activities, which they all need for the purposes of their business or non-business activities, are outsourced to a separate and independent entity, instead of carrying out those activities with their own resources.

Depending on the legal form of the independent group, the members may be its shareholders or participants. The mere fact that the recipients of the services are associated is sufficient to consider them “members”. In order to strengthen its claim on the exemption, the umbrella organization could lay down in its articles of association or internal regulations that its purpose is cost sharing and, in addition, institute an assembly of participants (members) that has the right to give directions or binding advice to its managers.⁶⁷

2.2.2 ‘who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable’

It is evidently clear from the wording that the members of a cost-sharing group must carry on either exempt activities or non-taxable activities. Although Art. 132(1)(f) EVD is included under article 132 laying down exemptions for certain activities in the public

62 Opinion of AG Mischo in Case C-348/87, *SUFA*, para.15. C-348/87, *SUFA*, paras.12 to 14

63 Case C-107/84, *Commission v Germany*, para.13

64 C-348/87, *SUFA*, para.14

65 Opinion of AG Mischo in Case C-348/87, *SUFA*, para.16

66 Vyncke (2006),p.343, Swinkels (2008), p. 15

67 Swinkels (2008), p.14

interest, such as entities carrying out medical, educational, social and cultural activities. However, it is apparent from the case *Taksatorringen* that Art. 132(1)(f) is not limited to those activities referred in Art. 132, it is also applicable to the exempted activities referred to in article 135 EVD.⁶⁸

As a consequence, the cost-sharing exemption is highly relevant for entities in the immovable property or financial/insurance sectors, even though the latter are entitled to deduct input tax in respect of supplies made to customers resident or established outside the European Union.⁶⁹

From the wording “carrying on an activity which is exempt from VAT” it is practically unrealistic to interpret the requirement restrictively to only include operators with full 100 % exempt supplies. Most of the operators do have a certain percentage of all its supplies being subject to VAT. In this regard, the Commission finds that in practice a level of non-exempt supplies of up to 30 % is regarded as permissible.⁷⁰

2.2.3 ‘for the purposes of rendering their members the services directly necessary for the exercise of that activity’

By the wording “for the purposes of rendering their members” it can be concluded that the exemption only applies to services rendered by the umbrella organisation to the members. The supplies made by other taxable persons to the umbrella organisation are subject to VAT. Also non-deductible is the VAT due on supplies contributed by the members to the cost-sharing association, unless those contributions would be exempt from VAT on different grounds.⁷¹

The requirement that the services must be directly necessary for the exercise of the members VAT exempt activities is not further explained by the Directive neither has the ECJ jurisprudence explicitly dealt with defining this concept.⁷² The wording and the meaning of ‘directly necessary’ is by its nature of such feature which gives rise to ambiguities about the kind of services which could be regarded to fall under its scope and benefit from the exemption.

Under a strict interpretation of the term ‘directly necessary’ it can be presumed that the exemption only covers services that are directly linked to the members’ VAT exempt or non-taxable activities.⁷³ It implies that the exemption cannot be applied to activities ancillary to the members’ exempt activities. However, Swinkels is of a contrary view, arguing that if they are excluded from the exemption on the ground of distortion of competition, it must be assumed that the services rendered by the umbrella organisation may also include those ancillary services.⁷⁴

In respect of the kind of services which may benefit the exemption, the view of the Commission is that where the cost-sharing exemption is available for financial services and insurances its focus is presumably on those services which would not otherwise be

68 Swinkels (2008), p.15

69 See Art. 169(c) EVD

70 SEC(2007)1554, section 4.3.5.5, p.44

71 Swinkels (2008), p.16

72 Eskildsen, p.455

73 Eskildsen, p.455

74 Swinkels (2008), p.15

treated as exempt services. It must focus on those services which are not defined as being “essential and specific” which could cause them to be exempt in any event.⁷⁵ Further, the Commission observes that the requirement ‘directly necessary for the exercise of that activity’ must be interpreted strictly, so that services of a general nature should not fall within the scope of Article 132(1)(f). The expression ‘directly necessary’ must be considered to refer to services which are specifically related to the downstream activity and are an indispensable input.⁷⁶

According to the Commission’s opinion, the *Taksatorringen* case presents a good example of such a service directly linked to an exempt car-insurance activity, the assessment of car damages. Services of a general nature such as providing cleaning services, security services, or legal and tax advice to a group of banks should not qualify since they are not directly connected to the exempt output activities.⁷⁷

In her Opinion in the case *CBO*, AG Sharpston uses ‘necessary supporting services’ in relation to the term ‘directly necessary’. AG Sharpston observed in the *CBO* case⁷⁸ that the strictness of the interpretation may be tempered according to the nature of the exemption concerned. And that the rationale of the cost-sharing exemption extends to necessary supporting services which, for reasons of economy of scale, are delegated to jointly-run entities. AG Sharpston observes that if ‘hospital and medical care’ is itself subject to strict interpretation, is it appropriate to subject necessary supporting services to an additional degree of strict interpretation, tightening the noose even further?⁷⁹

The conclusion drawn by AG Sharpston’s observation is that the kind of services which may fall under the scope of the condition ‘directly necessary’ is not to be assessed under a strict interpretation as those activities expressed and outlined in Arts. 132 and Article 135 EVD. Rather AG Sharpston emphasises on the term ‘necessary supporting’, which presumably has a wider scope but still requires some kind of a direct link and connection to the exempt activities at issue which it supports.

In this regard, a case that draws the line to the boundary issues concerning necessary supporting services which are directly linked to the members’ exempt activity and between those kinds of services of a general nature, guidance may be found in the case *Canterbury Hockey*⁸⁰. Even though the case did not deal with article 132(1)(f) EVD explicitly, it was assessed and ruled under Article 132(1)(m), the supply of certain services closely linked to sports. However the case sheds important light to the boundaries of the concept ‘directly necessary’. At the material time of the case, Article 132(1)(f) of the VAT Directive was not yet implemented in the UK VAT legislation.⁸¹ However, all the material conditions and the circumstances of the case at issue illustrate a typical cost-sharing group structure and fulfilling the requirements thereto. I share the

75 SEC(2007)1554, section 4.3.5.3

76 The Commission Working Paper 654, section 3.4 e). Further the Commission stated that the fact that the services may be used for other activities does not preclude the benefit of the exemption altogether. It does not follow from the fact that the services may be used for other activities that they are not directly necessary for an exempt activity. Reproduced in in Terra/Kajus, Commentary – A guide to the Recast VAT Directive, sect. 9.2.6.3, IBFD Tax research platform, 1 jan. 2013

77 VAT Committee Working Paper No. 450 reproduced in Terra/Kajus, Commentary – A guide to the Recast VAT Directive, sect. 9.2.6, IBFD Tax research platform, 1 jan. 2013

78 The Case *CBO* is dealt with in section 3.

79 AG Sharpston in C-407/07, *CBO*, para.14

80 C-253/07, *Canterbury Hockey*

81 United Kingdom started the regulatory work of implementing the cost-sharing exemption in 2010 to be in effect from 2012 HM Revenue & Customs VAT: Cost-sharing exemption; http://www.hm-treasury.gov.uk/d/vat_cost_sharing_exemption.pdf

view of Swinkels that this case should have been ruled under the cost-sharing provision.⁸² The *Canterbury Hockey* case has been criticised for extending the scope of strict interpretation.⁸³

The circumstances of the case are as follows; several hockey sports clubs in England are members to England Hockey, a non-profit making organisation for the encouragement and development of the playing of hockey in England. The members paid, in advance, a fixed annual affiliation fee to England Hockey, and received a package of certain services. The supplies of certain services consisted of e.g. club accreditation schemes, courses for coaches, umpires, teachers and young persons, access to government and lottery funding, advice on marketing and advertising, obtaining sponsorship, club management services, insurance, and competitions for teams.⁸⁴

The Commissioners for Her Majesty's Revenue and Customs took the view that since the hockey sports clubs were not persons taking part in sport, those supply of services did not fall within the exemption in Article 132(1)(m). The Commissioner notified England Hockey that the affiliation fees it received in consideration for the services it supplies to hockey clubs affiliated to it should be subject to VAT at the standard rate.⁸⁵

In its assessment, the ECJ took the view looking at the organisational structure of how sports clubs and sports activities are supplied to the benefit of the individuals taking part in sports. For practical, organisational or administrative reasons, the individual taking part in sports does not himself organise the services which are essential to participation in the sport.⁸⁶ Most of the activities within a sports club are channelled downstream, starting from the non-profit organisation channelled to the sport clubs and to the benefit of the individual sport participants. The services that were considered eligible for the exemption, under article 132(1)(m), was those considered to be closely linked and essential to sports and which are to the straight benefit of the participants. Those services that were considered to be linked to the sport clubs and their operation, such as advice about marketing and obtaining sponsors were held not to be eligible for the exemption.⁸⁷

In my opinion, the reasoning in *Canterbury Hockey* can be applied by analogy to the requirement of 'directly necessary' in Art. 132 (1)(f) EVD. The conclusion that can be drawn from *Canterbury Hockey* is that there has to be established a connecting link between the kind of services supplied by the umbrella organisation to its members for their exercise of exempt activities. In this context, the guidance to define the concept 'directly necessary' starts with AG Sharpston's observation in *CBO* with 'necessary supporting services'. Further as was observed by the ECJ in *Canterbury Hockey* the connection between those services supplied by the umbrella organisation to the members exempt activities needs to be 'closely linked and essential'. In this regard, *Canterbury Hockey* could be viewed as setting the outer limits to the boundary issues of the scope of the concept directly necessary by stating that services which are for the operation of the business as such are excluded to benefit from the exemption. Services

82 Swinkels, Sport under EU VAT.

83 See Schulyok, F. The ECJ's Interpretation of VAT Exemptions, IVT, 2010 No.4

84 C-253/07, *Canterbury Hockey*. para. 8

85 C-253/07, *Canterbury Hockey*. para. 9

86 C-253/07, *Canterbury Hockey*. para. 28

87 C-253/07, *Canterbury Hockey*. para. 33

such as marketing, advertising and sponsoring are services of a general nature that are connected to the operation of a business within an economy.

Further, bookkeeping, auditing, and related services are general compliance activities required by public administrative regulations for all economic operators within an economy, which mostly are of a mandatory nature for all economic operators, regardless of what kind of business is carried out. It is quite obvious that this kind of general services cannot fall under the scope of directly necessary and benefit of the cost-sharing exemption, rather are subject to VAT.

As regards certain administrative activities, depending on the sector and business, i.e. health, medical, finance, insurance, labour unions, there may be some certain public administrative regulations within an economy that an economic operator in that sector has to comply with in order to operate the business. It is submitted that this kind of activities that are specific administrative compliance activities for the sector at issue ought to be successfully argued not to be of a general nature to all economic operators within an economy, and thus benefit of exemption when supplied within a cost-sharing arrangement.

2.2.4 `where those groups merely claim from their members exact reimbursement of their share of the joint expenses´

For the services provided, the umbrella organisation may only claim from the members exact reimbursement of their share of the joint expenses. In view of the German language version reads “... genaue Erstattung des jeweiligen Anteils an den gemeinsamen Kosten”, whereas the French language version uses the phrase “le remboursement exact de la part leur incombant dans led dispenses engages en commun”, it must be assumed that the concept of “expenses” actually refers to the umbrella organisation’s costs.⁸⁸

This implies that the umbrella organisation must be reimbursed for all costs, i.e. both direct and general costs⁸⁹, associated with its activities.⁹⁰ According to Swinkels this condition further confirms that the umbrella organisation is an extension of the members.⁹¹

Swinkels points out that the VAT Directive does not indicate on the basis of what criteria the umbrella organisation must charge its expenses to the members and over what period the recharge must be equal to the joint expenses. As Swinkels notes, consequently, it is not clear whether the charge to the members must be equal to their share of the joint expenses of the umbrella organisation for each year of its existence or over its entire life span. The use of the word “reimbursement” implies that the umbrella organisation can only claim its expenses from the members in retrospect, which has the consequence that the members cannot make advance payments and that the umbrella

88 Swinkels (2008), p.16

89 A general cost is a cost that has a direct and immediate link to the taxable person’s economic activity as a whole but not particular supplies: see Case C-98/98, Midland Bank, paras. 28 and 31; Case C-16/00 Cibo Participations, para. 35; and Case C-408/98 Abbey National, para. 36. See also D.R. Jensen & H. Stensgaard, The Distinction between Direct and General Costs with Regard to the Deduction of Input VAT – The Case of Acquisition, Holding and Sale of Shares, World Tax Journal, 6-7 (2012).

90 Eskildsen, p.456

91 Swinkels (2008), p.16

organisation cannot form a financial buffer or other reserves. In the event of a large investment, the umbrella organisation has no option but to borrow the necessary funds from its members or from an independent third party.⁹²

AG Mischo noted, in his Opinion in *Taksatorringen* (paras. 121 and 122), that it is essential that the group does not exist for purposes of gain, in the sense that it only charges its members the exact cost of the joint expenses. In this regard, as concerns “not making any profit”, in the case *Kennemer Golf & Country Club*,⁹³ which was a non-profit making organisation, the ECJ declared that a non-profit making organisation can systematically seek to achieve surpluses which it then uses for the purposes of the provision of its exempt services.

However, in regard to the requirement of not making any profit, this concept needs more clarification. As the Commission observes, under a strict interpretation this is generally perceived as claiming exact reimbursement of the joint expenses in a manner which is self-liquidating.⁹⁴ Presumably, most of the cost element in supplying services constitutes labour costs, and apparently there is a certain amount of profit in the charge of providing staff. Labour costs is an element under strong competitiveness and thus members can always find cheaper labour if labour is the main profit bearing element.

This profit element is probably not the legal issue in this matter. The legal issue of making profit and how this may have a distortive affect is highlighted by Swinkels, that with effect of the cases *AXA* and *Kennemer*, that is the situation where the umbrella organisation provides services to non-members and making a surplus which is directly going to the benefit of the exempt services, could imply that a cost-sharing association could rely on the exemption in article 132(1)(f), to use the turnover or profits made by the supplies to non-members to reduce the joint expenses to be reimbursed by the members.⁹⁵

In the case *CBO*,⁹⁶ the wording and the meaning of ‘share’ and ‘joint’ expenses were elaborated to the extent if the requirement of strict interpretation would mean that the scope of the cost-sharing exemption is restricted to situations where the umbrella organisation has to provide a standard package of services which are collectively to the benefit of its members, in that way that “Community VAT law to be guided in that regard by the musketeers’ motto: ‘All for one, and one for all?’”.⁹⁷ Or, whether the exemption extends to the umbrella organisation providing services individually composed services for one or more members. The facts of the case are the following;

CBO is a foundation whose members are various medical and sickness insurance bodies and, in some cases, the individual members of those bodies are individual hospitals.⁹⁸ The activities of the members of CBO are exempt from VAT or are not

92 Swinkels (2008), p. 16–17.

93 C-174/00, *Kennemer Golf & Country Club v. Staatssecretaris van Financiën*.

94 (COM(2007) 1554

95 Swinkels (2008), p.19

96 C-407/07, (CBO), *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing v Staatssecretaris van Financiën*.

97 Opinion of AG Sharpston in C-407/07, CBO, para.1

98 Opinion of AG Sharpston in C-407/07, CBO, para. 5. Judgement of the Court C-407/07, CBO. For the interested reader see even the homepage for CBO at www.CBO.nl;

subject to VAT. The overall aim of CBO is to promote quality in medical care by providing various services to its members, such as defining and upholding professional standards for medical and nursing staff, which are mostly provided to hospitals. The costs are apportioned among them according to the numbers of beds.⁹⁹ CBO also provides other services to individual members on an occasional basis, such as providing a staff member to chair a group working on a project on appropriate medical care for one of the affiliated bodies, and delegating staff to speak at a colloquium on antiviral drugs and cardiac failure organised by another affiliated body. Such services are invoiced individually to the member organisation concerned.¹⁰⁰

The Netherlands tax authority questioned the scope of the cost-sharing exemption in respect of these services rendered and invoiced individually to one or more members, where the tax authorities considered that the criterion of 'reimbursement of their share of the joint expenses' is not met.¹⁰¹ In proceedings before the national court, the *Gerechthof te Amsterdam* held that no exemption from VAT could be granted since CBO had drawn separate invoices for the services at issue and that the corresponding payments did not cover joint expenses, within the meaning of the national implementation of article 13(A)(1)(f) of the Sixth Directive.¹⁰² The dispute came before the *Hoge Raad der Nederlanden*, which took the view that the outcome of the proceedings before it depended on the interpretation of article 13(A)(1)(f).

At the proceedings before the ECJ, the Netherlands Government considered that the provision cannot cover services provided and invoiced individually to members, arguing that the crucial distinction is between services provided in the collective interest, which are covered, and those provided in a member's individual interest, which are not covered.¹⁰³ The Netherlands Government submitted that the purpose of the exemption is to avoid placing a VAT burden on services provided by a group for its members when the same services would have borne no such burden if they had been provided internally by each individual member, thus treating these services as internal transactions.¹⁰⁴ Further, the Netherlands Government considered that the rationale of the exemption is the intention not to tax the efficiency gains derived from internal cooperation between the members of an independent group, and as a consequence, only services supplied by an independent group collectively to its members falls within the scope of the exemption.¹⁰⁵ The Netherlands Government argued that when a service is provided to a single member it is comparable to a transaction on the open market, with the provider at arm's length from the recipient,¹⁰⁶ which is not a provision of an internal service but of an independent service, which creates a client-supplier relationship that is not keeping with the aim of the exemption in question. The Netherlands Government contends that the term 'joint expenses' comprehends 'collective expense', which refers to services supplied to all the members of the group and not just to one member of it.¹⁰⁷

99 AG Shaprston, C-407/07, para. 5

100 AG Shaprston, C-407/07, para. 6. Judgment of the Court in C-407/07

101 AG Shaprston, C-407/07, para. 6.

102 Judgment of the Court in C-407/07

103 AG Shaprston, C-407/07, para. 17

104 AG Shaprston, C-407/07, para. 19

105 Judgment of the Court in C-407/07

106 AG Shaprston, C-407/07, para. 19

107 Judgment of the Court in C-407/07

CBO and the Commission submitted that if the question referred were to be answered in the negative the scope of article 13(A)(1)(f) of the Sixth Directive would be substantially curtailed. CBO contends that its many members, all of which are engaged in providing healthcare, do not always share the same needs since their activities are not homogeneous, and that it cannot be envisaged that all the members must engage in all the activities carried on within the group in order to qualify for the exemption in question. In that regard CBO stated that when a service is supplied only to one of its members the service is invoiced to that member at its actual cost, in keeping with accounting rules. That member will be invoiced for its share of the joint expenses and will only reimburse that share.¹⁰⁸

AG Sharpston noted that an overall-literal interpretation of the words 'share' and 'joint' would place an unwarranted and artificial restriction on the scope of the exemption.¹⁰⁹ Further, AG Sharpston recognised, as the ECJ confirmed, that the reality of a cost-sharing group made up of many members is complex. That the needs of the members are likely to vary from one tax period to the next, so that, in a given period, certain services will be provided to all members, other to several members and yet others perhaps to a single member only. Yet the cost of providing all those services is still in a very real sense joint expenditure, having been incurred by the group set up for that purpose by all the members, and cost accounting methods are quite capable of identifying the precise share of that expenditure attributable to each individual service provided.¹¹⁰

The ECJ noted that it is not clear from the wording of Article 13(A)(1)(f) of the Sixth Directive that the exemption must apply only to services supplied by independent groups to all its members. Further the ECJ noted that according to that wording, the Community legislature stated only that the VAT exemption should apply to services provided by independent groups where those groups merely claim from their members exact reimbursement of their share of the joint expenses. The ECJ stated that the Netherlands Government's interpretation would restrict the scope of that provision which is not supported by the purpose of that provision, which is to create an exemption from VAT in order to avoid an entity from offering certain services from being required to pay that tax when it has found it necessary to cooperate with other entities by means of a common structure set up to undertake activities essential for the provision of those services. The ECJ held that even where the services are supplied only to one or more members the cost of supplying those services remains a joint expense incurred by the group. The ECJ noted that it does not seem possible to interpret Article 13(A)(1)(f) of the Sixth Directive as making exemption from VAT conditional upon the services being offered to all members. Following this line of argument, the ECJ found that the need to interpret the cost-sharing provision strictly cannot lead to each member of an independent group being given the right to deprive the other members of that group of exemption from VAT by deciding at any particular time not to use a particular service.¹¹¹

What can be concluded from *CBO*, is that the umbrella organisation can have a standard package of services which are to the benefit collectively to its members and

108 Judgment of the Court in C-407/07

109 AG Sharpston, C-407/07, para. 18

110 AG Sharpston, C-407/07, para. 19

111 Judgment of the Court in C-407/07

also provide services which are individually composed for its members, and both of them to fall under the exemption.

2.2.5 'provided that such exemption is not likely to cause distortion of competition'

The main issue in the case *Taksatorringen* concerned distortion. The facts of the case are as follows.

Taksatorringen is an association established by small and medium sized insurance companies authorised to underwrite motor vehicle insurance policies in Denmark, with approximately 35 members. *Taksatorringen* has the purpose to assess damage caused to motor vehicles in Denmark on behalf of its member companies, its members being required to allow *Taksatorringen* to assess damage to motor vehicles insured with them throughout Denmark.¹¹² The expenses involved in *Taksatorringen*'s activity were apportioned among its members in such way that an individual member's payment for services provided by the association corresponded exactly to that member's share of the joint expenses.¹¹³

Taksatorringen were initially in 1992 authorised to carry on its activities without being obliged to register for VAT purposes. However, following complaints by several undertakings this authorisation was withdrawn in 1993. The complainant undertakings did not carry on vehicle damage assessment and did not specifically plan to offer such services.¹¹⁴

By decision in 1997 the Danish VAT Tribunal upheld the refusal and took the view that an exemption could give rise to distortions of competition inasmuch as the assessment carried out by *Taksatorringen* were not in principle distinguishable from other assessments and the services which it provided could, by virtue of its nature, be offered by other, independent experts.¹¹⁵ Further, the national VAT Tribunal took the view that even if the cost-sharing exemption were accepted not to result in distortion of competition, that would not be attributable to the nature of the services provided by *Taksatorringen*, but rather to the fact that the affiliated undertakings debarred themselves from engaging in such competition.¹¹⁶

The Danish court, Östre Landsret, referred five questions to the ECJ for a preliminary ruling, where one question concerning Article 13(A)(1)(f) of the Sixth Directive was whether the cost-sharing exemption must be granted where it cannot be demonstrated that the exemption will produce actual or imminent distortion of competition but where there is merely a possibility that this might happen.¹¹⁷ In proceedings before the ECJ, the Danish Tax authority, Skatteministeriet, argued that the cost-sharing exemption must be refused where it is liable, actually or potentially, to give rise to distortions of competition. Skatteministeriet argued that if such an exemption involves potential risk that independent third parties may refrain from establishing themselves on the market

¹¹² Opinion of AG Mischo in C-8/01, paras. 12 and 13

¹¹³ Judgment C-8/01, para 9349/96, Card Protection Plan, para.15 ; C-240/99, Skandia, para. 23 ; C-287/00, Commission v Germany, para. 44

¹¹⁴ Judgment C-8/01, para 18

¹¹⁵ Judgment C-8/01, para 21

¹¹⁶ Judgment C-8/01, para 21

¹¹⁷ Judgment C-8/01, para 25

to provide the services in question.¹¹⁸ Further, Skatteministeriet observed that it is manifestly advantageous, for purely economic reasons, to remain a member of Taksatorringen and to have the assessments in question carried out by that association rather than entrusting that task to an independent third party so long as the services which Taksatorringen provides are exempt. This has the effect of preventing actual competition on the Danish market for damage assessment reports on motor vehicles and at the same time of dissuading independent third parties from seriously contemplating establishment on that market.¹¹⁹

AG Mischo noted that from one point of view the legislators' intention of introducing the cost-sharing exemption was with the purpose to unify conditions of competition in a market covered simultaneously by large undertakings capable of offering their services through the use of their internal resources alone, and on the other side smaller undertakings have to rely upon external providers in order to offer the same services.¹²⁰ Accordingly to AG Mischo the provision of likely of distortion to competition appears to have been added in order to avoid a situation where the providers of exempt activities under a cost-sharing arrangement do not create distortion at another level, namely that of the market for services which these providers themselves require.¹²¹

In this regard, the Commission submitted that an exemption for cleaning services would be liable to distort competition as there is no particular specialisation or limitation of the clientele to a clearly defined sector.¹²² The Commission took the view that supplies within a cost-sharing framework is of a specific feature provided to undertakings which are specialised within in a defined sector and that the group is limited. By its nature the group is liable to dissuade potential providers by reason of the economic risk of that activity, even though there may potentially be an additional provider.

In this context, AG Mischo observed that the market for services necessary for the carrying on of the exempt activities is thoroughly an unusual one,¹²³ and where the buyers in the market do not include the biggest consumers, i.e. the large companies which make use of their own internal resources. The sellers in a cost-sharing group are operators which are not allowed to make a profit of any kind for the cost-sharing group, and to this effect the cost-sharing group is assumed to carry on the business at the lowest possible cost.¹²⁴ To this effect independent operators that want to compete at the market are not restricted by not making profit, however, the independent operators can hope to enter the market and to remain there only if they are able to be able to offer services at a lower price than the groups that are prohibited from making a profit.¹²⁵

AG Mischo noted that the legislature intended to avoid a situation in which cost-sharing groups would nevertheless be able to exclude all competition in situations by reason of the exemption from VAT even though the cost-sharing groups operate in cumbersome and inefficient manner and provide their services at a high price.¹²⁶ However, if cost-sharing groups are carrying out their operations efficiently, and thereby retain their

118 Judgment C-8/01, para 49

119 Judgment C-8/01, para.50

120 AG Mischo C-8/01, para 120

121 AG Mischo C-8/01, para.123

122 Judgment C-8/01, para.57

123 AG Mischo C-8/01, para 125

124 AG Mischo C-8/01, para 126

125 AG Mischo C-8/01, para 129

126 AG Mischo C8/01, para 130

members' customer base, it could not be suggested that it is the exemption from which they benefit that closes the market to independent operators. The ECJ confirms the argument by AG Mischo.¹²⁷

According to AG Mischo, the proper approach is to consider whether an exemption given to one party and the imposition of liability to tax another is the determining cause of independent operators being excluded from the market.¹²⁸ The ECJ concurred with AG Mischo. In relation to distortion to competition, the ECJ stated that it is the VAT exemption in itself which must not be liable to give rise to distortions of competition on a market in which competition will in any event be affected by the presence of an operator which provides services for its members and which is prohibited from seeking profits.¹²⁹ In a case with a genuine risk that the exemption may by itself, immediately or in the future, give rise to distortions of competition, the grant of VAT exemption must be refused.¹³⁰

What can be derived from *Taksatorringen* is that the market for those services that may be exempt under the cost-sharing provision belongs to a specific market. What is of importance is that the cost-sharing group does not enter into direct competition with enterprises that are not exempt. However, in this regard, the Commission observes that this precondition may already be fulfilled.¹³¹ Direct competition with other enterprises should be viewed from the point that a cost-sharing group is a closed entity. Accordingly, to enter in to direct competition with another enterprise that is not exempt would be in the situation if the cost-sharing group may provide services exempt outside the cost-sharing group. However, the supplies outside a cost-sharing group to non-members are nonetheless subject to VAT, so in this regard, the cost-sharing group is in competition under normal market conditions. Competition under normal market conditions is driven by economic factors on the market and not factors caused by inequalities in law, such as lack of neutrality in tax measures. Accordingly, distortion to competition, i.e. a competition not under normal market conditions, is a situation when the cost-sharing group may supply services exempt outside the cost-sharing group to non-members.

The precondition of competition is fulfilled in that regard that there is no distorting competition since services provided outside the cost-sharing group is subject to VAT, thus putting the economic operators on an equal footing. On the other side, if there is an economic operator competing with similar service which can be considered to fulfil the condition to be directly necessary, there is nothing precluding that economic operator to include a cost-sharing agreement in order to supply services exempt within the cost-sharing group to the members.

2.3 Geographical scope

The Commission submits that there is no basis in the wording of the provision or in the structure of the VAT system for the limitation of the exemption to domestic

¹²⁷ Judgment of the Court confirms this reason, para.59 and AG Mischo C-8/01, para. 131.

¹²⁸ AG Mischo C8/01, para. 134

¹²⁹ Judgment C-8/01, para.58

¹³⁰ Judgment C-8/01, para.64

¹³¹ COM(2007) 1554

transactions.¹³² The Commission emphasises that the cost-sharing exemption embraces cross-border scenarios.¹³³ The DG emphasis that co-operating on a cost-sharing basis cross-border is consistent with the neutrality principle and excludes the effect of input VAT in the costs,¹³⁴ and that cross-border cost-sharing is a means to reduce risks and to optimise investments.¹³⁵ Consequently, according to the Commission there is no justification for the refusal of certain Member States to apply the exemption in a cross-border situation.

The Commission emphasises that situation that since the transactions in a cost-sharing group is a “one-way” supply of services, the risk of that VAT advantages obtained in one Member State are transferred to another Member State is prevented. Cost-sharing compared to VAT-grouping is a solution that generates less tax risks and less administrative expenses monitoring the economic operators. Especially the risk of rating shopping is negligible in comparison to unjustified input VAT deduction in VAT-groups.¹³⁶

The Commission submits that for cross-border transactions in relation to the condition for exact reimbursement of the joint expenses, there are somewhat contrary rules colliding in respect to direct tax issues concerning transfer pricing adjustments, i.e. the open-market-value mark up for direct tax matters. However, this will not be of a significant hindrance due to it is not technically impossible to resolve this issue, which apparently has been done on an ad-hoc basis in those Member States where this issue has arisen.¹³⁷

2.4 Conclusion

The cost-sharing exemption provided by Art. 132 (1)(f) EVD is available for those undertakings which carries on exempt activities or non-taxable activities, for instance, financial and insurance institutions, hospitals, public bodies, universities, non-profit organisations. These undertakings have in common that, since they supply services not subject to VAT, they have no or a limited right to deduction of input VAT. In turn this leads to that VAT becomes a cost which is transferred hidden in the price of their supply of services. The hidden VAT has the affect that it causes accumulation of the tax, i.e. VAT is levied on VAT, in the supply chain. Accumulation of VAT is contrary to the fundamental economic structure of the EU VAT system, which is that VAT is to be neutral to taxable persons in the supply chain by the right of deduction of VAT of input VAT.

The structure of a cost-sharing group is that under the conclusion of a cost-sharing agreement, certain services are supplied by an independent entity to the members of the group. A cost-sharing group is either created by two independent undertakings setting up an independent entity which provides them with certain services. Or there may be an independent provider already established on a market supplying these certain services.

132 The Commission Working Paper 654, section 3.1

133 COM(2010) 1445, section 12.2.3.1.

134 TAXUD/2414/08, page 9.

135 TAXUD/2414/08, p.14

136 TAXUD/2414/08, p.14

137 Commission Working paper 654

By entering a cost-sharing group, an economic undertaking can make available internal resource to focus on its core economic activities by outsourcing services to the service provider in the cost-sharing group. In this way, the members of a cost-sharing group achieve economics of scale and enhance their competitiveness. This is in line with the EU legislators' purpose of introducing the cost-sharing exemption, to enhance competitiveness for small and medium sized enterprises against big enterprises which have the financial strength to use internal resources.

The effect provided by Art. 132 (1)(f) EVD is to mitigate non-recoverable VAT for economic operators on the purchase of directly necessary services for the carrying on of their exempt activity. Under the cost-sharing exemption, services which are directly necessary benefits of the exemption. Accordingly, services of a general character may not benefit of the exemption. The concept directly necessary prerequisites that, in order to benefit of the exemption, there needs to be established a relationship between the service in question rendered and the exempt activity of the member. There has to be a close and direct link in that sense that the rendered service has the character of being of a necessary supporting nature to carry on the exempt activity. Depending on the exempt activity of the member in question, this assessment is to be performed based on a case by case analysis. Nevertheless, what can be derived by ECJ jurisprudence is that services for the operation of the business are excluded.

As concerns the supply of services in relation to the common interest to cooperate with directly necessary services to the exempt activities of the members, the cost-sharing group is not limited to supply a common package of service to be utilized by all the members. In this regard, a variety of services can be supplied which fulfils the individual need of a member. Neither is a cost-sharing group limited to only supply services that are directly necessary. The cost-sharing exemption is sufficiently comprehensive to allow for supplies of services which are exempt and not exempt to its members and to supply outside the cost-sharing group to third parties. The supply of services that are not exempt to its members and supply of services outside to third parties does not imply to cause distortion to competition, and thus fiscal neutrality, as long as those supplies are subject to VAT.

In this context, distortion to competition arises in those situations when service providers in competition with the comparable services are treated differently, which would be in a situation when a cost-sharing group supplies services exempt which are not entitled to that right.

The concept of not making any profit has to be further clarified, but it is assumed that this concept is not to be interpreted in the strict sense that it is understood as being self-liquidating which may probably result to make the operation of a cost-sharing group inefficient with no equity. Presumably the concept of not making any profit is to be understood in relation to competition, that making profit is not done in a way that suppresses competition on the market.

Cost-sharing groups are not limited to local supplies rather it is an alternative for cross-border transactions. And probably it is assumed that for small and medium sized enterprises this is an efficient instrument to easier achieve economics of scale to enter new markets through a cost-sharing group, than to establish a head-office/branch structure.

Chapter 3 The Cost-sharing exemption in the Swedish VAT Act

Introduction

Article 132 (1)(f) EVD has been implemented in the Swedish VAT Act. The corresponding provision to article 132(1)(f) EVD is to be found in article 3 kap. 23a§ ML, Swedish VAT Act. However, the Swedish provision is not transposed in its entirety to be an exact literal translation of article 132 (1)(f) EVD. In this regard it is important to have in mind that article 132(1)(f) EVD is a mandatory provision and that, with settled case-law of, inter alia, *Becker* and *Lindöpark*, national provisions of EU VAT exemptions have to be consistent with EU VAT law. In this context, if the Swedish interpretation, and thus the practice of using the cost-sharing exemption, has the effect of being more strict than what is actually given by the EU VAT Directive, taxpayer's may rely on the direct applicability of article 132 (1)(f) EVD.

3.1 The Swedish cost-sharing provision

The provision was enacted with effect from 1 July 1998.¹³⁸ In the preparatory work, *les travaux préparatoires de la législation*, it is observed that the condition 'likelihood to distortion of competition' constitutes a major delimiting factor. This is to be understood as, under a restrictive interpretation, that the scope of the exemption is limited to services which are not under normal circumstances provided for on the open market.¹³⁹ Accordingly, first there needs to be established a close direct link between the kind of services which are provided in a cost-sharing group to the members carrying on of exempt activities and thus, the services rendered to the members must be of such a nature that the kind of services are not provided by any other economic operators outside the cost-sharing group on the open market. Services which are not covered are such as bookkeeping, automatic data-handling, asset management and similar services which are provided by others on the market.¹⁴⁰

The Swedish equivalent to article 132(1)(f) EVD is set out in 3 chapter 23a § of the Swedish VAT Act.¹⁴¹ The second subparagraph sets;

The exception relates only to those services which are normally not provided by any other outside the group.¹⁴²

138 Enacted by SFS 1998:346, prop. 1997/98:148.

139 Prop. 1997/98:148 s.64

140 Prop. 1997/98:148 s.64

141 3 kap. 23a§ ML, Mervärdesskattelagen, SFS 1994:200.

142 Own English translation of the Swedish provision, which states the following; Undantaget avser endast sådana tjänster som normalt inte tillhandahålls av någon utanför gruppen.

3.2 Swedish Case-law

The first Swedish case that dealt with the cost-sharing exemption was a case which was first brought up for an advanced ruling to Skatterättsnämnden¹⁴³ and later appealed by the applicant to the Swedish High Supreme Administrative Court. The circumstances in the case RÅ 2001 ref. 34 I, *DIK-förbundet*, where the following;

Three labour unions concluded an agreement to cooperate with the overall activities of operating a labour union. The agreement was concluded in order to achieve efficiency and minimise operational cost. Under the agreement the labour union *DIK-förbundet* was the umbrella organisation providing (itself and) the two other members with services. The staff to provide services were employed by the *DIK-förbundet*. Under the agreement the services provided by the umbrella organisation were divided in three categories (departments). The first department consisted of four personnel providing office management with the overall responsibility of the overall operation and negotiation activities. The second department was a negotiation department consisting of 14 personnel responsible for the overall negotiation process, which included, *inter alia*, providing general negotiation activities, activities in matters of labour law issues, labour union training of local representatives etc. Finally, the third department was an administrative department consisting of 7 personnel divided in 3 units, an auditing unit, a data-handling unit and last an office-service unit.

The costs incurred to provide the abovementioned activities under the agreement were apportioned among the three labour unions, by the number of members affiliated to the labour unions in question. In summary, the two labour unions had under the agreement outsourced the main functions of operating a labour union and left within each of the labour unions only a few employees remained with the responsibility to provide its affiliated members in matters concerning information and coverage in social and policy issues.

The legal question which was raised before the High Supreme Administrative Court (here after the Court) was whether the services rendered by the *DIK-förbundet* under the agreement was to be considered to be covered by the equivalent provision to, then, Art. 13 (A)(1)(f) of the Sixth VAT Directive in the Swedish VAT Act.

First, the Court noted that under the agreement that the labour unions had created an 'independent groups of persons' in accordance with the condition laid down in the national provision. Further, the condition of rendering services which are exempt or not taxable were fulfilled. In this respect, the activities carried out by labour unions are not subject to VAT. Accordingly, the Court concluded that the negotiation services fulfilled the condition of being 'directly necessary' for the members in carrying on their activity. And consequently, the negotiation services are under normal circumstances not provided by any other economic operators outside the independent group on the open market. Further the Court found that the other conditions were fulfilled, such as the exact reimbursement of the joint expenses.

As regards the other kind of services which the *DIK-förbundet* renders its members, the package of standard administrative services such as bookkeeping, accounting, billing etc, the Court noted that this kind of services are under the normal circumstances

¹⁴³ Skatterättsnämnden, is a department under the Ministry of Finance, which is a special board to where taxpayers can apply for advanced rulings in tax matters. An appeal to an advanced ruling is brought up to the High Supreme Administrative Court, Högsta förvaltningsdomstolen.

provided for by other economic operators on the open market, and thus, falls outside the field of application of the cost-sharing exemption. In this respect, the Court found that *DIK-förbundet* provided those services subject to VAT to the members.

The following view and approach has been reiterated that it constitutes a prerequisite that services which may benefit to be exempt under the cost-sharing exemption has to be of such a nature that they are not under normal circumstances provided by any other economic operators on the open market. An example is an advance ruling where several non-profit organisations, which carries on non-taxable activities, where to conclude an agreement to cooperate administrative activities in order to achieve efficiency and thus minimise costs. The board for advance rulings noted, referring to the case-law in RÅ 2001 ref. 34 I, that the kind of services, i.e. administrative services, are provided by other economic operators on the market and thus may not benefit from the cost-sharing exemption. And consequently, those administrative services provided to the non-profit organisations are taxable transactions subject to VAT.¹⁴⁴

3.3 Comments

What can be derived from the statement in the preparatory work to the provision in chapter 3 § 23a of the Swedish VAT Act, and which has been reiterated in national jurisprudence, is that the field of application of the national implementation of the cost-sharing exemption is very limited to be applied to a small range of services for certain situations. This limited scope is argued to be due to a strict interpretation.

What does it really mean that it is conditional that the service is not under normal circumstances provided by any other economic operator on the open market? This raises the legal issue on what basis are services to be assessed against to benefit of the exemption. For instance, who are the economic operators on the open market that the services should be assessed against?

Services that may benefit from the cost-sharing exemption should be assessed on basis of the general character of VAT. First, the exempt activities outlined in Arts. 132 to 135 EVD distinguishes from the character that VAT is a general broad based tax on consumption. Subsequently, the exempt activities outlined in Arts. 132 to 135 are performed by certain economic undertakings and which are supplied both to other businesses (B2B) and to final consumers (B2C) on an open market. In this regard, directly necessary services are provided by certain undertakings for certain transactions.

On one side this national condition is consistent with ECJ case-law in matters of that services which may not benefit of the exemption are those kinds of services which are for the operation of the business, in accordance with *Canterbury Hockey*. Accordingly the condition aims to target services which are general for all economic operators on the open market. Administrative services are of a general nature directly necessary for the operation of every business. Hence not a service that is directly necessary for the members to carry on their exempt activities.

On the other side, the Swedish condition sets out a restraining prerequisite in the condition that services are not to be under normal circumstances provided by any other on the market. This could be drawn very restrictively.

144 Förhandsbesked meddelat 2010-01-27 (dnr 5-09/I)

However, the conclusion drawn in respect of the abovementioned condition is that it should to be viewed from the perspective that it reflects the condition likely to cause distortion to competition as is set out in the EU VAT Directive. This has been transposed in to the Swedish VAT Act to prerequisite the condition that the service in question has to be of such a nature that it is not under normal circumstances provided by any other economic operators on the market.

The case-law in Sweden in this area is not explored in that regard that it could give a sufficiently comprehensive clarification and understanding of the provision. Taxpayers' have to rely on the jurisprudence of the ECJ and to find arguments presented by the Commission.

3.4 Possible field of application in cross border scenario

In my view, on the basis of the foregone, the possible field of application in a Swedish perspective is assessed from a recently decided case in Sweden by the High Administrative court.¹⁴⁵ The material circumstances in the case will not be discussed in-depth, only the situation of the case will provide as an example for a possible cross-border application of the cost-sharing exemption.

A Swedish insurance company provides its insurers under the insurance contract with a travel protection when the insurer is abroad. The Swedish insurance company have an agreement with a Danish company supplying a package of insurance claim handling services when the insurer is abroad and suffers damage. Before the national court, the Swedish insurance company argues that the insurance claims handling services supplied by the Danish company are covered by the exemption for insurance transactions and by medical care. Since these exemptions are under a stricter rule of interpretation, the national court does not find those supplied services to be covered under any of the argued exemptions.

In this scenario, the main legal question raised is whether insurance claim handling services are to be regarded as directly necessary services for the exempt activity of the Swedish insurance company in order to provide its insurers with the exempt activity insurance?

First the notion of insurance needs to be discussed. Pursuant to Article 135(1) EVD Member States shall exempt the following transactions:

- (a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents.

The characteristic features which encompasses the concept insurance has been interpreted and defined through settled case-law by the ECJ, in which AG Fennelly stated in CPP that as what can be generally understood, the essentials of an insurance transactions are that one party, the insurer, undertakes to indemnify another party, the insured, against the risk of loss (including liability for losses for which the insured may become liable to a third party) in consideration of the payment of a sum of money called the premium. The ECJ concurred with AG Fennelly and held that insurance

¹⁴⁵ Kammarrätten i Stockholm dommeddelad 2013-04-17 i mål-nr 2539-12

service consists in the assumption by the insurer of a risk borne by the insured.¹⁴⁶ Further, in *Skandia* the ECJ stated that an insurance transaction implies the existence of a contractual relationship between the provider of the insurance service and the person whose risks are covered by the insurance.¹⁴⁷

Insurance claim handling services can be defined as a combination of services to be rendered upon the submission of a policyholder's claim, for the purpose of deciding whether the claim should, in full or in part, be accepted or rejected by the insurance company.¹⁴⁸ In addition to processing and settling the claim itself, the settlement of insurance claims may also comprise the organisation or coordination of assistance provided by third party providers to the insured in case of damage or injury, provided that such assistance is covered by the insurance contract. Insurance companies can provide assistance to the insured themselves or, in particular when the claim is made abroad, they can also outsource those activities to external service providers.¹⁴⁹

When insurance claim handling services and other assistance services are covered by the insurance contract and are provided by the insurer, these services are exempt under the main provision of insurance. In this regard, AG Fennelly observed that it would not be consonant with the straightforward application of the exemption as enjoyed by Article 13(B) of the Sixth Directive that under an insurance contract where the insurer includes assistance services in the insurance policy that the exemption would be provided for part only of the service.¹⁵⁰ Although this kind of services are necessary to provide insurance as a whole and are performed in-house with internal resources, staff, and benefits exemption under the main concept of insurance transactions does not mean that when this kind of services are outsourced to a third party service provider that they may immediately benefit the same treatment.¹⁵¹

This consequence was in fact the issue in *Arthur Andersen*, where a life assurance company had included a collaboration agreement¹⁵² with an independent service provider under which that agreement the service provider undertook, for a certain remuneration and with the aid of qualified personnel who are expert in the insurance field to provide the assurance company with back-office activities, which most of the actual activities were related to insurance.¹⁵³ In the case it is not further explained how the collaboration agreement was outlined, but it was to be understood as a pure subcontracting of activities usually performed by an insurance company under which the service provider provides with human and administration resources which the assurance company lacks of, and supplies it with a series of services to assist it in the tasks inherent in its insurance activities.¹⁵⁴ Apparently, in *Arthur Andersen* the parties did not conclude a cost-sharing agreement. The outcome in *Arthur Andersen* was that

146 Opinion of AG Fennelly in C-349/96, *Card Protection Plan Ltd (CPP)*, para.34. See also the Judgment of the Court in C-349/96, *CPP*, para.17

147 C-240/99, *Skandia*, para.41

148 van der Paal, Vyncke, *Donnea*, p.411

149 van der Paal, Vyncke, *Donnea*, p.411

150 AG Fennelly C-349/96, *CPP*, para.27.

151 AG Mischo C-8/01, *Taksatorringen*, paras. 142 to 144

152 C-472/03, *Arthur Andersen*, para.9. In the Opinion of the AG Poiras Maduro the collaboration agreement is sharing agreement, see para.4

153 These back-office activities include, in particular, the acceptance of new applications for insurance, the processing of contractual and tariff changes, the issue, administration and rescission of insurance policies, the processing of claims, the fixing and payment of commission to insurance agents, the development and administration of information technology (IT), the provision of information to the life assurance company and to agents, and the preparation of reports for policyholders and third parties, such as the *Fiscale Inlichtingen- en Opspingsdienst* (Tax Information and Investigation Department). See para. 5 in the Opinion of AG Poiras Maduro in C-472/03, *Arthur Andersen*.

154 AG Poiras Maduro in C-472/03, *Arthur Andersen*, paras. 33-34. Judgment of the Court in C-472/03, para. 37.

the services were subject to VAT.¹⁵⁵ The issue was that the parties tried to squeeze the supply of the services within the notion of related services performed by insurance brokers and insurance agents, within the meaning of now Article 135(1)(a) EVD.

3.4.2 Comment

It is a difficult task to predict the possible field of application and especially the outcome of a case like the abovementioned example before the Courts. Especially in the case with insurance handling services since there can be a variety of this kind of services.¹⁵⁶ However, it is assumed that a case before the court have the chance to be more successful to argue that a package of insurance claim handling services fulfils the requirement of directly necessary. The consequences to argue for the benefit of the cost-sharing exemption to exempt the supply for necessary supporting services for the exercise of an exempt activity have minor impacts to the systematic structure of the EU VAT Directive. Since the VAT implication is that the VAT treatment of exempting the services rendered within the framework is that it only applies within the framework and not having such a groundbreaking change to the whole EU VAT Directive.

The other line of argument which is to argue to squeeze a package of insurance claim handling services under the notion of the insurance exemption has far reaching consequences than the above. The immediate consequence for holding this line of argument is that it leads to dilution of restricting the exemption of insurance to encompass specific core activities performed by certain economic operators. Accordingly, an extension of the concept implies systematic changes to the EU VAT Directive affecting all economic operators on the EU market, implying changes to the definition and scope of an exempt activity in the common EU VAT system.

¹⁵⁵ Judgment of the Court in C-472/03, para. 39

¹⁵⁶ A guidance to assess the quality of an insurance claim handling service the TAXUD/2146/07 – Working Party No 1 – Financial and Insurance services, is of great relevance

Chapter 4 Concluding Remarks

The legal uncertainty surrounding Art. 132 (1)(f) EVD becomes clearer when the jurisprudence of the ECJ is read in conjunction with the several documents presented by the Commission regarding the cost-sharing provision.

It is clear that this provision is certainly of a specific character to be applied for specific situations in order to be entitled for the exemption. However, this should not amount to be an obstacle to only supply services that may benefit of the exemption. Since the provision is sufficiently comprehensive to allow for all kinds of services to be supplied within and outside the cost-sharing group. Consequently were only those services that fulfil the requirement of directly necessary will eventually benefit of being supplied exempt. This is not an obstacle to achieve scale of economics and competitiveness. For small and medium sized enterprises this is presumed to be an instrument to easily access new markets in other Member States.

What is to be perceived as an obstacle is the uncertainty as concerns the requirement of not making any profit. Uncertainty exists in how this is to be assessed, if it is strictly interpreted to encompass that the operation of the cost-sharing group has to be self-liquidating in that sense that in the end of the taxperiod no profit remains for direct tax purposes, for income and corporate taxation. This should be assessed against the requirement of not causing distortion to competition.

In my opinion, the possible field of application in cross-border scenarios, for insurance companies to achieve economics of scale, lies in the area of concluding a cost-sharing agreement for the supply of insurance claim handling services. The legal arguments to successfully argue for supplying insurance claim handling services within a cost-sharing group cross border exists.

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