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VAT Grouping through a Head Office or a
Branch –
How Does a Membership of a VAT Group Affect
the Relationship between a Head Office and its
Branch?

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Summary

In its ruling in *FCE Bank*¹, the CJEU stated that a supply between a head office and its branch does not constitute a taxable transaction since the head office, together with its branch, constitute one taxable person. Ten years later the CJEU ruled in *Skandia America*² stating that the principle deriving from *FCE Bank* is not applicable when the branch is a member of a VAT group. This ruling generated many questions and uncertainties regarding the relationship between a head office and its branch and the concept of VAT grouping.

The VAT Directive³ states that a taxable person is “any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity”⁴. As the CJEU stated in *FCE Bank*, a branch is dependent on its head office, why a head office and its branch together constitute one taxable person. Thus, the question deriving from the ruling in *Skandia America* regards whether a head office and its branch can constitute two separate taxable persons just because the branch is a member of a VAT group. I am of the opinion that a branch cannot be separated from its head office when it regards the concept of a taxable person why a head office and its branch, irrespective of the circumstances, constitute one taxable person. A branch can neither be part of a VAT group independently from its head office since the branch does not constitute a legally independent person. I namely take the view that the branch and the head office do not cease to constitute one legal person just because the branch becomes a member of a VAT group. Moreover, since cross-border VAT grouping is a disallowed concept, neither the branch nor the foreign head office should be able to become members of a VAT group that is formed in the Member State of the branch.

Furthermore, a supply of services constitute a taxable transaction if the establishment receiving the services is a legal entity separated from the supplier, since there otherwise is no supply made for consideration. Thus, for a supply made between a head office and its branch to constitute a taxable transaction, the branch has to, independently from its head office, carry out an economic business and bear the risk of the business. Since a head office and its branch constitute one legal entity, the branch does not, independently, carry out the economic activity and does not bear the economic risk of the business. Thus, the supplies made between a head office and its branch should not constitute taxable transactions. In *Skandia America* though, the CJEU did not discuss the concept of a taxable

¹ C-210/04 *FCE Bank*.

² C-7/13 *Skandia America*.

³ Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

⁴ Quote: Article 9(1) Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

transaction, it merely just stated that the services supplied between the head office and the branch did constitute taxable transactions.

Based on the above-mentioned, it is of importance to discuss the application of the ruling in Skandia America since the ruling generated many questions. Initially, it should be stated that the ruling should be applicable to all Member States of the EU since the ruling derives from the concept of EU law and the principles deriving there from. Moreover, all the Member States of the EU have to comply with EU law and shall not interpret a provision of the VAT Directive in a way that is contrary to the objective of the VAT Directive. The Member States therefore have to amend their legislation in accordance with the rulings of the CJEU. However, the intentions of the CJEU could not possibly be to drive the Member States to amend their systems of VAT grouping if it results in a legislative act that, in my opinion, is contrary to EU law. These conclusions are founded on the fact that the system of VAT grouping is a well-established concept throughout the EU and on the fact that the VAT Directive allows each Member State to, in a suitable way, choose how to introduce the concept of VAT grouping. Hence, the intentions of the CJEU could not have been to restrict this possibility, but just to avoid a situation of non-taxation. Thus, it would have been more legitimate, and in accordance with the EU law, to focus on the prevention of tax evasion and tax avoidance and the situation of non-taxation instead of the relationship between a head office and its branch and the possibility to become a member of a VAT group.

Sammanfattning

I EU-domstolens dom i FCE Bank⁵ menade EU-domstolen att ett tillhandahållande av en tjänst mellan ett huvudkontor och dess filial inte utgör en beskattningsbar transaktion då huvudkontoret och dess branch, tillsammans, utgör en och samma beskattningsbara person. Tio år senare dömde EU-domstolen i Skandia America⁶ där EU-domstolen menade att den princip som härrör från domen i FCE Bank inte är tillämplig när en filial är en medlem i en momsgrupp. Denna dom har föranlett många frågor och osäkerheter gällande relationen mellan ett huvudkontor och dess filial men samt synen på momsgrupper.

Mervärdesskattedirektivet⁷ definierar begreppet beskattningsbar person som den person ”som, oavsett på vilken plats, självständigt bedriver en ekonomisk verksamhet, oberoende av dess syfte och resultat”⁸. EU-domstolen påpekade i sin dom i FCE Bank att en filial är beroende av det huvudkontor till vilket filialen tillhör, varför ett huvudkontor och dess filial, tillsammans utgör en och samma beskattningsbara person. I Skandia America uppstod dock frågan om ett huvudkontor och en filial kan utgöra två separata beskattningsbara personer när filialen ingår i en momsgrupp. Jag menar att en filial inte kan separeras från sitt huvudkontor när det gäller definitionen av en beskattningsbar person, varför ett huvudkontor och dess filial, oavsett omständigheterna, utgör en och samma beskattningsbara person. Jag anser nämligen att ett huvudkontor och dess filial inte upphör att utgöra en och samma juridiska person bara för att filialen tillhör en momsgrupp. Som ett resultat av detta tillsammans med det faktum att gränsöverskridande momsgrupper inte är tillåtna enligt EU-rätten, borde varken filialen eller huvudkontoret bli inkluderade i en momsgrupp i de fall där filialen och huvudkontoret är etablerade i olika medlemsstater och momsgruppen är upprättad i samma medlemstat som filialen.

Vidare definierar Mervärdesskattedirektivet begreppet beskattningsbar transaktion. Ett tillhandahållande av en tjänst utgör en beskattningsbar transaktion om mottagaren av tjänsten är en juridisk enhet vilken är separerad från tillhandahållaren. Om så inte är fallet utgör tillhandahållandet inget tillhandahållande mot ersättning och transaktionen utgör därmed inte en beskattningsbar transaktion. Följaktligen krävs det att filialen, oberoende av sitt huvudkontor, bedriver en ekonomisk verksamhet och även bär risken för denna verksamhet för att en transaktion mellan ett huvudkontor och en filial skall utgöra en beskattningsbar transaktion. Baserat på den faktiska relationen mellan ett huvudkontor och en filial kan slutsatsen dras att

⁵ C-270/04 *FCE Bank*.

⁶ C-7/13 *Skandia America*.

⁷ Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

⁸ Quote: Article 9(1) Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

transaktionerna mellan ett huvudkontor och en filial inte bör utgöra beskattningsbara transaktioner. Frågan kring huruvida transaktionerna i Skandia America utgjorde beskattningsbara transaktioner eller inte blev dock aldrig behandlad av EU-domstolen i Skandia America. EU-domstolen fastställde nämligen bara att transaktionerna mellan huvudkontoret och dess filial skulle utgöra beskattningsbara transaktioner, men redogjorde aldrig för varför.

I och med det ovan sagda är det av vikt att diskutera till vilken utsträckning EU-domstolens dom i Skandia America kommer att tillämpas, speciellt då domen har föranlett många frågor. Inledningsvis kan det konstateras att domen borde tillämpas bland alla medlemsstater inom EU då domen grundar sig på EU-rätten och de principer som följer därav. Dessutom måste alla medlemsstater följa det som framgår av EU-rätten och därmed inte tolka de olika artiklarna i Mervärdesskattedirektivet på ett sätt som strider mot syftet med detta direktiv. Följaktligen måste medlemsstaterna inte bara anpassa sig efter Mervärdesdirektivet utan även efter EU-domstolens praxis. Vad gäller Skandia America kan EU-domstolen däremot inte ha haft som avsikt att tvinga de olika medlemsstaterna att anpassa deras mervärdesskattesystem, och då reglerna kring momsgrupper, på ett sätt som resulterar i att medlemsstaternas momslagar strider mot EU-rätten, vilket de tvingas göra om de följer vad som sägs i EU-domstolens dom i Skandia America. Jag grundar detta resonemang på det faktum att systemet med momsgrupper är väletablerat inom EU och tillåter varje medlemsstat att, på ett sätt som de anser lämpligt, introducera momsgrupper i deras momslagar. Baserat på detta menar jag att EU-domstolen inte kan ha haft som avsikt att begränsa möjligheten att införa momsgrupper, utan borde snarare haft som avsikt att förhindra skatteflykt. Därmed hade det varit mer befogat att, i enlighet med EU-rätten, fokusera på förhindrandet av skatteflykt och situationen där beskattning av transaktionerna mellan huvudkontoret och filialen uteblir istället för på den faktiska relationen mellan ett huvudkontor och dess filial samt möjligheterna att ingå i en momsgrupp.

Preface

When entering the building of the Faculty of Law in Lund the first time, I never thought that I would manage to end up at the place where I am today, five years later. I never thought that I would apply for a Master program and never thought that I would specialize within the area of tax law, especially not VAT. However, here I am today, finishing my Master thesis regarding VAT and could not think of any thing else that I would rather prefer to write about.

During the five past years there have been many ups and downs and I would never have been able to go through all these years without my family and my friends. Therefore, I would like to thank and express my appreciations to my beloved family and my amazing friends who have been there and supported me during all these years.

I would also like to thank my supervisor, Oskar Henkow, for helping me and giving me the guidance that I have needed throughout the process, but also for making me realize that the area of VAT is more interesting than I would ever imagine.

Josefin Nyqvist
2nd of April 2015

Abbreviations

AG	Advocate General
C-	Court case number
CJEU	Court of Justice of the European Union
COM	Commission of the European Communities
EU	European Union
Implementing Regulation	Regulation (EU) No. 282/2011 as amended latest by the 2 nd of April 2015.
ML	Mervärdesskattelag (1994:200) as applicable at the 2 nd of April 2015.
Sixth VAT Directive	Sixth Council Directive 77/388/EEC of 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
VAT	Value added tax
VAT Directive	Council Directive 2006/112/EC as amended latest by the 2 nd of April 2015.

1 Introduction

1.1 Background

In September 2014, the CJEU ruled in *Skandia America*⁹, a ruling that has generated many questions and uncertainties regarding the concept of a taxable person and the VAT charged on transactions that are made between a head office and its branch, especially when either the head office or the branch is part of a VAT group. Before giving the reader the background to the case law, the thesis intends to explain some of the concepts deriving from the VAT Directive¹⁰.

1.1.1 The Scope of the VAT Directive

A Member State can charge VAT on a transaction when the transaction falls within the scope of the VAT Directive, established in article 2 of the VAT Directive.¹¹

The VAT Directive distinguishes between the field of application and the territorial scope.¹² To fall within the field of application the transaction shall

- (i) constitute a supply of goods, a supply of services or an importation of goods,
- (ii) be supplied for consideration and
- (iii) be made by a taxable person acting as such.¹³

The transaction can also constitute an intra-community acquisition of goods by both a taxable- and a non-taxable person, as long as the transaction meets the conditions mentioned in article 2(1)(b) of the VAT Directive.¹⁴ To fall within the territorial scope the transaction shall take place within the territory of a Member State of the EU.¹⁵

A taxable person is “any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity”^{16, 17}. When different, legally independent taxable persons, established within the same Member State, are closely bound to each other by financial, economic and organisational links, the Member State, in which the taxable persons

⁹ C-7/13 *Skandia America Corporation*.

¹⁰ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as amended latest by the 2nd of April 2015.

¹¹ Article 2 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

¹² Terra, B. and Kajus, J., *Introduction to European VAT (Recast)*, IBFD, 2014, p. 275.

¹³ Article 2 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

¹⁴ Article 2(1)(a)-(d) Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

¹⁵ Terra, B. and Kajus, J., *Introduction to European VAT (Recast)*, IBFD, 2014, p. 309.

¹⁶ Quote from Article 9(1) Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

¹⁷ Article 9(1) Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

have their place of establishment, can regard these different taxable persons as one single taxable person, i.e. a VAT group.¹⁸ Hence, the supplies made between the members of the VAT group will not be charged VAT.¹⁹

1.1.2 The Development of the Case Law

The CJEU has through the years ruled in numerous cases regarding the concepts of a taxable person and taxable transactions, of which the rulings in *FCE Bank*²⁰ and *Skandia America*²¹ are of great importance for this research.

1.1.2.1 C-210/04 FCE Bank

In *FCE Bank*, the FCE Bank, a head office established in the United Kingdom, had a branch, FCE IT, with the place of establishment in Italy, to which FCE Bank supplied services. FCE IT applied for a repayment of the VAT charged on the services, which the Italian tax authorities rejected. The Italian Court referred three questions to the CJEU, whereof the research intend to focus on the following question.

“(i) Must Articles 2(1) and 9(1) of the Sixth Directive²² be interpreted as meaning that the branch of a company established in another State (belonging to the European Union or otherwise), which has the characteristics of a production unit, may be regarded as an independent person and thus that a legal relationship between the entities can be said to exist with consequent liability for VAT in relation to supplies of services effected by the parent company? [...] Can a legal relationship be said to exist where there is a cost-sharing agreement concerning the supply of services to the subordinate entity? If so, what conditions must be satisfied for such relationship to be considered to exist?”²³

Hence, the main issue of the case was whether FCE IT was an independent tax subject or whether FCE Bank and FCE IT, together, constituted one taxable person.²⁴

The CJEU commenced by referring to article 2 and 4 of the Sixth VAT Directive²⁵ and defined a taxable person as an entity that, independently,

¹⁸ Article 11 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

¹⁹ C-162/07 *Amplisientifica and Amplifin*, paras. 19-20; Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 99.

²⁰ C-210/04 *FCE Bank*.

²¹ C-7/13 *Skandia America*.

²² Sixth Council Directive 77/388/EEC of 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.

²³ Quote from C-210/04 *FCE Bank*, para 20.

²⁴ C-210/04 *FCE Bank*, paras. 14-19.

²⁵ Sixth Council Directive 77/388/EEC of 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.

carries out an economic business. The CJEU then referred to its case law and stated that there has to be a legal relationship between the supplier and the purchaser, which results in a reciprocal obligation to perform, for a supply to constitute a taxable transaction. Hence, for a supply between a head office and its branch to constitute a taxable transaction, the branch has to, independently from its head office, carry out an economic business and bear the risk of the business. In the case at issue, FCE IT did not contribute with any capital to the business, and was therefore dependent of FCE Bank, while FCE Bank bore the risk of the business.²⁶

The principle established by the CJEU in *FCE Bank*, known as the *FCE Bank-principle*, states that a branch is neither independent from its head office nor does a legal relationship exist between a head office and its branch. Thus, a head office and its branch, together, constitute one taxable person and the supplies made between the two entities do not constitute taxable transactions.²⁷ Thus, the ruling of the CJEU infers that a branch, established in a Member State other than the Member State of the head office, is not a legal entity separated from its head office and does therefore not constitute a separate taxable person, not even in the situations where the branch receives supplies from its head office.²⁸

1.1.2.2 C-7/13 Skandia America Corporation

Ten years after the ruling in *FCE Bank*, the CJEU ruled in *Skandia America* stating that the principle deriving from *FCE Bank* is not applicable when the branch is a member of a VAT group.²⁹ This statement has generated many commentaries and caused many questions, which this thesis intend to discuss in depth under section 6.

Skandia America regarded two of the entities of the *Skandia* group, the head office *Skandia America Corporation (SAC)*, established in the United States of America, and its branch *Skandia Sverige*, established in Sweden. SAC was, during 2007 and 2008, the global purchasing company for IT-services. SAC carried out its business through its branch *Skandia Sverige*, which became a member of a Swedish VAT group in 2007 (see figure 1.1). SAC distributed the externally purchased IT-services to several companies within the *Skandia* group, amongst them *Skandia Sverige*. *Skandia Sverige* then processed the externally purchased IT-services, which made it possible to produce the final product. The final product, called the IT-production, was supplied to the companies within the *Skandia* group, independently of whether they were part of the Swedish VAT group or not. To each supply, an additional fee, i.e. a mark-up, of 5 per cent was added, both on the supplies made between SAC and *Skandia Sverige* and between *Skandia Sverige* and the other companies within the *Skandia* group. In addition, the

²⁶ C-210/04 *FCE Bank*, paras. 34-37.

²⁷ C-210/04 *FCE Bank*, para. 51.

²⁸ C-210/04 *FCE Bank*, para. 41.

²⁹ C-7/13 *Skandia America Corporation*, para. 32.

costs assignable to the supplies between SAC and Skandia Sverige were allocated through internal invoices.³⁰

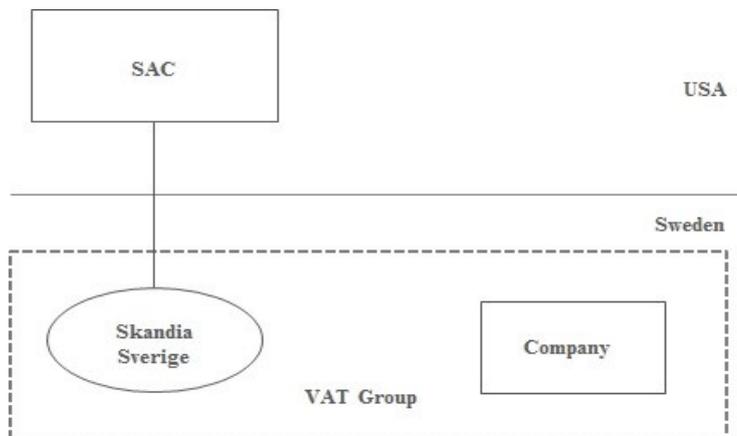


Figure 1.1

The Swedish Tax Authorities, Skatteverket, implied that the supplies supplied by SAC to Skandia Sverige constituted taxable transactions and charged VAT on the supplies. Skatteverket also stated that both SAC and Skandia Sverige constituted taxable persons.³¹

Skandia Sverige appealed the decision of Skatteverket to the Stockholm Administrative Court, Förvaltningsrätten i Stockholm, which referred two questions to the CJEU for a preliminary ruling;³²

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

“(ii) If the answer to the first question is in the affirmative, is the main establishment in the third country to be viewed as a taxable person not established in the Member State within the meaning of Article 196 of [the VAT Directive³³], with the result that the purchaser is to be taxed for the transactions?”³⁴

The CJEU answered the questions by stating that SAC supplied the services for consideration to the VAT group through Skandia Sverige, i.e. the services supplied to Skandia Sverige were considered supplied to the VAT group as a whole, not to Skandia Sverige. Thus, the services supplied by SAC constitute taxable transactions.³⁵ In conclusion, the CJEU stated that a supply of services, made from a head office with its place of establishment

³⁰ C-7/13 *Skandia America Corporation*, para. 17.

³¹ C-7/13 *Skandia America Corporation*, para. 18.

³² C-7/13 *Skandia America Corporation*, paras. 19-20.

³³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

³⁴ Quote from C-7/13 *Skandia America Corporation*, para. 20.

³⁵ C-7/13 *Skandia America Corporation*, paras. 30-31.

in a third country to its branch within a Member State of the EU, constitutes a taxable transaction when the branch is a member of a VAT group.³⁶ Furthermore, the CJEU emphasized that SAC constituted a separate taxable person in relation to the VAT group and stated that the VAT group constituted the taxable person that should be charged VAT.³⁷

Hence, the CJEU summarized its ruling by stating that services are supplied for consideration to a VAT group when a head office, with its place of establishment in a third country, supplies the services to its branch, which has its place of establishment within the territory of the EU, and when the branch is part of the VAT group.³⁸

1.2 Purpose and Question Formulation

Based on the development of the case law and especially on the ruling in *Skandia America*, this thesis discusses some of the unanswered questions and issues still existing in regards to the relationship between a head office and its branch. The purpose of the research is to discuss how the development of the case law of the CJEU has affected the relationship between a head office and its branch, focusing on the transactions between a head office and its branch in the situation where the branch is part of a VAT group. In what circumstances does the VAT Directive imply that a head office and its branch constitute two separate taxable persons and when does the services, supplied made between a head office and its branch, constitute taxable transactions?

To be able to discuss the relationship between a head office and its branch and whether the supplies, made between the two entities, constitute taxable transactions or not, the research intends to discuss different areas of the VAT Directive, such as the concepts of a taxable person, a taxable transaction and VAT grouping.

1.3 Delimitations

The research focuses on the relationship between a head office and its branch and discusses the concepts of a taxable person, a taxable transaction and VAT grouping. The different concepts mentioned by the VAT Directive and the issues discussed focuses on the facts of *Skandia America*, while the thesis mainly discusses the supply of services and not the supply of goods and the supplies made between taxable persons, more exactly the situations where the supplies are made between a head office and a branch. Since the research focuses on a situation where the branch constitutes a fixed establishment, the term “fixed establishments” implies a branch if the context, in which the term “fixed establishment” is mentioned, does not indicate something else.

³⁶ C-7/13 *Skandia America Corporation*, para. 32.

³⁷ C-7/13 *Skandia America Corporation*, paras. 35-37.

³⁸ C-7/13 *Skandia America Corporation*, para. 38.

Moreover, the research does not intend to discuss some of the areas of the VAT Directive, such as the place of establishment, the place of supply, the concept of taxable amount and the obligations to pay VAT. However, there is a brief discussion of the concept of tax evasion and tax avoidance in accession to the section of VAT groups since the prevention of tax evasion and tax avoidance can justify the decisions made by the Swedish Tax Authorities, Skatteverket, in the case of Skandia America.

The thesis also, briefly, presents the content of the Swedish VAT Act, Mervärdesskattelagen³⁹, in section 6, which intend to help the reader understand the ruling and the consequences deriving from it. Thus, the presentation of the Swedish VAT Act does not have as its purpose to constitute the foundation to the analysis or to be used when answering the main questions of the thesis.

1.4 Method

This thesis mainly consists of two parts, a descriptive part and an analytical part, and focuses on the legal situation of today from a critical perspective. A discussion of the legal situation from a critical perspective implies a critical discussion and analysis of the legal situation including both the law and the case law of the CJEU. The critical perspective also contains a presentation of the weaknesses of the law when discussing actual result of both the law and case law.⁴⁰

When discussing the area of EU law, the legal dogmatic method is the method most commonly used along with the EU legal method.⁴¹ Since the research concerns EU law, the research considers both the legal dogmatic method and the EU legal method. Furthermore, the research does not discuss the national law of Sweden, even though Sweden brought Skandia America to the CJEU due to the Swedish VAT Act. However, the exclusion of the Swedish VAT Act from the analysis, to some extent, does not matter since Sweden has implemented the VAT Directive through the Swedish VAT Act and, as a corollary, has to comply with the VAT Directive and the rulings of the CJEU.⁴² There is an extensive harmonization of the system of VAT throughout the EU.⁴³ Therefore, the provisions of the Swedish VAT Act shall be interpreted in the light of the VAT Directive.⁴⁴ Furthermore, the

³⁹ Mervärdesskattelag (1994:200) as applicable at the time.

⁴⁰ Bernitz et.al. "*Finna rätt – Juristernas källmaterial och arbetsmetoder*", Tenth edition, 2008, p. 236.

⁴¹ Hettne, J., "*EU-rättslig metod – teori och genomslag i svensk rättstillämpning*", Second edition, Norstedts Juridik, 2011,

⁴² C-7/13 *Skandia America*, paras. 11-16; Mervärdesskattelag (1994:200) as applicable at the time.

⁴³ Terra, B. and Kajus, J., *Introduction to European VAT (Recast)*, IBFD, 2014, p. 7.

⁴⁴ Hettne, J., "*EU-rättslig metod – teori och genomslag i svensk rättstillämpning*", Second edition, Norstedts Juridik, 2011, pp. 34-38.

Swedish VAT Act is normally interpreted in conformity with the VAT Directive.⁴⁵

The EU legal method implies that the sources of the EU law are considered and applied in the following order: the primary law, the Statute of the EU, the principles of law, secondary law, the case law of the CJEU, preparatory work, the Opinion of the AG and the doctrine.⁴⁶

When applying the legal dogmatic method, also known as the legal method, the legally recognized sources of law applies as follows; the EU law when implemented in national law, the national law, the preparatory work, the case law and the doctrine.⁴⁷

1.5 Material

The research proceeds from the VAT Directive and its implementing regulations. The VAT Directive has been amended in 2010 and since Skandia America derives from the time before the year of 2010 the research has to take both the VAT Directive, which is applicable until the 1st of January 2010, and the VAT Directive, which is amended latest by the 2nd of April 2015, into account. The research mainly, if nothing else is stated, focuses on the VAT Directive amended latest by the 2nd of April 2015. In the situations where the research refers to the case law of the CJEU, the discussion regards the VAT Directive based on the wording at the time of the case. Thus, in some section the VAT Directive, applicable until the 1st of January 2010, and the Sixth Council Directive 77/388/EEC of May 1977 are of relevance. There is an indication in the footnotes regarding the applicable VAT Directive for each case. In addition to the VAT Directive, the Communication of the Commission of the EU⁴⁸ is of relevance when analysing and discussing the VAT Directive and the relationship between a head office and its branch.

Furthermore, when discussing the VAT Directive and the different provisions relevant for the thesis, the research focuses on the case law of the CJEU along with the doctrine and articles of the researchers within the area of VAT. The CJEU has ruled in more than 700 cases throughout the years, while the research only focuses on a few of them. The, for the research, most important cases are FCE Bank and Skandia America. Since this thesis focuses on the situation after the ruling in Skandia America, the thesis discusses Skandia America in depth under a separate section, i.e. in section 6. Beyond FCE Bank and Skandia America, the research, continuously, refers to the other rulings of the CJEU throughout the thesis. These cases are

⁴⁵ Henkow, O., *"Mervärdesskatt i teori och tillämpning"*, Second edition, Gleerups Utbildning AB, 2013.

⁴⁶ Hetne, J., *"EU-rättslig metod – teori och genomslag i svensk rättstillämpning"*, Second edition, Norstedts Juridik, 2011, p. 40.

⁴⁷ Dahlman, C., *"Rätt och rättfärdigande"*, 2011, pp. 21 and following.

⁴⁸ COM (2009) 325 final.

mainly the ones mentioned in the doctrine and in the rulings of FCE Bank and Skandia America.

One of the researchers that appear the most frequently within the area of VAT is Ben Terra who has written many guidelines and commentaries to the VAT Directive. Since Ben Terra is a well-known researcher who has authored many updated publications within the area of VAT, the research often refer to his publications. Besides the publications of Ben Terra, the research discusses a Swedish commentary to the VAT Directive of Björn Westberg and a research of Medeleine Merckx, which focuses on, inter alia, the relation between a head office and its branch and the concept of VAT grouping. The research also discusses some international sources of law, such as some publications published in the EC tax review.

Beyond the case law and the doctrine, the research discusses different commentaries to the ruling in the Skandia America and the development of the case law of the CJEU, written by tax consultants throughout Europe and the HM Revenue and Customs.

1.6 Outline/Disposition

The thesis consists of four sections. The first section focuses on the different VAT concepts and discusses the concepts that are of importance for the research and for the questions asked in the section “Purpose and Question Formulation” above. After discussing the different concepts of VAT, the thesis proceeds to the discussion regarding the relationship between a head office and its branch.

The third section consists of a presentation and discussion of the ruling in Skandia America, followed by a discussion of the questions deriving from the development of the case law of the CJEU. This section, inter alia, discusses the effects of the ruling in Skandia America and the commentaries to the ruling.

Finally, after a presentation and discussion of the three above-mentioned sections, the thesis proceeds to the analysis. In this section, the material presented in the previous sections are analysed and I present my own thoughts when it regards the relationship between a head office and its branch. Furthermore, after the analysis of the material, the thesis ends up in a conclusion, which processes the different discussions presented throughout the thesis.

2 Taxable Person

A taxable person is “any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity”.⁴⁹ Hence, the concept of any person includes both private and legal persons. Even a co-operation, joint venture and a partnership is a taxable person, even though they do not have a legal personality, as long as the entity acts as a single unit.⁵⁰ Since the concept of a taxable person is subject to a broad interpretation, it also includes persons established within a territory outside of the territory of the EU.⁵¹

2.1 Economic Activity

To constitute a taxable person, the entity has to carry out an economic activity.⁵² The concept of an economic activity is an objective criterion, which is subject to a broad interpretation and considered irrespective of the purpose or result of the transaction.⁵³ However, all activities performed with the purpose of receiving income on a continuing basis constitute an economic activity, as long as there is a direct link between the activity performed and the payment received.⁵⁴

The concept of an economic activity consists of two alternative requirements. The first regards commercial businesses as well as other economic businesses and comprises the need for production, distribution and supplies of services.⁵⁵ Thus, a producer, trader or person who supplies services performs an economic activity.⁵⁶ The second requirement implies that an economic activity can include the exploitation of tangible and intangible property. The term exploitation consists of all transactions, irrespective of the legal form, as long as the purpose is to generate revenue.⁵⁷

In addition, there is a requirement of a legal relationship between the supplier and the purchaser. Thus, a transaction cannot constitute an

⁴⁹ Quote: Article 9(1) Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

⁵⁰ Terra, B. and Kajus, J., *Introduction to European VAT (Recast)*, IBFD, 2014, p. 311.

⁵¹ Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 86.

⁵² Article 9(1) Council Directive 2006/112/EC as amended latest by the 2nd of April 2015..

⁵³ Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, pp. 88-89.

⁵⁴ Terra, B., and Wattel, P., “*European Tax Law*”, fifth edition, Wolters Kluwer, 2008, p. 270.

⁵⁵ Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 89.

⁵⁶ Terra, B., and Wattel, P., “*European Tax Law*”, fifth edition, Wolters Kluwer, 2008, p. 270.

⁵⁷ Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 90;

economic activity if there is no legal relationship between the supplier and the purchaser.⁵⁸ The existence of a legal relationship between the supplier and the acquirer was discussed by the CJEU in depth in *Tolsma*⁵⁹.

In *Tolsma*, a man, Mr Tolsma, played a barrel organ on the highway. The money Mr Tolsma received derived from donations made by the persons passing by but also from other donations, which he received when knocking on doors to houses and visiting stores. Thus, Mr Tolsma could not claim any right to remuneration, but was dependent on the fact that the passers-by were willing to make donations.⁶⁰ According to the CJEU, the donations did not constitute considerations since the passers-by, voluntarily, donated the money. The passers-by namely had no obligation to give Mr Tolsma their money why a reciprocal obligation to perform did not exist. Thus, there was no legal relationship between Mr Tolsma and the passers-by.⁶¹

In summary, the CJEU has stated that a supplier does not perform an economic activity and that no legal relationship exists between the supplier and the acquirer if the acquirer is not obliged to pay for the services supplied by the supplier. Hence, the person supplying the goods or services does not constitute a taxable person.⁶²

2.2 VAT Grouping

The requirement, established in article 9 of the VAT Directive, stating that the taxable person has to, independently, carry out the economic activity raises the question whether associated enterprises can constitute one single taxable person or not, a concept that is known as VAT grouping.⁶³

When different, legally independent taxable persons, established within the same Member State, are closely bound to each other by financial, economic and organisational links, the Member State in which they are established can regard the different taxable persons as one single taxable person, i.e. a VAT group.⁶⁴

Regarding the VAT grouping systems of each Member States of the EU, the VAT Directive allows the Member States to, individually, enact certain provisions regarding the introduction of the VAT systems, while the systems of each Member States might differ and diverge from each other. However, even though the Member States are free to, individually, choose

⁵⁸ Terra, B., and Wattel, P., “*European Tax Law*”, fifth edition, Wolters Kluwer, 2008, p. 270.

⁵⁹ C-16/93 *Tolsma*.

⁶⁰ C-16/93 *Tolsma*, para. 3.

⁶¹ C-16/93 *Tolsma*, paras. 16-20.

⁶² C-16/93 *Tolsma*, para. 14.

⁶³ Terra, B., and Wattel, P., “*European Tax Law*”, fifth edition, Wolters Kluwer, 2008, p. 273.

⁶⁴ Article 11 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

their own systems of VAT grouping, the VAT Directive outlines the personal-, territorial- and material scope, from which the Member State cannot derive. Furthermore, the Member States that introduce a VAT grouping system have to respect the VAT Directive and the purpose thereof. Thus, there is no room for the Member States to interpret their VAT systems without considering the VAT Directive and the principles deriving therefrom, such as the principles of fiscal neutrality, non-discrimination and economic reality.⁶⁵

Thus, AG Mengozzi argues in his opinion in *Larentia + Minerva*⁶⁶ that the VAT Directive does not confer any margin of discretions on the Member States. However, AG Mengozzi emphasizes that the CJEU, in its earlier case law, has, based on the objectives of the VAT Directive, recognised the possibility for the Member States to restrict the application of their VAT grouping systems as long as the restrictions comply with the EU law.⁶⁷ AG Mengozzi though means that the VAT directive confer a margin of discretion on the Member States as long as it complies with the objective of the VAT Directive. Hence, the Member States have the possibility to restrict the application of their VAT grouping systems as long as the restrictions are necessary and appropriate in relation to the objective of the VAT Directive and do comply with the principles of non-discrimination and fiscal neutrality. The VAT grouping systems shall therefore reflect the economic reality and not result in artificial distinctions according to the legal form of the persons joining the VAT group.⁶⁸ Some researchers though implies that the margin of discretion risks to infringe the principles of EU law, why they argue that the option of the Member States to, individually, introduce a VAT grouping system should be restricted.⁶⁹

The purpose of VAT grouping is mainly to simplify the administration for both the taxpayers and the tax authorities when it regards VAT and to, by treating the businesses that are not truly independent as one single taxable person, prevent tax abuse. Furthermore, it has also been argued that the purpose of VAT grouping is to avoid the obligation to pay VAT on transactions between closely linked entities.⁷⁰ Hence, there is no VAT

⁶⁵ Vyncke, K., “*EU VAT Grouping from a Competitive Tax Law Perspective*”, EC Tax Review, 2009/6 pp. 299-309; AG Mengozzi, *Opinion in joined cases C-108/14 and C-109/14 Larentia + Minerva*, paras. 67 and 71; Van Doesum, A. and Van Norden, G-J., “*T(w)o become one: the Communication from the Commission on VAT grouping*”, British Tax Review, 2009, 6, pp. 657-667.

⁶⁶ AG Mengozzi, *Opinion in joined cases C-108/14 and C-109/14 Larentia + Minerva*.

⁶⁷ AG Mengozzi, *Opinion in joined cases C-108/14 and C-109/14 Larentia + Minerva*, para. 68. See the ruling by the CJEU in C-480-10, *Commission v. Sweden* and C-74-11, *Commission v. Finland*.

⁶⁸ AG Mengozzi, *Opinion in joined cases C-108/14 and C-109/14 Larentia + Minerva*, paras. 70-72.

⁶⁹ Van Doesum, A. and Van Norden, G-J., “*T(w)o become one: the Communication from the Commission on VAT grouping*”, British Tax Review, 2009, 6, pp. 657-667.

⁷⁰ Terra, B. and Kajus, J., *Introduction to European VAT (Recast)*, IBFD, 2014, p. 343; Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 99.

charged on the services supplied between the entities of a VAT group.⁷¹ For VAT purposes, a VAT group constitutes one single taxable person and, as a corollary, the entities entering a VAT group do no longer constitute separate taxable persons.⁷² Thus, the various obligations regarding the VAT now apply to the VAT group as a whole and not to the separate entities themselves.⁷³ To emphasize is that article 11 of the VAT Directive does not state that a member of a VAT group has to constitute a taxable person, i.e. article 11 of the VAT Directive might also apply to non-taxable persons even though they fall outside the scope of article 9 of the VAT Directive.⁷⁴

When introducing a VAT grouping system, a Member State can choose to introduce a compulsory or an optional VAT grouping arrangement. The compulsory VAT grouping arrangement implies that the taxable persons, fulfilling the conditions for group registration, automatically constitute a VAT group. Meanwhile, an optional VAT grouping arrangement requires the taxable persons to both fulfil the requirements and opt for a group registration. When applying the optional VAT group arrangement the Member States has to comply with the principle of non-discrimination, i.e. the VAT grouping system cannot discriminate amongst other VAT groups or taxable persons.⁷⁵

Furthermore, article 11 of the VAT Directive outlines the territorial scope, stating that the entities that join a VAT group have to have their place of establishment within the territory of the Member State that has introduced the VAT grouping scheme.⁷⁶ Thus, the entities have to be physically located within the territory of the Member State that introduces the VAT grouping scheme to be able to become a member of a VAT group formed under the system of that Member State.⁷⁷ In addition, the Commission has rejected the possibility to create cross-border VAT groups due to the lack of harmonization between the Member States regarding important areas of law.⁷⁸ Hence, the Commission has emphasised the importance of knowing

⁷¹ Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 99; AG Mengozzi, *Opinion in joined cases C-108/14 and C-109/14 Larentia + Minerva*, para. 47.

⁷² C-162/07 *Ampliscientifica and Amplifin*, paras. 19-20; Van Doesum, A. and Van Norden, G-J., “*T(w)o become one: the Communication from the Commission on VAT grouping*”, *British Tax Review*, 2009, 6, pp. 657-667..

⁷³ C-162/07 *Ampliscientifica and Amplifin*, paras. 19-20; Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 99; AG Mengozzi, *Opinion in joined cases C-108/14 and C-109/14 Larentia + Minerva*, para. 48; Van Doesum, A. and Van Norden, G-J., “*T(w)o become one: the Communication from the Commission on VAT grouping*”, *British Tax Review*, 2009, 6, pp. 657-667.

⁷⁴ Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 100.

⁷⁵ Vyncke, K., “*EU VAT Grouping from a Competitive Tax Law Perspective*”, *EC Tax Review*, 2009/6 pp. 299-309.

⁷⁶ COM(2009) 325 final, pp. 6.

⁷⁷ Vyncke, K., “*EU VAT Grouping from a Competitive Tax Law Perspective*”, *EC Tax Review*, 2009/6 pp. 299-309.

⁷⁸ See a further discussion regarding cross-border VAT grouping under chapter “*Cross-Border VAT Groups*”; Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 99.

which establishments that are, but also when the establishments are, established within the territory of a Member State. Since there is no guidance regarding the place of establishment, the Commission states that a business has its place of establishment in the Member State where it has its seat of economic activity.⁷⁹

When it regards VAT grouping, a Member State also has the right to take any measures necessary to prevent tax evasion or tax avoidance and can therefore prohibit VAT groups formed under their VAT act through purely artificial arrangements.⁸⁰ The researchers though emphasize that the tax advantages, which derives from the VAT grouping systems, do not necessarily entails tax evasion or tax avoidance, why only the unjustified tax advantages fall within the scope of article 11 of the VAT Directive.⁸¹ Furthermore, the restrictive measures taken by the Member States have to be justified, i.e. compatible with the principles of EU law and proportionate in relation to the intended aim.⁸² Thus, a Member State has, inter alia, the right to require the taxable persons to, by objective circumstances, confirm the stated intentions to carry out an economic activity.⁸³

Unfortunately, the case law of the CJEU primarily regards tax evasion and tax avoidance in relation to transactions and not to VAT grouping. When it regards the tax evasion and tax avoidance in relation to transactions, the CJEU has stated that for a transaction to constitute a supply of services for VAT purposes and not a transaction with the aim of tax evasion or avoidance, the transaction has to satisfy the objective criteria. A transaction satisfies the objective criteria when it, inter alia, has an economic substance in the sense that there is a transfer of the ownership and when the transaction is made for consideration. In addition, the objective criteria are not satisfied when the purpose of the transaction is tax evasion or tax avoidance.⁸⁴ Thus, it does not matter that the sole purpose of the transaction is to obtain tax advantages when deciding whether there is a supply of service or no if the transaction meets the objective criteria.⁸⁵

Moreover, the CJEU has stated that a transaction constitutes an abusive practice when the advantage obtained is contrary to the purpose of the

⁷⁹ COM(2009) 325 final, pp. 6-7; See a further discussion of the seat of the economic activity under chapter “*A Head Office and a Branch – The Existence of a Fixed Establishment*”.

⁸⁰ Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 101; Vyncke, K., “*EU VAT Grouping from a Competitive Tax Law Perspective*”, EC Tax Review, 2009/6 pp. 299-309.

⁸¹ Van Doesum, A. and Van Norden, G-J., “*T(w)o become one: the Communication from the Commission on VAT grouping*”, British Tax Review, 2009, 6, pp. 657-667.

⁸² Vyncke, K., “*EU VAT Grouping from a Competitive Tax Law Perspective*”, EC Tax Review, 2009/6 pp. 299-309; AG Mengozzi, *Opinion in joined cases C-108/14 and C-109/14 Larentia + Minerva*, paras. 71 and 76.

⁸³ Terra, B., and Wattel, P., “*European Tax Law*”, fifth edition, Wolters Kluwer, 2008, p. 271.

⁸⁴ C-354/03 *Optigen*, para. 14; C-255/02 *Halifax*, paras. 58-59; Terra, B., and Wattel, P., “*European Tax Law*”, fifth edition, Wolters Kluwer, 2008, p. 272.

⁸⁵ *Halifax*, para. 59

legislation and when the essential aim of the transaction is to obtain tax advantages.⁸⁶

2.3 Cross-Border VAT Grouping

In general and from the wording of article 11 of the VAT Directive regarding VAT grouping, cross-border VAT grouping is a disallowed concept. However, some Member States, such as the Netherlands, the United Kingdom and Finland, allows branches with their place of establishment in other Member States to become a member of a VAT group formed in the territory of the Member State introducing the VAT group.⁸⁷

If the concept of cross-border VAT grouping would work perfectly, it would result in a situation where pure national and cross-border situations were treated the same since the taxable persons of both the national and the cross-border VAT groups would enjoy the same administrative-, cash flow- and financial advantages. In addition, VAT grouping would eliminate the different treatment of foreign subsidiaries and foreign fixed establishments. For example would the supplies made between a head office and its branch be non-taxable due to the legal relationship of the two entities, while the supplies made between a parent company and its subsidiary would be non-taxable if there was a VAT group in which the entities were members.⁸⁸

Furthermore, when discussing the situation of cross-border VAT grouping, three different scenarios appear of which the first and third scenarios only exist in theory.⁸⁹

Firstly, there is the situation where the VAT group itself does not constitute a cross-border VAT group, but where the VAT group has a cross-border effect. In this situation, the Member States have to recognize the VAT groups of the other Member States and recognize the members of the VAT group as a single taxable person. This recognition results in a situation where the supplies made between the members of the VAT group constitute non-taxable transactions within all Member States. The second situation regards the cases where the VAT group does not have a cross-border effect, but where the taxable persons, established in a State other than the Member State of the VAT group, can become a member of the VAT group. In these situations, the VAT group effects the taxable transactions in the Member State of the VAT group. Thirdly, a situation with a genuine cross-border VAT group could arise, i.e. a situation where all Member States of the EU have to apply the concept of VAT grouping. In this situation, the VAT

⁸⁶ C-255/02 *Halifax*, paras. 74-75.

⁸⁷ Zutt, J., "VAT on Intercompany Supplies: Why Skandia Is a Big Deal", *Derivatives & Financial Instruments*, November/December 2014, p. 279; HMRC Policy paper "Revenue and Customs Brief 2 (2015): VAT grouping rules and the Skandia judgment", 10th of February 2015; Vyncke, K., "EU VAT Grouping from a Competitive Tax Law Perspective", *EC Tax Review*, 2009/6 pp. 299-309.

⁸⁸ Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, pp. 152-153.

⁸⁹ Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, pp. 152-153.

groups will have an effect within all the Member States of the EU. In these situations, all taxable persons, irrespective of the place of establishment, can become members of the VAT group.⁹⁰

As stated above, the first and third situations only exist in theory. The first scenario requires a Member State, which does not apply the concept of VAT grouping, to treat the members of foreign VAT groups more favourably than it treats the taxable persons within its own territory, since the latter cannot benefit from the concept of VAT grouping. The third situation requires that all Member States interpret the requirements of VAT grouping in the same way and, unanimously, adopt the concept of cross-border VAT grouping, a requirement that do not work in practice.⁹¹

When allowing cross-border VAT groups a situation of non- or double taxation might appear. Assume that a subsidiary in Member State A is supplying services, exempted from VAT, to its parent company in Member State B. As long as no VAT group exists, the supplies constitute taxable transactions. However, in this situation, Member State B treats the parent company and the subsidiary as a VAT group, which Member State A does not. The result is a situation of non-taxation since Member State A allows the subsidiary to deduct the VAT on the supplies and Member State B do not tax the supplies made within a VAT group. In the case of a reversed situation, i.e. when the parent company supplies the services to its subsidiary, there would be a situation of double taxation. Member State B would not allow any deduction since the VAT group supplies exempt services and Member State A would tax the supplies since it does not recognize the VAT group.⁹² In addition to this example, the CJEU has stated in its ruling in *Swiss Re*⁹³ that it is not possible to interpret a provision of the VAT Directive in a way that results in a situation that is contrary to the objective of that provision.⁹⁴

⁹⁰ Merckx, M., *Establishments in European VAT*, Wolters Kluwer, 2013, pp. 152-153.

⁹¹ Merckx, M., *Establishments in European VAT*, Wolters Kluwer, 2013, pp. 152-153.

⁹² Merckx, M., *Establishments in European VAT*, Wolters Kluwer, 2013, p. 154.

⁹³ C-242/08 *Swiss Re*.

⁹⁴ C-242/08 *Swiss Re*, para. 63.

3 Taxable Transaction for Consideration

3.1 Taxable Transaction

The VAT Directive mentions different kinds of transactions, which all are subject to different treatment in regards to VAT.⁹⁵ Even though this research intends to focus on the supply of services, the concept of a supply of services requires a presentation of the concept of a supply of goods. The first provision within the VAT Directive that regards the supply of services, i.e. Article 24 of the VAT Directive, namely states that a supply of services is any transaction that does not constitute a supply of goods.⁹⁶

3.1.1 Supply of Goods

All transactions of tangible property, from one person to another, falls within the concept of a supply of goods as long as the right to dispose over the tangible property as an owner is transferred to the acquirer.⁹⁷ The phrase “as an owner” implies any transfer, giving the other party the right to dispose over the tangible property as if the person was the owner. Hence, the concept “as an owner” does not have the same meaning as the concept “transfer of the ownership”.⁹⁸

The concept supply of goods is independent of the purpose and result of the transaction since the main purpose is to strengthen the principle of legal certainty and to facilitate the application of the law.⁹⁹ Therefore, the purpose of the transaction does not matter when classifying a transaction as a supply of goods, i.e. it does not matter that the purpose of the transaction is to obtain advantages, as long as the purpose of the parties is not deceptive.¹⁰⁰

3.1.2 Supply of Services

A transaction constitutes a supply of services when it does not constitute a supply of goods.¹⁰¹ For example, the assignment of intangible property constitutes a supply of services,¹⁰² but also a transfer of immovable

⁹⁵ Title IV Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

⁹⁶ Article 24 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

⁹⁷ Article 14 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

⁹⁸ C-320/88 *SAFE*, para 7.

⁹⁹ C-255/02 *Halifax*, paras. 56-57.

¹⁰⁰ C-223/03 *Huddersfield*, para. 51; Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, p. 117.

¹⁰¹ Article 24 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

¹⁰² Article 25 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015..

property.¹⁰³ However, a transfer of immovable property only constitutes a supply of services as long as the Member States do not state anything else.¹⁰⁴ Even though there are situations, as the two now mentioned, where it is clear that the transaction constitute a supply of services, there are situations where it is not that clear. Thus, when determining whether the transaction constitutes a supply of goods or a supply of services, all the circumstances are of relevance.¹⁰⁵

For example, a transaction containing different parts can constitute one transaction when in regards to VAT, while it has to be decided whether the transaction consists of one or several supplies.¹⁰⁶ Thus, a supply consisting of several parts is, for VAT purposes, a single supply if the different parts objectively, together and economically, constitute one single unit.¹⁰⁷

In *Faaborg-Gelting Linien*¹⁰⁸, for example, a Danish ferry company offered the travellers to sit down and eat at the restaurant on board on the ferry.¹⁰⁹ In this case, the CJEU stated that the provision of a meal at a restaurant constitutes a supply of services since the provision of the meal, including inter alia, laying the table, taking the order and serving the diners, is the dominating transaction, not the supply of the food, i.e. the goods.¹¹⁰

In addition to *Faaborg-Gelting Linien*, the CJEU stated in *Levob*¹¹¹, a case regarding the supply of software, that elements, which are so closely linked that they objectively and from an economic point of view form a single transaction that would be artificial to split, constitute one single supply. Thus, a supply of tailor-made software constitutes a supply of services, while the supply of a specific program, which the customer directly can and only has to install, constitutes a supply of goods.¹¹²

The concept of a supply of services is, like the concept of a supply of goods, independent of the purpose and result of the transaction since the main purpose is to strengthen the principle of legal certainty and to facilitate the application of the law.¹¹³

¹⁰³ Terra, B. and Kajus, J., *Introduction to European VAT (Recast)*, IBFD, 2014, p. 402.

¹⁰⁴ Terra, B. and Kajus, J., *Introduction to European VAT (Recast)*, IBFD, 2014, p. 402.

¹⁰⁵ Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, pp. 144-145.

¹⁰⁶ Westberg, B., “*Mervärdesskattedirektivet – en kommentar*”, Thomson Reuters, 2009, pp. 144-145.

¹⁰⁷ C-41/04 *Levob*, paras. 19-22.

¹⁰⁸ C-231/94 *Faaborg-Gelting Linien*.

¹⁰⁹ C-231/94 *Faaborg-Gelting Linien*, para. 2.

¹¹⁰ C-231/94 *Faaborg-Gelting Linien*, paras. 13-14.

¹¹¹ C-41/04 *Levob*

¹¹² C-41/04 *Levob*, para. 30.

¹¹³ C-255/02 *Halifax*, paras. 56-57.

3.2 For Consideration

A supply constitutes a taxable transaction within the meaning of article 2(1) of the VAT Directive when the supplier supplies the services for consideration.¹¹⁴ A supplier supplies a service for consideration when the transaction meets three criteria.

Firstly, there has to be a stipulation of a price or a consideration. For example, a supply made by an end user, who does not constitute a taxable person, does not constitute a taxable transaction made for consideration.¹¹⁵

In *Hong Kong Trade*¹¹⁶, the Hong Kong Trade Development Council, with its place of establishment in the Netherlands, promoted trade between Hong Kong and other States by providing information and advice. These services were provided free of charge. The costs of the business were financed partly by the Government of Hong Kong and partly through the importation and exportation of products into and from Hong Kong. In this case the CJEU firstly stated that the Hong Kong Trade Council did not constitute a taxable person since it, habitually, supplied goods or services free of charge and did not act in the capacity of a taxable person but in the capacity of a private individual. Thereafter it stated that the supplies did not constitute transactions made for consideration.¹¹⁷

Secondly, there has to be a direct and immediate link between the consideration and the supply.¹¹⁸ A *direct* link exists when the transactions are directly connected, i.e. there cannot be a third transaction that takes place in between of the two main transactions. Meanwhile, an *immediate* link exists if the time passed between the two transactions is not too long.¹¹⁹

In *Tolsma* the CJEU stated that no direct link existed between the donations and the services supplied. The passers-by did not request the music, while the amount of donation depended on subjective motives, i.e. some persons donated a significant sum while others just listened to the music, without giving Mr Tolsma any money at all. Thus, since the donations were voluntary and since Mr Tolsma could not predict how much money he would receive, the supplies did not constitute supplies made for consideration.¹²⁰

¹¹⁴ Article 2(1) Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

¹¹⁵ Terra, B. and Kajus, J., *Introduction to European VAT (Recast)*, IBFD, 2014, p. 290.

¹¹⁶ Case 89/81 *Hong Kong Trade*.

¹¹⁷ Case 89/81 *Hong Kong Trade*, paras 10 and 13.

¹¹⁸ Case 154/80 *Coöperatieve Aardappelenbewaarplaats*, para. 12; C-174/00 *Kennemer Golf*, para. 37; C-102/86 *Apple & Pear*, para. 11; C-16/93 *Tolsma*, para. 13; C-98/98 *Midland Bank plc*, paras. 17 and 20.

¹¹⁹ Terra, B. and Kajus, J., *Introduction to European VAT (Recast)*, IBFD, 2014, pp. 294-297.

¹²⁰ C-16/93 *Tolsma*, paras 17-20.

Finally, there has to be a legal relationship between the supplier and the acquirer. The legal relationship between the parties shall consist of an obligation, for both parties, to perform, i.e. there has to be a reciprocal obligation to perform.¹²¹ The existence of a legal relationship between a foreign head office, established outside the territory of the EU, and its branch, established within the territory of a Member State of the EU, was up for discussion in the ruling in *FCE Bank*¹²². In *FCE Bank*, the CJEU stated that a legal relationship exists and a supply constitutes a taxable transaction if the branch carries out an independent economic activity and bears the economic risk that derives from the business.¹²³ However, the CJEU implied that a branch neither carries out an independent economic activity, nor bear the economic risk that derives from the business and stated that a legal relationship does not exist between a head office and its branch. Since the legal relationship is a requirement for the supplies to constitute taxable transactions and since there is no legal relationship between a head office and its branch, the supplies made between a head office and its branch did not constitute taxable transactions.¹²⁴

¹²¹ C-16/93 *Tolsma*, para. 14; C-210/04 *FCE Bank*, para. 34.

¹²² C-210/04 *FCE Bank*.

¹²³ C-210/04 *FCE Bank*, para. 35.

¹²⁴ C-210/04 *FCE Bank*, paras. 37 and 51.

4 A Head Office and its Branch

Before discussing the relationship between a head office and its branch, it has to be determined whether there is an existence of a branch and whether the branch constitutes a taxable person or not.

4.1 The Existence of a Fixed Establishment

To constitute a fixed establishment, the entity has to possess a sufficient degree of permanence and a structure that makes it possible to supply the services in question on an independent basis, i.e. the entity has to have enough technical and human resources.¹²⁵

The term “independent” does not have the same meaning when it regards the existence of a fixed establishment as it has when it regards the relation between a head office and its branch. When it regards the existence of a fixed establishment the term “independent” requires that the entity shall be able to carry out the essential activities of the services concerned, without any assistance of another part of the business.¹²⁶ Meanwhile, to become “independent” in relation to its head office, the branch shall carry out an economic business and bear the risk of the business, which a branch does not. Thus, a branch is dependent in relation to its head office.¹²⁷

In addition to the requirements of technical and human resources and a sufficient degree of permanence, there is a requirement stating that an entity has to effect the business transactions of the taxable person to constitute a fixed establishment.¹²⁸

4.1.1 Technical and Human Resources

When discussing whether an entity has enough technical and human resources, it is of importance to establish where the business carries out the main elements of the services and where the technical and human resources, carrying out these elements, are located.¹²⁹ The CJEU emphasized the importance of the technical and human resources in its ruling in DFDS.¹³⁰

¹²⁵ Article 11(2) Regulation (EU) No. 282/2011 as amended latest by the 2nd of April 2015; C-190/95 *ARO Lease*, para. 16.

¹²⁶ Merckx, M., “*Establishments in European VAT*”, Wolters Kluwer, 2013, p. 76.

¹²⁷ C-210/04 *FCE Bank*, para. 51.

¹²⁸ C-318/11 *Daimler and Widex*, para. 44. Researchers have also discussed the concept of a passive- and an active fixed establishment in, for example, Merckx, M., “*Establishments in European VAT*”, Wolters Kluwer, 2013, p. 92 and in a ruling of the CJEU, C-605/12 *Welmory*. This concept is though not of relevance for this research and will therefore not be discussed further in this thesis.

¹²⁹ Merckx, M., “*Establishments in European VAT*”, Wolters Kluwer, 2013, pp. 75-76.

¹³⁰ C-260/95 *DFDS*.

The CJEU namely stated that VAT was payable on the services in the Member State of the intermediary of a tour operator, which has its place of establishment within another Member State. The CJEU emphasized that the tour operator shall provide the services through the intermediary, which acts as a mere auxiliary organ of the tour operator, and that the intermediary shall have the human and technical resources characteristic of a fixed establishment.¹³¹ Thus, a branch will not constitute a fixed establishment if its head office only uses the branch for auxiliary or preparatory activities.¹³²

Furthermore, some management is required to ensure the operation of the fixed establishment. However, all the circumstances of each case matters when discussing the technical and human resources since the question is whether the taxable person can supply its services through the fixed establishment and not whether the taxable person actually does so.¹³³

The concept of the technical and human resources is subject to a broad interpretation and an entity, which does not need to have any technical or human resources to be able to supply the services, does not have to meet the requirement.¹³⁴ There is also a discussion regarding the actual possession of the technical and human resources deriving both from the Implementing Regulation and from the case law of the CJEU.¹³⁵ For example, in *ARO Lease*¹³⁶ the CJEU stated that *ARO Lease* did not possess the human resources itself since the human resources were independent representatives.¹³⁷

In *ARO Lease*, a leasing company, *ARO*, supplied passenger cars under leasing agreements. *ARO* leased cars in both the Netherlands and in Belgium but had its office in the Netherlands, from which the agreements derived. The customers in Belgium concluded the leasing agreements through self-employed intermediaries, established in Belgium and paid a commission for the services. The intermediaries were therefore not involved in the agreements concluded between *ARO* and the customer. The customers chose a car from a dealer in Belgium and the dealer delivered the car to *ARO* who paid for the car. *ARO* then made the car available to the customer, through the leasing agreement. In addition, the car was registered in Belgium and the customer paid the costs of maintaining the car as well as the Belgian road tax. Meanwhile, *ARO* paid, through its insurance, the repairs and assistance in event of damages.¹³⁸ Based on these circumstances the CJEU stated that the self-employed intermediaries did not constitute permanent human resources.

¹³¹ C-260/95 *DFDS*, para. 29.

¹³² C-73/06 *Planzer Luxembourg*, para. 56; C-318/11 *Daimler and Widex*, para. 44.

¹³³ C-73/06 *Planzer Luxembourg*, para. 59; Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, pp. 75-76.

¹³⁴ Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, pp. 75-76.

¹³⁵ Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, p. 79.

¹³⁶ C-190/95 *ARO Lease*.

¹³⁷ C-190/95 *ARO Lease*, para. 19.

¹³⁸ C-190/95 *ARO Lease*, para. 4.

However, researchers argue that the human resources can be hired staff, as long as the taxable person is free to determine how and where the resources are used.¹³⁹

4.1.2 Sufficient Degree of Permanence

A foreign taxable person, who continuously supplies services within the territory of another Member State in which it also possess the human and technical resources necessary to provide the services for a certain amount of time, has a fixed establishment in the latter. However, it is the intentions of the taxable person that matters when deciding whether a taxable person meets the requirement of a sufficient degree of permanence or not, not the actual period during which the fixed establishment exists.¹⁴⁰

In ARO Lease the CJEU stated that ARO lease did not possess a sufficient degree of permanence in Belgium and could therefore not be considered to have a fixed establishment in Belgium. The CJEU based this statement on the fact that the customers did choose their vehicles themselves in Belgium, where ARO did not possess its own staff, and that ARO draw up the agreements as well as it took the management decisions in the Netherlands.¹⁴¹

4.1.3 Effect the Business Transactions

The CJEU has also stated in Daimler and Widex¹⁴² that an entity has to effect the business transactions of the taxable person to constitute a fixed establishment.¹⁴³ Daimler and Widex¹⁴⁴ regarded two cases, in which both Daimler and Widex applied for a refund of VAT to the Swedish Tax Authorities, Skatteverket.¹⁴⁵

In Daimler,¹⁴⁶ a parent company, with its seat of economic activity in Germany, sells cars in Germany. Daimler has a wholly-owned subsidiary in Sweden from which all the testing activities of Daimler, which are necessary for the car selling activities carried out in Germany, are carried out. The subsidiary has its own staff and provides the parent company with premises, test tracks and services connected with the test activities.¹⁴⁷

Meanwhile, Widex¹⁴⁸ regarded a taxable person with its seat of economic activity in Denmark. Widex had a research division in Sweden, which carried out the research activity of Widex. Widex acquired the goods and

¹³⁹ Merks, M., "Establishments in European VAT", Wolters Kluwer, 2013, p. 79.

¹⁴⁰ Merks, M., "Establishments in European VAT", Wolters Kluwer, 2013, pp. 77-78.

¹⁴¹ C-190/95 *ARO Lease*, paras. 21-22.

¹⁴² C-318/11 *Daimler and Widex*.

¹⁴³ C-318/11 *Daimler and Widex*, para. 44.

¹⁴⁴ C-318/11 *Daimler and Widex*.

¹⁴⁵ C-318/11 *Daimler and Widex*, paras. 15 and 23.

¹⁴⁶ C-318/11 *Daimler*.

¹⁴⁷ C-318/11 *Daimler and Widex*, paras. 11-13.

¹⁴⁸ C-319/11 *Widex*.

services needed for the research activity, which was carried out in Sweden.¹⁴⁹

When ruling in *Daimler and Widex*, the CJEU stated that a taxable person, with its place of establishment in one Member State, does not have a fixed establishment from which the business transactions are effected in another Member State if it only carries out technical testing or research work that do not include taxable transactions in that Member State.¹⁵⁰

4.2 The Existence of a Taxable Person

A taxable person is a person who, independently, carries out the activity concerned. As stated in *FCE Bank*¹⁵¹, a branch, established within the territory of one Member State, is dependent on its head office, which has its place of establishment in another Member State. Thus, a head office and its branch, together, constitute one taxable person.¹⁵² The CJEU though, in its ruling in *Skandia America*, deviated from its ruling in *FCE Bank* when stating that the branch is independent from its head office when the branch is a member of a VAT group.¹⁵³ In this situation the VAT group constitute one taxable person in which the branch is included, meanwhile the head office, independently from its branch, constitutes another taxable person.¹⁵⁴

4.3 Supplies made between a Head Office and its Branch

The development of the case law regarding the relationship between a head office and its branch has surprised many. After the ruling in *FCE Bank* the CJEU laid down a main principle, from which it deviated in its ruling in *Skandia America*. Due to the development and the changed view taken by the CJEU, a discussion of the rulings and their consequences follows, focusing in the situation after *Skandia America*.

4.3.1 The Branch is not a Member of a VAT Group

To classify a supply of services as a taxable transaction, the entity receiving the service has to be a legal entity separated from the supplier.¹⁵⁵ This reasoning derives from the fact that there has to be a supply made for consideration. Since a head office and its branch constitute one legal entity, irrespective of whether the branch has its place of establishment within the

¹⁴⁹ C-318/11 *Daimler and Widex*, paras. 21-22.

¹⁵⁰ C-318/11 *Daimler and Widex*, para. 44.

¹⁵¹ C-210/04 *FCE Bank*.

¹⁵² C-210/04 *FCE Bank*, para. 41.

¹⁵³ C-7/13 *Skandia America Corporation*, para. 32.

¹⁵⁴ C-7/13 *Skandia America Corporation*, paras. 27-29.

¹⁵⁵ Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, pp. 126-127.

territory of a Member State other than the head office or not, the transactions made between a head office and its branch do not constitute transactions supplied for consideration.¹⁵⁶ Moreover, the ruling in FCE Bank supports this reasoning since the ruling implies that a supply of services constitute a taxable transaction if there is an existence of a legal relationship between the head office and its branch. The legal relationship shall result in a reciprocal obligation for the parties to perform and implies that the branch shall, independently from its head office, carry out an economic activity and bear the economic risk of the business, which the CJEU inferred that the branch does not do.¹⁵⁷

4.3.2 The Branch is a Member of a VAT Group

After the ruling in FCE Bank, the CJEU left a few questions unanswered, inter alia when it regards the situations where one of the entities of the taxable person is part of a VAT group and might become part of another taxable person.¹⁵⁸ Some researchers argue that these circumstances results in a situation where the supplies, made between the head office and its branch, constitute supplies made between two different taxable persons,¹⁵⁹ while others argue that the payments between a head office and its branch constitute payments to establishments of the same legal entity. These researchers then imply that “the reality shall prevail over the administrative convenience in the form of a single taxable person”¹⁶⁰, an implication that is also supported by Van Doesum and Van Norden but also by the opinion of AG Mengozzi in Larentia + Minerva.¹⁶¹ Furthermore, some researchers argue that, irrespective of whether the head office and the branch constitute one taxable person or not, the FCE Bank-principle is not applicable when one of the entities of the taxable person is part of a VAT group. An application of the FCE Bank-principle would namely result in a situation of tax avoidance. For example, if a branch of a non-resident head office becomes part of a VAT group, both the supplies made between the head office and the branch and the supplies made between the branch and the members of the VAT group would constitute non-taxable transactions, and a situation of non-taxation would appear.¹⁶²

¹⁵⁶ Terra, B., *“The Place of Supply in European VAT”*, Kluwer Law International, 1998, p. 112.

¹⁵⁷ C-210/04 *FCE Bank*, paras. 34-37.

¹⁵⁸ Merckx, M., *“Establishments in European VAT”*, Wolters Kluwer, 2013, pp. 149-150.

¹⁵⁹ Vyncke, K., *“EU VAT Grouping from a Competitive Tax Law Perspective”*, EC Tax Review, 2009/6 pp. 299-309.

¹⁶⁰ Quote from Terra, B., *“The Place of Supply in European VAT”*, Kluwer Law International, 1998, pp. 112-113.

¹⁶¹ Terra, B., *“The Place of Supply in European VAT”*, Kluwer Law International, 1998, pp. 112-113; Van Doesum, A. and Van Norden, G-J., *“(w)ho become one: the Communication from the Commission on VAT grouping”*, British Tax Review, 2009, 6, pp. 657-667; AG Mengozzi, *Opinion in joined cases C-108/14 and C-109/14 Larentia + Minerva*, para. 83.

¹⁶² Vyncke, K., *“EU VAT Grouping from a Competitive Tax Law Perspective”*, EC Tax Review, 2009/6 pp. 299-309.

4.3.2.1 “Established” and “Person”

To become a member of a VAT group an entity has to have its place of establishment within the territory of the Member State that introduces the VAT grouping scheme.¹⁶³ The Commission has taken the view that a business has its place of establishment within the territory of the Member State of the VAT group as long as the economic activity is carried out or the fixed establishment is physically present within the Member State of the VAT group. A fixed establishment of a foreign business can therefore be included in the VAT group if it has its place of establishment within the Member State of the VAT group. However, a fixed establishment situated abroad does not have its place of establishment within the territory of the Member State of the VAT group and can therefore not become a member of the VAT group.¹⁶⁴

Furthermore, the Commission implies that if an entity of a taxable person is part of a VAT group, while another entity of the same taxable person, with its place of establishment within the territory of another Member State, is not, then the supplies made between the two entities constitute taxable transactions.¹⁶⁵ This statement was supported by the CJEU in 2007, i.e. even before the ruling in *Skandia America*, through the ruling in *Ampliscientifica* and *Amplifin*¹⁶⁶.

In *Ampliscientifica* and *Amplifin*, the parent company *Ampliscientifica* and the subsidiary *Amplifin* were incorporated under the Italian law and formed part of the *Amplifon* group. The companies submitted tax declarations to the Milan VAT office but the Milan VAT office stated that *Amplifin* was not entitled to submit the declarations based on the Italian law. The case was referred to the CJEU for a preliminary ruling where the relation between the parent company and the subsidiary was discussed.¹⁶⁷ The CJEU answered the questions asked by stating that an establishment, when joining a VAT group, loses its status as a taxable person.¹⁶⁸ Thus, some researchers argue that a transaction between a head office and its fixed establishment, which is a part of a VAT group, constitute a taxable transaction. However, *Ampliscientifica* and *Amplifin* regarded the situation as being between separate legal persons, not a situation between a head office and its branch. Furthermore, not all the Member States of the EU share the view taken by the CJEU. For example do both the Netherlands, the United Kingdom and Finland include the whole taxable person in the VAT group, not only the entity established within their territory.¹⁶⁹

¹⁶³ Article 11 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

¹⁶⁴ COM(2009) 325 final, pp. 6-8.

¹⁶⁵ COM(2009) 325 final, pp. 6-8.

¹⁶⁶ C-162/07 *Ampliscientifica and Amplifin*.

¹⁶⁷ C-162/07 *Ampliscientifica and Amplifin*, paras. 12-16.

¹⁶⁸ C-162/07 *Ampliscientifica and Amplifin*, para. 23.

¹⁶⁹ Merx, M., “*Establishments in European VAT*”, Wolters Kluwer, 2013, pp. 149-151; Ardous, R., “*CJEU/Skandia-case- What does HMRC think?*”, Mazars, 5th of December 2014; Vyncke, K., “*EU VAT Grouping from a Competitive Tax Law Perspective*”, EC Tax Review, 2009/6 pp. 299-309.

According to the wording in Article 11 of the VAT Directive, the entity joining a VAT group has to constitute a “person”.¹⁷⁰ The concept of a “person” has generated questions when it regards a head office and a fixed establishment since it is not clear whether a branch constitutes a “person” within the meaning of article 11 of the VAT directive or not.¹⁷¹ However, some researchers, but also the Commission, argue that the term “person”, when mentioned in article 11 of the VAT Directive, implies a “taxable person”.¹⁷²

If the concept of a “person” implies a “taxable person”, if a fixed establishment merely constitutes a part of a taxable person and if the main establishment of the taxable person has its place of establishment within the territory of another State than the Member State of the VAT group, two situations arise. In the first situation, which can infringe the right of freedom of establishment, the fixed establishment has its place of establishment outside the Member State of the VAT group and can therefore not become a member of the VAT group. Thus, this situation treats businesses differently based on the place and legal form of the establishment. In the second situation, the taxable person as a whole is part of the VAT group as long as its fixed establishment has the place of establishment within the same territory as the VAT group. The second situation regards cross-border VAT grouping and complies with the Dutch, British and Finish view on VAT grouping.¹⁷³

4.3.2.2 Supply of Services from the Head Office

In general, when a foreign entity acquires services, these supplies shall be charged VAT in the Member State where the entity has its place of establishment, as long as the entity does not have its place of establishment in the Member State of a VAT group. In these cases, the supplies are subject to VAT in the Member State of the VAT group. To clarify this an example is illustrated by a situation where there is a company (M) established in Denmark, owning all the shares in a Swedish company (D), which has a fixed establishment established in Denmark (see figure 4.1). Furthermore, M and the fixed establishment are both members of a Danish VAT group. Both M and D are supplying exempted services and M charges both D and the fixed establishment for its advertising costs. If D would have been included in the Danish VAT group, a situation of taxation but no deduction

¹⁷⁰ Article 11 Council Directive 2006/112/EC as amended latest by the 2nd of April 2015.

¹⁷¹ Merx, M., *“Establishments in European VAT”*, Wolters Kluwer, 2013, p. 151.

¹⁷² Vyncke, K., *“EU VAT Grouping from a Competitive Tax Law Perspective”*, EC Tax Review, 2009/6 pp. 299-309; AG Mengozzi, *Opinion in joined cases C-108/14 and C-109/14 Larentia + Minerva*, paras. 60-61; Van Doesum, A. and Van Norden, G-J., *“T(w)o become one: the Communication from the Commission on VAT grouping”*, British Tax Review, 2009, 6, pp. 657-667.

¹⁷³ Merx, M., *“Establishments in European VAT”*, Wolters Kluwer, 2013, p. 151; Bjerregaard Eskildsen, C., *“VAT Grouping versus Freedom of Establishment”*, EC Tax Review, 2011/3, pp. 114-120; Vyncke, K., *“EU VAT Grouping from a Competitive Tax Law Perspective”*, EC Tax Review, 2009/6 pp. 299-309.

would arise since Sweden does not recognize the Danish VAT groups. Sweden will namely tax the advertising services supplied by M to D, while the supplies made by M to the fixed establishment will not constitute taxable transactions because of the VAT group. Thus, M will not be able to deduct the VAT on the acquired advertising services since the services supplied by the VAT group constitute exempted services. In this situation, D is charged VAT and M will not be able to deduct.¹⁷⁴

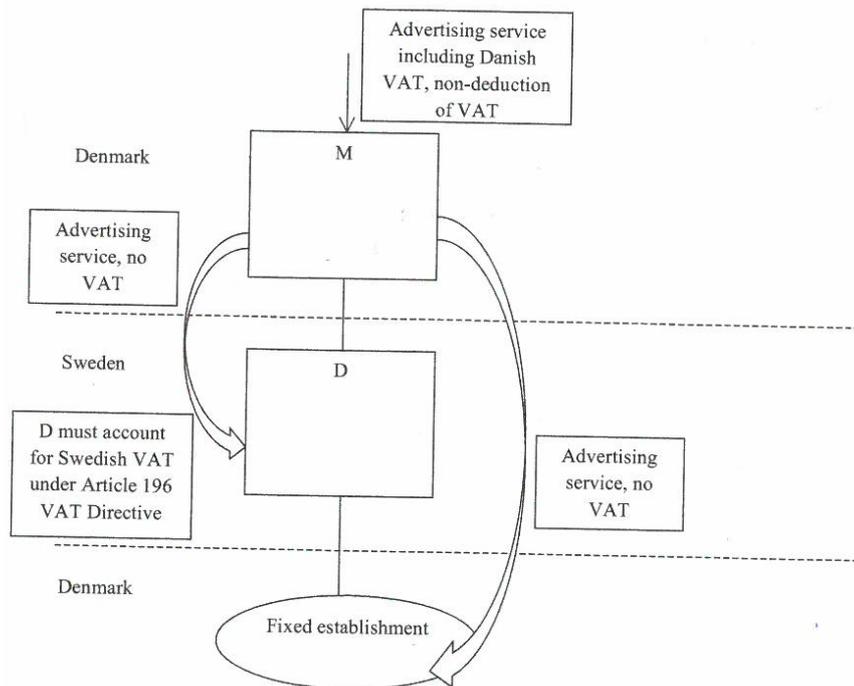


Figure 4.1¹⁷⁵

Moreover, the Commission has stated that the principle deriving from FCE Bank is not applicable when a fixed establishment of a foreign head office is part of a VAT group.¹⁷⁶ A statement that was supported by the CJEU in its ruling in Skandia America.¹⁷⁷ This statement is based on the fact that a branch, when joining a VAT group, becomes part of another taxable person and since a branch cannot be part of two taxable persons it is seen as separated from its head office.¹⁷⁸ The ruling in Ampliscentifica and Amplifin supports this view, stating that the individual taxable persons cease to exist for VAT purposes when they join a VAT group.¹⁷⁹

In general, a branch, in accordance with the FCE Bank-principle, neither bears the economic risks of its business nor is independent from its head office why the branch and its head office, together, constitute one taxable

¹⁷⁴ Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, pp. 158-159.

¹⁷⁵ Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, p. 159.

¹⁷⁶ Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, pp. 159-160.

¹⁷⁷ C-7/13 Skandia America Corporation, para. 32.

¹⁷⁸ Merckx, M., "Establishments in European VAT", Wolters Kluwer, 2013, pp. 159-160.

¹⁷⁹ C-162/07 Ampliscentifica and Amplifin, para. 23.

person.¹⁸⁰ However, researchers argue that when the branch is part of a VAT group, the VAT group constitute the taxable person and the branch therefore becomes independent from its head office. Thus, the supplies made between a head office and its branch constitute transactions made between two different taxable persons. Some researchers have though argued the opposite, i.e. that the supplies made by a head office, which branch is part of a VAT group, do not constitute taxable transactions, neither when they are made to the branch nor when they are made to the entire VAT group. This reasoning derives from the reasoning stating that the legal person as a whole, i.e. both the head office and its branch, not solely the branch, constitutes the member of the VAT group.¹⁸¹

Finally, it is not clear whether it is the head office or its branch that supplies the services when the taxable person, consisting of a head office and a branch, supplies services to a third party. In these situations, there are no clear answers to the question of whether the head office or the branch is the entity supplying the services. However, researchers argue that, in a situation where there are no clear answers, the head office is the entity supplying the services.¹⁸²

¹⁸⁰ C-210/04 *FCE Bank*, para. 51.

¹⁸¹ Merckx, M., *Establishments in European VAT*, Wolters Kluwer, 2013, pp. 159-160.

¹⁸² Terra, B., *The Place of Supply in European VAT*, Kluwer Law International, 1998, p. 113.

5 C-7/13 Skandia America Corporation

Under the first section of this thesis, the introduction, the thesis gave the reader the background of the facts of the case and the ruling of the CJEU in Skandia America. As have been stated, the ruling in Skandia America deviated from the earlier case law and praxis regarding the relationship between a head office and its branch, why this section implies to give a detailed presentation of the arguments of the parties, the Opinion of the AG, the ruling of the CJEU and the commentaries to the ruling.

5.1.1 The Legal Issues and the Legal Context

Since Skandia America is a Swedish case, it derives from the provisions of the Swedish VAT Act, Mervärdesskattelagen¹⁸³, and the VAT Directive¹⁸⁴. Therefore, this section first presents the relevant provisions of the Swedish VAT Act, followed by the questions referred to the CJEU and the legal issues deriving from the case.

5.1.1.1 The Swedish VAT Act

The main rule, mentioned in Mervärdesskattelagen, states that the taxable person, supplying services, which constitute taxable transactions and economic activities, shall pay VAT to the State.¹⁸⁵ The taxable person is not liable to pay VAT if certain exemptions mentioned in chapter 1 section 2 points 2 to 4 ML are met.¹⁸⁶ Inter alia, a person mentioned in chapter 5 section 7 ML, acquiring a service from a foreign undertaking, is liable to pay VAT on the service acquired.¹⁸⁷ A foreign taxable person is an undertaking that has its place of establishment outside the territory of Sweden and is not permanently or habitually resident in Sweden.¹⁸⁸

Furthermore, the supplies mentioned in chapter 5 section 7 point 2 ML shall be considered supplied within the territory of Sweden if the supplies are made from a third state, i.e. a State that is not a member of the EU, and if

¹⁸³ Mervärdesskattelag (1994:200) as applicable at the 2nd of April 2015.

¹⁸⁴ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

¹⁸⁵ Chapter 1 section 1 ML as applicable at the 2nd of April 2015; C-7/13 *Skandia America*, paras. 11-16.

¹⁸⁶ Chapter 2 section 2 ML as applicable at the 2nd of April 2015; C-7/13 *Skandia America*, paras. 11-16.

¹⁸⁷ Chapter 2 section 2 point 2 ML as applicable at the 2nd of April 2015; C-7/13 *Skandia America*, paras. 11-16.

¹⁸⁸ Chapter 1 section 15 ML as applicable at the 2nd of April 2015; C-7/13 *Skandia America*, paras. 11-16.

the acquirer is an economic operator established within the territory of Sweden.¹⁸⁹

Finally, Sweden has incorporated the concept of VAT grouping into Mervärdeskattelagen. However, the Swedish provisions regarding VAT grouping are limited in its scope and only allows the fixed establishments of an economic operator to become a member of a VAT group. In addition the fixed establishment has to have its place of establishment in Sweden.¹⁹⁰

5.2 Arguments of the Parties

As stated in the introduction, the Stockholm Administrative Court, Förvaltningsrätten i Stockholm, referred two questions to the CJEU for a preliminary ruling:

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

“(ii) If the answer to the first question is in the affirmative, is the main establishment in the third country to be viewed as a taxable person not established in the Member State within the meaning of Article 196 of [the VAT Directive¹⁹¹], with the result that the purchaser is to be taxed for the transactions?”¹⁹²

When Förvaltningsrätten i Stockholm, had referred the two questions to the CJEU for a preliminary ruling, the parties, either supported by other Member States of the EU or by the Commission, presented the below mentioned arguments before the CJEU.

5.2.1 Arguments of Skandia America Corporation

The first argument presented by SAC stated that a branch can, separated from its head office, become a member of a VAT group. The German Government evolved this argument by stating that the expression “persons established in the Member State of the VAT group” renders article 11 of the VAT Directive¹⁹³ applicable to fixed establishments of foreign taxable person, established within the Member State of the VAT group.¹⁹⁴

¹⁸⁹ Chapter 5 section 7 section 1 ML as applicable at the 2nd of April 2015; C-7/13 *Skandia America*, paras. 11-16.

¹⁹⁰ Chapter 6a sections 2-4 ML as applicable at the 2nd of April 2015.

¹⁹¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

¹⁹² Quote from C-7/13 *Skandia America Corporation*, para. 20.

¹⁹³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

¹⁹⁴ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 26.

SAC and the German Government, supported by the Government of the United Kingdom, then referred to the FCE Bank-principle, stating that a head office and its branch constitutes one business entity, and claimed that the principle was applicable even in the case at issue. SAC also claimed that Skandia Sverige was not sufficiently independent from SAC, neither to act for its own account and with its own responsibility nor to bear the economic risks deriving from the business itself.¹⁹⁵

In addition, the German Government claimed that the principle of one business entity only applies to the establishments of the same legal entity or to the members of a VAT group, if the members have their place of establishment in the same Member State as the VAT group. Thus, the internal transactions between the members of the VAT group and between the members and their head offices do not constitute taxable transactions as long as the entities have their place of establishment within the Member State of the VAT group. Hence, if the transactions include an entity established outside of the territory of the Member State of the VAT group, the transactions constitute taxable transactions.

In contrast to both SAC and the German Government, the Government of the United Kingdom stated that a branch cannot, alone, become a member of a VAT group and took the view that the phrase “person established shall be legally independent” excludes the branches from the possibility to, independently from their head offices, join a VAT group. Thus, the Government of the United Kingdom stated that the “person” is the legal entity to which the branch belongs, not the branch itself. In the case at issue, the “person” is SAC who has its place of establishment in Sweden through its branch.¹⁹⁶

5.2.2 Arguments Presented by Skatteverket and the Commission

Contrary to SAC and the German Government, Skatteverket, the Swedish Government and the Commission stated that the FCE Bank-principle does not apply to a case where the branch constitutes a member of the VAT group and not the head office. They claimed that when the branch is a member of a VAT group, the branch and its head office represent two different taxable persons since the VAT group constitutes a single taxable person in which the branch is included. To support its standing, Skatteverket, the Swedish Government and the Commission relied on the ruling in *Ampliscientifica and Amplifin*¹⁹⁷, stating that companies with financial, economic and organizational links cease to constitute separate taxable persons and shall instead constitute one single taxable person, i.e. a VAT group. Thus, Skatteverket, the Swedish Government and the

¹⁹⁵ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 27-28 and 30.

¹⁹⁶ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 29 and 31-32.

¹⁹⁷ C-162/07 *Ampliscientifica and Amplifin*.

Commission claimed that the services supplied between SAC and Skandia Sverige constituted services supplied between two taxable persons.¹⁹⁸

Furthermore, the Commission referred to its communication¹⁹⁹ and stated that a branch, which has its place of establishment outside the Member State of the VAT group but belongs to a legal entity that is a member of the VAT group, cannot be part of the VAT group. On the contrary, a branch that has its place of establishment within the Member State of the VAT group and belongs to a legal entity established outside that Member State can become a member of the VAT group.²⁰⁰

Finally, Skatteverket, the Swedish Government and the Commission stated that the decision taken by Skatteverket, i.e. not to include Skandia Sverige in the VAT group, is compatible with the principle deriving from FCE Bank.²⁰¹

5.2.3 AG Wathelet's Opinion

5.2.3.1 The First Question

5.2.3.1.1 Initial Comments

AG Wathelet commenced his opinion by discussing if there is a difference between the concept of a “person” and the concept of a “taxable person”. By referring to the ruling in *Commission v. Ireland*²⁰², AG Wathelet emphasized that the concept of a “person” is not the same as the concept of a “taxable person”, which he also supported by the fact that the CJEU never defined the meaning of a person, mentioned in article 11 of the VAT Directive²⁰³. The CJEU has neither stated that a branch can become a member of a VAT group without its head office, i.e. when a branch becomes a member of a VAT group, the head office also becomes a member of the same VAT group. AG Wathelet then stated that there is a difference between the wordings in article 9 and 11 of the VAT Directive²⁰⁴, which makes the scope of article 11 narrower in comparison to the scope of article 9. A person shall be an individual or a legal person and a taxable person can be an individual and a legal person as well as a non-legal entity.²⁰⁵

The conclusion deriving from the above-mentioned reasoning is that a branch cannot, independently from its head office, become a member of a

¹⁹⁸ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 33-35; ; C-162/07 *Amplificativa and Amplifin*, para. 19.

¹⁹⁹ COM(2009) 325 final.

²⁰⁰ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 37.

²⁰¹ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 38.

²⁰² C-85/11 *Commission v. Ireland*.

²⁰³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁰⁴ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁰⁵ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 40-45.

VAT group since article 11 of the VAT Directive²⁰⁶ states that the entity has to constitute a person. Neither can the head office and the branch belong to two different taxable persons since the entities together constitute one legal person.²⁰⁷ In addition, AG Wathelet referred to the ruling in FCE Bank in which AG Léger, in his opinion²⁰⁸, stated that one legal person only can constitute one taxable person.²⁰⁹ Furthermore, the CJEU in FCE Bank stated that branches, which do not constitute legal entities separated from its head offices, do not constitute independent taxable persons.²¹⁰ AG Wathelet emphasized that the fact that the CJEU excludes a discussion regarding VAT grouping from its ruling in FCE Bank, does not support the argument that a branch can, independent from its head office, become a member of a VAT group.²¹¹

Moreover, AG Wathelet referred to the ruling in *Crédit Lyonnais*²¹² and argued that a head office and its branch both become members of the same VAT group, since they, together, constitute one legal person.²¹³ In *Crédit Lyonnais* the CJEU stated that a head office with a fixed establishment in another Member State has its place of establishment in the latter when it regards the activities accomplished in the Member State of the fixed establishment.²¹⁴

Finally, before AG Wathelet continued to the conclusion, he emphasised that an interpretation of the case at issue in the light of the ruling in FCE Bank results in a situation of non-taxation, i.e. neither the supplies made by SAC, nor the supplies made by Skandia Sverige are taxed. AG Wathelet also stated that it is not possible for the branch to form one business entity together with its head office and at the same time be separated from the head office by concluding a VAT group.²¹⁵

5.2.3.1.2 Conclusion – Four Situations

According to AG Wathelet, the decision made by Skatteverket, i.e. to consider Skandia Sverige as being a member of the VAT group but not the head office, is in breach of article 11 of the VAT Directive^{216, 217}. Moreover, AG Wathelet presents four different situations to illustrate the consequences of the decision made by Skatteverket.

²⁰⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁰⁷ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 46-47.

²⁰⁸ AG Léger, *Opinion in C-210/04 FCE*.

²⁰⁹ AG Léger, *Opinion in C-210/04 FCE Bank*, para. 56.

²¹⁰ *C-210/04 FCE Bank*, para. 41.

²¹¹ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 52.

²¹² *C-388/11 Crédit Lyonnais*.

²¹³ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 56.

²¹⁴ *C-388/11 Crédit Lyonnais*, para. 33.

²¹⁵ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 57-58.

²¹⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²¹⁷ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 60.

- (i) The decision cannot be applied

In the first situation, the branch is not included in the VAT group since the decision is incompatible with the VAT Directive²¹⁸. Hence, the supplies made between SAC and Skandia Sverige constitute non-taxable transactions, while the supplies made between Skandia Sverige and the members of the VAT group constitute taxable transactions. In accordance with article 193 of the VAT Directive²¹⁹ SAC will be charged VAT on the services supplied from Skandia Sverige to the VAT group.²²⁰

- (ii) The decision is subject to an EU-conform interpretation

AG Wathelet stated that a head office, through its branch, has its place of establishment in the Member State of the branch. Thus, the phrase “persons established”, mentioned in article 11 of the VAT Directive²²¹, implies that a head office, having its place of establishment in a third country, which has a branch established in the Member State of the VAT group, can be included in the VAT group of the Member State in which the branch has its place of establishment. Therefore, if Förvaltningsrätten i Stockholm chooses to include the branch in the VAT group in accordance with EU law, then it also has to include the head office in the VAT group.

SAC is, through its branch, established in Sweden and can become a member of the Swedish VAT group. Hence, based on the principle deriving from the ruling in FCE Bank, the services are supplied from Sweden and the supplies made between SAC and Skandia Sverige constitute non-taxable transactions.²²² However, a supply of services between the VAT group, which acts in the capacity of a purchaser, and a foreign supplier, not included in the Skandia group, constitutes taxable transactions since these transactions constitutes supplies of services made for consideration.

In Skandia America the IT services were supplied in Sweden and article 56(1)(k) of the VAT Directive²²³ is applicable. According to article 56(1)(k), the place of supply is the place where the purchaser, here the VAT group, has established its economic business, i.e. in Sweden. Furthermore, in accordance with article 196 of the VAT Directive²²⁴, the VAT group is the taxable person that shall be charged VAT.²²⁵

²¹⁸ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²¹⁹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²²⁰ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 62-63.

²²¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²²² AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 64-68.

²²³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²²⁴ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²²⁵ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 69-74.

- (iii) Neither SAC, nor Skandia Sverige are included in the VAT group

The third situation implies the possibility of a business to decide whether it will join a VAT group or not. Because of this possibility, AG Wathelet takes the view that SAC would probably not join the VAT group if it had known about the approach of Skatteverket. Therefore, SAC should only be included in the VAT group if it was the intention of SAC.²²⁶

- (iv) The prevention of tax evasion or tax avoidance

A Member State has, in accordance with the second paragraph of article 11 of the VAT Directive²²⁷, the right to charge VAT if there is a risk for tax evasion or tax avoidance. If both SAC and Skandia Sverige are included in the VAT group the transactions, neither between SAC and Skandia Sverige, nor between Skandia Sverige and the members of the VAT group constitute taxable transactions. Therefore, the decision made by Skatteverket can be justified by the prevention of tax evasion and tax avoidance. Thus, the supplies made between SAC and Skandia Sverige constitute the taxable transactions for which the VAT group is charged VAT, since the VAT group is the purchaser of the services.²²⁸

5.2.3.1.3 The Proposed Answer to the Question

AG Wathelet, firstly, emphasized that it is not possible for a branch of a foreign head office, which is established in accordance with the rules of the third country, to, independently from its head office, become a member of a VAT group formed in the Member State of the branch.²²⁹

Secondly, AG Wathelet stated that the supplies made by Skandia Sverige to the members of the VAT group did constitute taxable transactions, which the supplies made by SAC to the Skandia Sverige did not.²³⁰

5.2.3.2 The Second Question

Firstly, AG Wathelet stated that if the transactions between SAC and Skandia Sverige constituted taxable transactions, the VAT should be payable by the VAT group in accordance with article 196 of the VAT Directive^{231 232}.

²²⁶ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 73.

²²⁷ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²²⁸ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 75-77.

²²⁹ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 79.

²³⁰ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 79.

²³¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²³² AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 81.

Secondly, AG Wathelet stated that the need of an answer to the second question only exists if the answer to the first question implies that the supplies made from SAC to Skandia Sverige constitute taxable transactions. In this situation, the branch cannot constitute the same taxable person as SAC since the branch is the acquirer of the services, i.e. a member of the VAT group.

AG Wathelet means, based on the ruling in FCE Bank, that SAC has its place of establishment in Sweden through Skandia Sverige, i.e. in the opinion he stated the opposite in relation to the decision made by Skatteverket. Skatteverket namely stated that SAC does not have its place of establishment in Sweden and that Skandia Sverige therefore, independent from SAC, is a member of the VAT group.²³³

In summary, AG Wathelet answers the second question in accordance with article 196 of the VAT Directive²³⁴ by stating as follows. The VAT group, in which a branch is a member, is liable to pay VAT in a situation where the head office of the branch, which has its place of establishment in a third country and not in the Member State of its branch, is a taxable person who supplies the services to the branch.²³⁵

5.2.4 The Ruling of the CJEU

In contrast to the opinion of AG Wathelet the CJEU stated that the head office and the branch constitute two different legal entities.²³⁶ In my opinion, this ruling is interesting since it both derives from the ruling in FCE Bank and states the opposite from the Opinion by AG Wathelet. Hence, it is important to go through and analyse the ruling and the arguments made by the CJEU in depth.

5.2.4.1 The First Question

To answer the first question, i.e. whether “supplies of externally purchased services from a company’s main establishment in a third country to its branch in a Member State, with an allocation of costs for the purchase to the branch, constitute taxable transactions if the branch belongs to a VAT group in the Member State”²³⁷, the CJEU first stated that the concept of a taxable person shall be subject to an autonomously and uniform interpretation.²³⁸ Secondly, the Court referred to its ruling in FCE Bank meaning that there has to be a legal relationship between the supplier and the purchaser, which results in a reciprocal obligation for both of the parties to perform, for a supply, between the two entities, to constitute a taxable transaction. A legal relationship exists between a foreign head office and its branch, which has

²³³ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 82-86

²³⁴ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²³⁵ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, para. 87.

²³⁶ C-7/13 *Skandia America Corporation*, para. 38.

²³⁷ Quote from C-7/13 *Skandia America Corporation*, para. 20.

²³⁸ C-7/13 *Skandia America Corporation*, para. 23.

its place of establishment in a Member State of the EU, when the branch carries on an independent economic activity. A branch is carrying out an independent economic activity when the branch is independent and, thus, bears the economic risk deriving from the business.²³⁹

Based on the above-mentioned circumstances, the CJEU stated that Skandia Sverige is dependent in relation to SAC and does not bear the economic risk of the business. Neither does it have its own capital and the assets of Skandia Sverige are included in the assets of SAC. Hence, the CJEU takes the view that Skandia Sverige is dependent in relation to SAC and does not constitute a separate taxable person.²⁴⁰

Furthermore, the CJEU emphasizes that Skandia Sverige and the other members of the VAT group, together, constitute one single taxable person, i.e. a VAT group.²⁴¹ As a single taxable person, the VAT group is the one submitting the VAT declaration, i.e. the members do not individually submit any declarations. The members do neither constitute separate taxable persons, since they are all part of the same single taxable person.²⁴² Thus, the services supplied from a person outside the VAT group to a member within the VAT group, constitute supplies made to the VAT group and not supplies made to the actual member.²⁴³ The existence of a contract regulating the allocation of the costs between SAC and Skandia Sverige does not change the outcome of the case since the contract concluded is concluded between two dependent parties.²⁴⁴

With the above said, the CJEU stated that the services supplied by SAC to Skandia Sverige were supplied, for consideration, to the VAT group, not to Skandia Sverige. Thus, the services supplied by SAC to Skandia Sverige constituted taxable transactions.²⁴⁵

In summary, article 2(1), 9 and 11 of the VAT Directive²⁴⁶ states that a supply of services, from a head office with its place of establishment in a third country to its branch within a Member State of the EU, constitutes a taxable transaction as long as the branch is a member of a VAT group.²⁴⁷

5.2.4.2 The Second Question

When answering the second question, i.e. “(i)f the answer to the first question is in the affirmative, is the main establishment in the third country to be viewed as a taxable person not established in the Member State within

²³⁹ C-7/13 *Skandia America Corporation*, paras. 24-25; C-210/04 *FCE Bank*, paras. 34-35.

²⁴⁰ C-7/13 *Skandia America Corporation*, para. 26.

²⁴¹ C-7/13 *Skandia America Corporation*, para. 28.

²⁴² C-7/13 *Skandia America Corporation*, para. 29; C-162/07 *Ampliscientifica and Amplifin*, para. 19.

²⁴³ C-7/13 *Skandia America Corporation*, para. 29.

²⁴⁴ C-7/13 *Skandia America Corporation*, para. 27.

²⁴⁵ C-7/13 *Skandia America Corporation*, paras. 30-31.

²⁴⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁴⁷ C-7/13 *Skandia America Corporation*, para. 32.

the meaning of Article 196 of [the VAT Directive²⁴⁸], with the result that the purchaser is to be taxed for the transactions?²⁴⁹, the CJEU stated that, in accordance with the main rule in article 193 of the VAT Directive²⁵⁰, it is the taxable person who supplies the goods or services, that is liable to pay VAT. Furthermore, article 196 of the VAT Directive²⁵¹ consists of an exception to the main rule. Article 196 of the VAT Directive²⁵² namely implies that the purchaser is liable to pay VAT when the transaction falls within the scope of article 56 of the VAT Directive²⁵³ and the supplier does not has its place of establishment within the Member State concerned, i.e. in the Member State where the VAT is due.²⁵⁴

The CJEU found it to be undisputed that Skandia America regarded a case where the supplies constituted taxable transactions that fell within article 56 of the VAT Directive²⁵⁵, where Skandia Sverige was the purchaser and SAC, established in a third country, was the supplier. The CJEU also emphasized that SAC constituted a separate taxable person in relation to the VAT group. Based on these circumstances the VAT group constituted the taxable person liable to pay VAT.²⁵⁶

In summary, the CJEU ruled that services are supplied, for consideration, to a VAT group when a branch is established within the EU, is part of the VAT group and acquires services supplied by its head office, which has its place of establishment in a third country. Thus, the VAT group is the taxable person liable to pay VAT.²⁵⁷

5.2.5 How Does the Ruling Differ from the AG Opinion

As stated above, the CJEU and AG Wathelet came to different conclusions in Skandia America. AG Wathelet founded his opinion on the FCE Bank-principle, stating that a branch of a foreign head office cannot alone become a member of a VAT group formed in the Member State of the branch, and stated that the case at issue regarded two different transactions. The first transaction, i.e. the supply of the services made by the head office to the

²⁴⁸ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁴⁹ Quote from C-7/13 *Skandia America Corporation*, para. 20.

²⁵⁰ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁵¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁵² Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁵³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁵⁴ C-7/13 *Skandia America Corporation*, para. 34.

²⁵⁵ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010.

²⁵⁶ C-7/13 *Skandia America Corporation*, paras. 35-37.

²⁵⁷ C-7/13 *Skandia America Corporation*, para. 38.

branch, constituted a non-taxable transaction since the head office and the branch constitute one taxable person. The other transaction, i.e. the supply made by the branch to the members of the VAT group, constituted a taxable transaction since the head office and the branch supplied the services, for consideration, to another taxable person. AG Wathelet therefore did not support the view that the branch, independently from its head office, can become a member of a VAT group. He stated that a branch is linked to its head office and is therefore dependent on whether the head office is a member of the VAT group or not. Since SAC has its place of establishment outside the territory of Sweden and, as AG Wathelet stated in his third example, would probably not want to join the VAT group, the branch should not be a member of the VAT group.²⁵⁸

When the CJEU then ruled in the case, the ruling was contrary to the opinion by AG Wathelet and, in my opinion, modified the FCE Bank-principle. The CJEU stated that a supply of services, made from a head office with its place of establishment in a third country to its branch with its place of establishment within the territory of a Member State of the EU, constitutes a taxable transaction as long as the branch is a member of a VAT group.²⁵⁹ The fact that the CJEU stated that the FCE Bank-principle is applicable as long as the branch is not part of the VAT group is, in my opinion, the interesting part of the ruling and the statement that generates many questions.

5.3 The Questions Deriving from Skandia America

When the CJEU had ruled in *Skandia America*, many market operators reacted due to the possible effects of the ruling. One of the reactions regards the application of the ruling and to which extent the ruling will apply. Some commentators argue that the wording of the national law is the decisive factor, i.e. the ruling will only be applicable to the Member States with a national law similar to the Swedish VAT Act. This argument derives from the fact that the Swedish VAT Act does not permit the foreign head office to become a member of a VAT group. Thus, the ruling should only apply to the Member States with a national law that expressly states that a foreign head office cannot become a member of a VAT group. The commentators though emphasize that it is not clear whether the CJEU is analysing the Swedish VAT Act or the EU law since the CJEU, extensively, refers to the VAT Directive and the case law of the CJEU, not the Swedish VAT Act.²⁶⁰ For example does the United Kingdom include the whole legal entity in the VAT group. Thus, the supplies made between an establishment established overseas and an establishment established within the territory of the United Kingdom constitute non-taxable transactions. Since the CJEU did not

²⁵⁸ AG Wathelet, *Opinion in C-7/13 Skandia America Corporation*, paras. 60-87.

²⁵⁹ *C-7/13 Skandia America Corporation*, paras. 21-38.

²⁶⁰ Ardous, R., “*CJEU/Skandia-case- What does HMRC think?*”, *Mazars*, 5th of December 2014.

consider these rules, which include the whole legal entity in the VAT group, researchers argue that these rules are compatible with EU law. However, the ruling will have an impact on the legal entities, established in for example the United Kingdom, when one of its establishments has its place of establishment in a State that applies the same rules as Sweden and when the establishment is a member of a VAT group in that State.²⁶¹

Furthermore, researchers argue that a broad interpretation of the ruling will result in a situation where all the supplies made between a head office and its branch, with their place of establishment in different States, would constitute taxable transactions as long as one of the establishments is a member of a VAT group, while a more narrow interpretation will have almost no impact at all.²⁶² However, the general conclusions imply that the ruling will, firstly, have an impact on the taxpayers established within the Member States that allow VAT grouping and, secondly, treat the supplies made between the establishments of the same entity as falling outside the scope of VAT.²⁶³ Hence, some market operators fear that the ruling will result in a situation where the businesses will be more careful when it comes to VAT grouping and therefore, in a greater extent, look at the pros and cons with VAT grouping. The commentators therefore fear that VAT grouping will occur for strategic manners and not with the purpose of managing the VAT affairs, as the VAT grouping does today.²⁶⁴

There have also been some reactions regarding the reverse situation, i.e. when a domestic head office is part of a VAT group and has a branch established in a foreign country. According to some commentators, this ruling will not be applicable to this reverse situations since a branch, alone, is not a taxable person. It is also unclear whether the ruling is applicable to a situation where the head office has its place of establishment within the territory of a Member State of the EU and not within the territory of a third country, as it has in Skandia America.²⁶⁵

²⁶¹ HMRC Policy paper “*Revenue and Customs Brief 2 (2015): VAT grouping rules and the Skandia judgment*”, 10th of February 2015.

²⁶² Zutt, J., “*VAT on Intercompany Supplies: Why Skandia Is a Big Deal*”, Derivatives & Financial Instruments, November/December 2014, pp. 279-280.

²⁶³ Iferenta, R. and Loudon, R., “*Skandia America Corporation (C-7/13) – Judgement. Pan-European Implications*”, ALERT, KPMG International, 2014.

²⁶⁴ Bailey, A. and Harris S., “*The Skandia case: analysis*”, *Economia*, 23rd of September 2014.

²⁶⁵ Mobach, O.L. and Norden, van G.J., “*Judgement in Skandia America Corporation (C-7/13)*”, Meijburg & Co, KPMG, 22nd of September 2014.

6 Analysis

The purpose of this analysis is to answer the question in what circumstances does the VAT Directive imply that a head office and its branch constitute two separate taxable persons and when does the services, supplied made between a head office and its branch, constitute taxable transactions?

Before commencing the analysis by applying the research above, the research shortly discusses whether the branch in Skandia America, i.e. Skandia Sverige, constitutes a fixed establishment or not. In my opinion, Skandia Sverige has its own technical and human resources, it has a sufficient degree of permanence and effects the business transactions. Skandia Sverige has namely the possibility to supply the services in question and actually does supply the services, why Skandia Sverige meets the requirement regarding the technical and human resources and constitutes a fixed establishment from which the business transactions are effected. Furthermore, SAC continuously supplies services in Sweden, which is also the intention of SAC, why Skandia Sverige has a sufficient degree of permanence.

6.1 A Breaking Point in the Case Law?

After the ruling in FCE Bank, the researchers and market operators stated that it was clear that the FCE Bank-principle implied that a branch and its head office constituted the same taxable person. However, a question remained, namely what happens in a situation where one of the entities of the same taxable person becomes a member of a VAT group. The CJEU answered this question in Skandia America, but the answer was not in line with the opinions of many researchers and market operators.

In Skandia America, it was undisputed that Skandia Sverige constituted a branch of SAC. As stated above, Skandia Sverige possesses a sufficient degree of permanence and has a structure that makes it possible to supply the services on an independent basis. Thus, the question regarded whether Skandia Sverige constituted a taxable person, separated from SAC, or not.

6.1.1 A Taxable Person?

A taxable person is “any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity”. As stated in FCE Bank, a branch is dependent on its head office. Thus, a head office and its branch, together, constitute one taxable person. In my opinion, this conclusion is legitimate and in accordance with the concept of VAT and the VAT Directive. As the CJEU stated, a branch is not, independently, carrying out an economic activity and shall therefore not constitute a taxable person in accordance with article 9 of the VAT Directive. Thus, the branch and the head office constitute the same taxable person.

A problem then arose when the CJEU, in the ruling in *Skandia America*, stated that the relationship between a head office and its branch changes when the branch joins a VAT group.

The CJEU took the view, which was in line with the VAT Directive and the concept of VAT grouping, that a VAT group constitutes one single taxable person. However, what surprised many was the statement that a VAT group, and therefore also the branch, constituted one taxable person meanwhile the head office, independent from its branch, constitute another taxable person. The concept of VAT grouping has as its purpose to simplify the administration, to prevent tax abuse and to avoid the obligation to pay VAT on transactions between the closely linked entities. Thus, the VAT grouping systems result in a situation where the supplies made between the entities within a VAT group constitute non-taxable transactions. Furthermore, a VAT group constitute one single taxable person and the entity, i.e. the separate taxable person, entering a VAT group will no longer constitute a separate taxable person since it now constitutes a single taxable person together with the other members of the VAT group. However, in my opinion, the problem derives from the fact that a branch, in the first stage, does not constitute a separate taxable person and there are no reasons to consider a branch, when entering a VAT group, independent from its head office, just because it enters a VAT group. A discussion regarding whether a branch has to constitute a taxable person or not to be able to join a VAT follows in the section “A Member of a VAT Group” below.

I base this statement on the ruling of the CJEU in both *FCE Bank* and *Skandia America*. In *FCE Bank* the CJEU clearly stated that a branch is neither independent from its head office nor does a legal relationship exist between the head office and its branch, while the head office and the branch, together, constitute one taxable person. Furthermore, the CJEU implied, in its ruling in *Skandia America*, that a branch does not constitute a legal entity separated from its head office and does not, based on this, constitute a separate taxable person, not even when the branch receives supplies from its head office. In my opinion, these factors do not change when a branch enters a VAT group. Firstly, it is not consistent with the wording of the VAT Directive to establish that a branch, independently from its head office, is able to become a member of the VAT group, which, as stated above, will be discussed further in the section below. Secondly, even though a branch becomes a member of a VAT group, its business still derives from the business of the head office and the fact that a branch joins a VAT group does not change the actual relationship between the head office and the branch. Neither can I say that the branch is less dependent from its head office just because the transactions between the branch and the other member of the VAT group constitute non-taxable transactions. Therefore, I am of the opinion that a branch cannot be separated from its head office when it regards the concept of a taxable person. This reasoning generates the next question, which in my opinion is of more importance when it regards the relationship between a head office and its branch and the ruling

in Skandia America, i.e. whether a branch, independently from its head office, can become a member of a VAT group.

6.1.2 A Member of a VAT Group?

In Skandia America, AG Wathelet discusses the case at issue in depth. He, inter alia, implies that a head office, through its branch, has its place of establishment in the Member State of the branch. After a profound discussion of the concepts of VAT, I take the view that the doctrine supports the statement of AG Wathelet. Thus, a head office, established within the territory of a third country, having a branch established in the Member State of the VAT group, shall be included in the VAT group of the Member State in which the branch is established. Furthermore, AG Wathelet concluded that if Förvaltningsrätten i Stockholm chooses to include the branch in the VAT group, then it also has to include the head office in the VAT group.

I am of the opinion that the reasoning of AG Wathelet is legitimate, which does not contravene the concept of a taxable person. The reasoning namely results in a situation where the branch is still dependent on its head office meanwhile it constitutes the same taxable person as the head office, but now together with the VAT group. However, I infer that this above-mentioned reasoning can lead to a situation where the transaction neither between the head office and the branch, nor between the branch and the members of the VAT group will constitute taxable transactions, meaning that a situation of non-taxation appears. Thus, if a Member State assumes that the taxable persons aim for tax evasion or tax avoidance and that the VAT group is formed entirely based on artificial manners, the Member State has the right to charge VAT on the transactions. Because there is a risk that a situation of non-taxation occurs, a decision not to include the head office in the VAT group and to tax the transactions between the head office and its branch can be, but does not have to be, justified by the prevention of tax evasion and avoidance.

I find a reasoning regarding tax evasion and tax avoidance to be, from a VAT perspective, more convincing argument than the reasoning made by the CJEU in Skandia America. In my opinion, both the exclusion of the head office from the VAT group and the statement that a head office and its branch constitute two separate taxable persons when the branch, independently from its head office, becomes a member of a VAT group, are contrary to both the EU law as such and the purpose of the VAT Directive. The CJEU should either, instead of stating that the branch constitutes another taxable person than the head office when being part of a VAT group, have stated that the entities still constitute the same taxable person or have included the both the head office and the branch in the VAT group. Thereafter, the CJEU should have given the Member State the possibility to justify its decision to charge VAT on the transactions based on the prevention of tax evasion or tax avoidance, if there were any grounds for it. A more profound discussion regarding the application of tax evasion and tax

avoidance will follow when the analysis discusses the scope of the ruling in Skandia America.

Moreover, the researchers have discussed whether a branch constitutes a “person” or not, a discussion that supports the reasoning put forward in the opinion by AG Wathelet. The discussion of a “person” derives from the fact that an entity, to fall within the scope of article 11 of the VAT Directive, has to constitute a person. In my opinion, the wording in article 11 of the VAT Directive implies that a branch does not constitute a “person” since the provision states that a “person”, who becomes a member of a VAT group, shall be legally independent. Thus, since a branch is dependent of its head office and a legal relationship does not exist between the head office and its branch the branch shall not constitute a “person” within the meaning of article 11 of the VAT Directive. I imply that this reasoning also is in line with the argument put forward by the Government of the United Kingdom in the ruling in Skandia America. The Government of the United Kingdom namely stated that a branch cannot, independent from its head office, become a member of a VAT group and stated that the phrase “person established shall be legally independent” excludes the branches from the possibility to, independently form their head offices, join a VAT group. Thus, the Government of the United Kingdom stated that the “person” is the legal entity to which the branch belongs, not the branch itself. Moreover, the CJEU has also implied that a branch is not a legal entity separated from its head office and therefore not a separate taxable person, not even when the branch receives supplies from its head office.

I also base my reasoning regarding the concept of a “person” on the fact that the personal scope of the VAT Directive, from which the Member State cannot derive, implies that the concept of a “person” shall be interpreted as meaning a taxable person. Thus, based on the discussion of the concept of a taxable person, I am of the opinion that a branch does not constitute a taxable person and therefore not a “person” within the meaning of article 11 of the VAT Directive.

Hence, since a branch is just a part of a taxable person and, as a corollary, does not constitute a “person” within the meaning of article 11 of the VAT Directive, it is not possible for a branch to, independently from its head office, become a member of a VAT group. To clarify this reasoning, if we have a situation like the one in Skandia America, where the main establishment of the taxable person is within the territory of a foreign State or within the territory of a Member State other than the Member State of the VAT group, two situations arise. Either, the branch has its place of establishment outside the Member State of the VAT group and can therefore not become a member of the VAT group, or the taxable person as a whole becomes a member of the VAT group as long as it has a branch within the same territory as the VAT group. The first situation infringes the right of freedom of establishment. It namely treats businesses differently based on the place of establishment and the legal form of the entities and therefore risks infringing the right of freedom of establishment. On the other hand,

when including the foreign head office in the VAT group a situation of cross-border VAT grouping appears, which is a disallowed concept within the EU law. However, if the concept of cross-border VAT grouping would work perfectly, it would result in a situation where pure national and cross-border situations were treated the same since the taxable persons of both the national and the cross-border VAT groups would enjoy the same administrative-, cash flow- and financial advantages. In addition, VAT grouping would eliminate the different treatment of foreign subsidiaries and foreign fixed establishments. I am also aware of the fact that the Netherlands, the United Kingdom and Finland allow cross-border VAT grouping, but the VAT grouping systems of these three Member States and the question whether their systems are compatible with EU law are subject to another discussion and other research.

As a corollary, it is interesting to discuss whether the right of freedom of establishment or the prevention of cross-border VAT grouping, which would result in a situation where pure national and cross-border situations were treated the same, should prevail. The right to freedom of establishment is one of the main principles and objectives of EU law, why it should be argued that the freedom of establishment should prevail over the prevention of cross-border VAT grouping. This discussion is taken further in the section regarding “the scope of the ruling in Skandia America” below.

Meanwhile, and based on what have been stated until today, cross-border VAT grouping is a disallowed concept and it is stated that the entities that join a VAT group have to be physically located within the territory of the Member State introducing the VAT group. Therefore, I take the view that the above-mentioned reasoning should lead to the fact that neither the branch nor the foreign head office can become members of the VAT group. A result that I though mean should be questioned since it seems to be contrary to the right of freedom of establishment. I have though noticed that there are some research published regarding this question why I recommend the interested reader to read what have been stated within the area of VAT grouping and the freedom of establishment.

6.1.3 A Taxable Transaction?

One of the reasons to why the ruling in Skandia America is interesting is because the CJEU did not discuss the concept of a taxable transaction. In Skandia America, the CJEU namely just stated that the services supplied did constitute taxable transaction but never discussed why. This conclusion is interesting since it should not be seen as in accordance with the wording of the VAT Directive to allow a Member State to charge VAT if the supplies made by the taxable person do not constitute taxable transactions. I base this opinion on the discussion above and the wording of the provisions of the VAT Directive regarding taxable transactions. I am namely of the opinion that it is not obvious that the supplies made from SAC to Skandia Sverige or from Skandia Sverige to the other members of the VAT group do

meet the requirements established in the VAT Directive and its provisions regarding the concept taxable transactions.

To classify a supply of services as a taxable transaction, the establishment receiving the services has to constitute a separate legal entity, i.e. an legal entity that is separated from the supplier, otherwise there is no supply made for consideration. In addition, for a supply between a head office and its branch to constitute a taxable transaction, the branch has to, independently from its head office, carry out an economic business and bear the risk of the business. Thus, since the CJEU has stated that a head office and its branch constitute one legal entity and since the branch does not independently carries out the economic activity and does not bear the economic risk of the business, the services supplied between a head office and its branch should not constitute taxable transactions.

Furthermore, the doctrine has discussed the situation where one of the entities becomes part of another taxable person, i.e. a VAT group, and whether the supplies made between the head office and its branch constitute supplies made between two different taxable persons or not. In these situations the researchers have argued that the payments between a head office and its branch constitute payments to establishments of the same legal entity, irrespective of whether the branch is a member of a VAT group or not. They have also argued that “the reality shall prevail over the administrative convenience in the form of a single taxable person”, and implied that the services supplied between a head office and its branch shall constitute non-taxable transactions even though the branch is a member of a VAT group.

With the above said I agree with the researchers and take the view that the branch and the head office do not cease to constitute one legal person just because the branch becomes a member of a VAT group. The head office and the branch do still constitute the same legal entity, the branch is still dependent on the head office while carrying out the services and the head office does still bear the economic risk. In reality, the relationship between the head office and the branch does not change just because the branch joins a VAT group. Thus, it does not matter whether the head office and its branch constitute one taxable person or not, the supplies made between the head office and its branch shall still not constitute taxable transactions since they do not constitute supplies made for consideration. In my opinion, it is to be questioned why the CJEU never discussed this concept within its ruling. I namely mean that there was no transaction made for consideration but apparently the CJEU was of another opinion. Thus, I am of the opinion that the CJEU should have discussed the concept of a taxable transaction for consideration and clarified what it takes for a consideration to actually exist.

6.2 The Scope of the Ruling in Skandia America

Based on the discussion and argumentation deriving from the section above, it can be argued that the ruling in Skandia America not just changes the concepts of a taxable person, a taxable transaction and the treatment of a head office and its branch. It can namely also be argued that the ruling is hard to reconcile with the structure and context of the VAT Directive, the EU law as a whole and the previous case law of the CJEU. Therefore, it is of great interest to discuss the scope of the ruling since the impact and the consequences of the ruling differ depending on the scope of the ruling, i.e. to which extent the ruling will apply.

6.2.1 The Interpretation of the Ruling

The commentaries of the different market operators implied that a broad interpretation of the ruling in Skandia America would result in a situation where all the supplies made between a head office and its branch will constitute taxable transactions, as long as either the head office or the branch is a member of a VAT group. Meanwhile, a more narrow interpretation will have almost no impact at all. Therefore, my first thought was that the CJEU would interpret the ruling broadly, since a broad interpretation secures the right to charge VAT on transactions and therefore counteracts the risk of tax evasion and tax avoidance. My second thought though was that the CJEU realizes that its ruling, not only, might be hard to reconcile with the structure and context of the VAT Directive, the EU law as a whole and the previous case law of the CJEU, but has also caused many problems and questions. The CJEU might therefore see a possibility to “solve the situation” by interpreting the ruling in a more narrow way.

Furthermore, I agree with the commentators and take the view that it is of importance to discuss and reflect upon which legal system the CJEU actually discussed in its ruling in Skandia America. If the CJEU has answered the questions referred to it from a Swedish perspective, then the wording of the national law is the decisive factor and the ruling shall only apply to the Member States with a national law, whose wording is similar to the Swedish VAT Act. I mean that the CJEU, even though the questions referred derived from the Swedish VAT Act, ruled almost exclusively based on the purpose and wording of the EU law, i.e. the VAT Directive, since the CJEU, throughout the whole ruling, did only mention the VAT Directive and its case law within the area of VAT. Therefore, I am of the opinion that the ruling in Skandia America should be applicable to all Member States of the EU, irrespective of the wording of the national law of each Member State, since the ruling derives from the concept of EU law and the principles deriving there from.

Moreover, all the Member States of the EU have to comply with EU law and shall not interpret a provision of the VAT Directive in a way that is

contrary to the objective of the VAT Directive. In addition, the Member States also have to amend their legislation in accordance with the rulings of the CJEU. This procedure and the obligations of the Member States support my attitude regarding how to interpret the ruling. The intentions of the CJEU could not possibly have been to drive the Member States to amend their systems of VAT grouping in a way that, in my opinion, might be contrary to EU law. I also base this conclusion on the fact that the system of VAT grouping is a well-established concept throughout the EU and that the VAT Directive allows each Member State to, in a suitable way, choose how to introduce the concept of VAT grouping. Therefore, the intentions of the CJEU could not have been to restrict this possibility, but just to avoid a situation of non-taxation, a conclusion that is also supported by the reasoning of the AG Mengozzi in his ruling in *Larantia + Minerva*.

6.2.2 Tax Evasion, Tax Avoidance and Non-taxation

Based on the reasoning in the section above, I am of the opinion that the CJEU should have discussed the situation of tax evasion and tax avoidance instead of the relationship between a head office and its branch and the possibility to become a member of a VAT group. In my opinion, the CJEU had no reasons not to discuss the concept of tax evasion and tax avoidance and the possibility to justify a restriction based on these grounds, especially since a Member State actually has the right to take any measures necessary to prevent tax evasion or tax avoidance.

I mean that the discussion regarding tax evasion and tax avoidance applies to the transactions between members of a VAT group, but also to the transactions between a head office and its branch, if the branch is part of the VAT group with the aim of avoiding VAT. I though imply that it is difficult for a Member State to claim that a VAT group has tax evasion or tax avoidance as its purpose, especially since one of the results of VAT grouping is the non-taxation of the supplies made between the members of a VAT group. In my opinion, there are probably no reasons to assume that the VAT groups are formed based on purely artificial arrangements with its purpose to, in a disallowed manner, avoid VAT assignable to the supplies. A conclusion that I base on the fact that there are no reasons to, in a disallowed manner, avoid VAT if there is no VAT to avoid.

However, a situation can arise where VAT grouping can result in a situation of non-taxation, which is not in line with the purpose of the VAT Directive, like in *Skandia America* where the supplies neither between the head office and the branch, nor between the branch and the members of the VAT group would constitute non-taxable transactions. A situation that is also similar to the situation in *Swiss Re*, a case where a discussion of the purpose of the VAT Directive appeared.

Thus, based on the discussion made by the CJEU in *Swiss Re*, I would argue that the CJEU, in addition to the argument of tax evasion and tax

avoidance, could have referred to the purpose of the VAT Directive. It could have referred to its ruling in *Swiss Re* and stated that the supplies made between SAC and Skandia Sverige, but maybe also between Skandia Sverige and the other members of the VAT group, should constitute taxable transactions, since a situation of non-taxation is contrary to the purpose of the VAT Directive.

In other words, the CJEU could have achieved the same result as it did in *Skandia America*, but in a different way, which, in my opinion, would have been more appropriate and compatible with EU law.

6.2.3 Reversed Situations

Besides the discussion above, the ruling has generated questions regarding whether the ruling shall apply to a reversed situation, i.e. when a domestic head office is part of a VAT group and has a branch established in a foreign country.

Some commentators imply that the ruling will not apply to reversed situations. This argument is based on the fact that a branch, independently from its head office, does not constitute a taxable person, an argument that I support. It has namely been stated that a branch cannot, independent from its head office, constitute a taxable person. In other words, if a head office is a member of a VAT group it loses its status as a separate taxable person and becomes part of the single taxable person. Thus, since the case law of the CJEU implies that a branch constitutes the same taxable person as its head office, the branch should also constitute a taxable person together with the VAT group in which the head office is a member. Therefore, since the branch has to become a member of the VAT group, the supplies made between the head office and the branch constitute non-taxable transactions.

6.2.4 The Head Office has its Place of Establishment within the EU

In addition to the question of reversed situation, the ruling has generated questions regarding whether the ruling can apply and have the same effect to the situations where the head office has its place of establishment within the territory of the EU.

Regarding this second issue, i.e. if the ruling has the same effect when the head office has its place of establishment within the territory of the EU, it, in my opinion, does not matter whether the head office has its place of establishment within or outside the EU. In both situations, there will be a situation of cross-border VAT grouping, which, in general, is a disallowed concept. However, I am of the opinion that cross-border VAT grouping solves the problem of discrimination since it treats pure national and cross-border situations the same, i.e. the taxable persons of both the national and the cross-border VAT groups enjoys the same administrative-, cash flow-

and financial advantages, and would eliminate the different treatment of foreign branches. On the other hand, cross-border VAT grouping can result in a situation of non-taxation, which is contrary to the purpose of EU law. This conclusion generates a question of which concept of EU law that prevail, the principle of non-discrimination or the prevention of non-taxation, a question that, as I stated above and like the discussion of cross-border VAT grouping, should be subject to another, more profound, research and therefore not be discussed just briefly in this analysis.

Irrespective of the discussion above, I am of the opinion that since cross-border VAT grouping already is applied by some of the Member States of the EU and since cross-border VAT grouping solves the problem of discrimination, both the foreign head office and the branch should become members of the VAT group. This reasoning should apply irrespective of whether the head office has its place of establishment within or outside the territory of the EU. Thereafter, the CJEU should apply the argument of the prevention of tax evasion and tax avoidance to be able to charge VAT on either the transactions made between the head office and the branch, or between the head office, or the branch, and the members of the VAT group. Through this argumentation, the situation of both discrimination and non-taxation could be solved, but as I said, this should be subject to a more profound research and discussion and therefore subject to another thesis.

6.3 De Lege Lata – What is the Legal Situation Today?

To conclude this thesis, this analysis ties the research together by discussing the legal situation of today. Irrespective of the discussion above and the reactions deriving from the ruling in *Skandia America*, it is a fact that the CJEU has ruled in *Skandia America*, why it is necessary to discuss the legal situation of today.

Through the ruling in *Skandia America*, the CJEU stated that the Member States should deviate from the principle, established by the ruling in *FCE Bank*, when a branch is a member of a VAT group and when it regards the treatment of the transactions made between a head office and its branch. Thus, the Member States shall treat the head office and its branch as two separate taxable persons and consider the supplies, made between the two entities, as taxable transactions. I am of the opinion the CJEU either changed the legal status of a branch when stating that a branch can constitute a legally independent entity that constitutes a taxable person separated from its head office, or changed the interpretation of the different concepts of VAT, such as the concept of a taxable person, a taxable transaction and VAT grouping. However, no one is able to know what the CJEU actually did but neither what the CJEU had as its intentions to do.

The consequences of the ruling are therefore that the Member States will have to interpret the already established concepts of VAT differently than

before, but they do not know to which extent and to which situations the ruling will apply since the CJEU did not discuss these consequences and the legal situation of today. Therefore, the Member States cannot know whether they should apply the ruling to reversed situations, whether the ruling will apply to the situations where the head office has its place of establishment within the territory of the EU or whether the ruling will apply to situation where the head office is part of the VAT group and not the branch.

Since the Member States that introduce a VAT grouping system have to respect the VAT Directive and the purpose thereof and not interpret their VAT Acts and their VAT grouping systems without considering the VAT Directive and the principles deriving there from, the uncertainties deriving from the ruling in *Skandia America* generates some concerns. It is namely of great importance, especially for the Member States that have chosen an optional VAT grouping arrangement, to comply with, inter alia, the principle of non-discrimination, why a VAT grouping system cannot discriminate amongst other VAT groups or taxable persons. However, the Member States do not just have to comply with the VAT Directive and the principles deriving there from, they also have to comply with the case law of the CJEU. Since the CJEU has left many questions unanswered through its ruling in *Skandia America*, the Member States of the EU cannot be sure how to interpret both the ruling and the VAT Directive.

I am of the opinion that the ruling in *Skandia America* is contrary to the purpose of the VAT Directive and take the view that the ruling infringes both the principle of non-discrimination and the principle of legal certainty. I base this conclusion on the fact that the ruling infringes the principle of non-discrimination since it discriminates the different entities based on their place of establishment and the principle of legal certainty since no one will know for sure how to interpret the different concepts of VAT.

However, when a ruling is contrary to a legislative act, here the VAT Directive, the legislative act will prevail. Therefore, I argue that the ruling made by the CJEU in *Skandia America* will not be as crucial in the future as many researchers might fear. The ruling will namely have to be interpreted in the light of the VAT Directive and the underlying purpose of the VAT Directive, which, in my opinion, does not support a broad interpretation of the ruling in *Skandia America*.

I am therefore of the opinion that the ruling in *Skandia America* should be subject to a narrow interpretation and not modify the FCE Bank-principle since the ruling in *Skandia America* is contrary to the principle of non-discrimination. I also take the view that an application of the ruling to other situations would risk infringing the principle of legal certainty. The ruling is namely too unclear and leaves too many questions unanswered, for example, when it regards the application and interpretation of the ruling to other situations such as reversed situations, situations where the head office has its place of establishment within the EU and situations where the head office is part of a VAT group and not the branch.

After a profound discussion of the ruling, I would also argue that the ruling is contrary, not only to the principles of EU law, but also to the VAT Directive and the EU law as a whole. Moreover, I mean that it is a common opinion, which also complies with the VAT Directive, that a head office and its branch constitute the same legal entity and one taxable person, irrespective of whether one of the entities constitutes a member of a VAT group or not. Therefore, I do not mean that the situation of today will change to that great extent as many might fear and do not think that the Member States of the EU will have to amend their legislations in accordance with the ruling in *Skandia America*, unless until the legal situation has been examined further.

7 Conclusion

After presenting, discussing and analysing the VAT Directive, the case law of the CJEU and the doctrine within the area of VAT the conclusion to be drawn is that there are no real answers to the questions asked in the beginning of the thesis. The outcome of the cases appearing in front of the CJEU will always depend on the circumstances of each case, why it is not possible to give the reader a clear answer to the initial questions. However, the research has resulted in the following conclusions.

7.1 The Relation Between a Head Office and its Branch

When it regards the relationship between a head office and its branch, a branch cannot be separated from its head office when it regards the concept of a taxable person. Thus, a head office and its branch, irrespective of the circumstances, constitute one taxable person.

In addition, a branch does not meet the requirements mentioned in article 9 of the VAT Directive since it is neither independent from its head office nor a legal entity separated from its head office. Therefore, a branch cannot become part of a VAT group, independently from its head office. However, since cross-border VAT grouping is a disallowed concept and the entities, joining a VAT group, have to be physically located within the territory of the Member State introducing the VAT group, it can be argued that neither a foreign head office nor its branch can become members of the VAT group. However, irrespective of the discussion above, I am of the opinion that since cross-border VAT grouping already is applied by some of the Member States of the EU and since cross-border VAT grouping solves the problem of discrimination, both the foreign head office and the branch should become members of the VAT group. A reasoning that I mean should apply irrespective of whether the head office has its place of establishment within or outside the territory of the EU.

Furthermore, a payment cannot exist within the same legal entity and when there is no consideration related to the supplies, the supplies do not constitute taxable transactions. Therefore, the supplies made between the head office and its branch cannot constitute, under any circumstances, taxable transactions.

If there would be a situation where the branch could become a member of a VAT group, independently from its head office, and if the two entities do constitute two taxable persons, separated from each other, I still mean that the supplies do not constitute taxable transactions. I take the view that the branch and the head office do not cease to constitute one legal person just because the branch becomes a member of a VAT group. Thus, it does not

matter whether the head office and its branch constitute one taxable person or not, the supplies made between the head office and its branch still do not constitute taxable transactions since they do not constitute supplies made for consideration.

In summary, the ruling in *Skandia America* should be seen as a breaking point in the case law since it, in my opinion, not just changes the treatment of a head office and its branch, it is also hard to reconcile the ruling with the structure and context of the VAT Directive, the EU law as a whole and the previous case law of the CJEU.

7.2 The Scope of the Ruling in Skandia America

The ruling in *Skandia America* should be applied by all Member State of the EU, irrespective of the wording of the national law of each Member State, since the ruling derives from the concept of EU law and the principles deriving there from. The CJEU namely ruled almost exclusively based on the EU law, i.e. the VAT Directive, and the purpose thereof since the CJEU, throughout the whole ruling, did only mention the VAT Directive and its case law within the area of VAT. Moreover, all the Member States of the EU have to comply with EU law and shall not interpret a provision of the VAT Directive in a way that is contrary to the objective of the VAT Directive. The Member States therefore have to amend their legislation in accordance with the rulings of the CJEU. Thus, the way in which the ruling should be interpreted is of great relevance for each Member State of the EU.

A broad interpretation of the ruling will result in a situation where all the supplies made between a head office and its branch will constitute taxable transactions as long as either the head office or the branch constitute a member of a VAT group, while a more narrow interpretation will have almost no impact at all. The CJEU might realize that the ruling has caused many problems and questions and might therefore see a chance to “solve the situation” by interpreting the ruling in a more narrow way. Through a narrow interpretation, the ruling will not affect the law of the Member States to the same extent as a broad interpretation would. A broad interpretation would namely force many of the Member States of the EU, such as the United Kingdom, the Netherlands and Finland, to amend their VAT legislations, especially when it regards VAT grouping.

Furthermore, the ruling should not be applied to reversed situations, i.e. to situations where a head office is part of a VAT group and has a branch established in a foreign country. I am of the opinion that, independently of the outcome of the ruling in *Skandia America*, it is not possible to separate a branch from its head office if the branch does not, at the same time, constitute a taxable person together with another entity, which it cannot do. Therefore, if a head office becomes a member of a VAT group that is

formed in the Member State of the head office, both the branch and the head office has to become members of that VAT group.

Finally, I mean that the CJEU could not have had as its intention to change the well-established system of VAT grouping, especially since the VAT Directive allows each Member State to introduce the concept of VAT grouping in a way which they find suitable. However, the CJEU might have had as its intentions to prevent a situation of non-taxation. Therefore, it would be more legitimate, and in accordance with the EU law, to focus on the prevention of tax evasion and tax avoidance or the prevention of non-taxation instead of the relationship between a head office and its branch and the possibility to become a member of a VAT group.

Legislation

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as applicable until the 1st of January 2010

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as amended latest by the 2nd of April 2015

Mervärdesskattelag (1994:200) as applicable at the 2nd of April 2015.

Preamble Council Directive 2006/112/EC as amended latest by the 2nd of April 2015

Regulation (EU) No. 282/2011 as amended latest by the 2nd of April 2015.

Sixth Council Directive 77/388/EEC of 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

Table of Cases and AG Opinions

Case 6/64	<i>Costa v. E.N.E.L.</i>	ECLI:EU:C:1964:66
Case 89/81	<i>Hong Kong Trade</i>	ECLI:EU:C:1982:121
Case 154/80	<i>Coöperatieve Aardappelenbewaarplaats</i>	ECLI:EU:C:1981:38
Case 168/84	<i>Berkholz</i>	ECLI:EU:C:1985:299
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C-231/94	<i>Faaborg-Gelting Linien</i>	ECLI:EU:C:1996:184
C-190/95	<i>ARO Lease</i>	ECLI:EU:C:1997:374
C-260/95	<i>DFDS</i>	ECLI:EU:C:1997:77
C-98/98	<i>Midland Bank plc</i>	ECLI:EU:C:2000:300
C-174/00	<i>Kennemer Golf & Country Club</i>	ECLI:EU:C:2002:200
C-255/02	<i>Halifax</i>	ECLI:EU:C:2006:121
C-223/03	<i>Huddersfield</i>	ECLI:EU:C:2006:124
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C-41/04	<i>Levob</i>	ECLI:EU:C:2005:649
C-210/04	<i>FCE Bank</i>	ECLI:EU:C:2006:196
C-210/04	<i>Opinion by AG Léger</i>	ECLI:EU:C:2005:582
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C-162/07	<i>Ampliscientifica and Amplifin</i>	ECLI:EU:C:2008:301
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C-74-11	<i>Commission v. Finland</i>	ECLI:EU:C:2013:266
C-85/11	<i>Commission v. Ireland</i>	ECLI:EU:C:2013:217
C-318/11	<i>Daimler and Widex</i>	ECLI:EU:C:2012:666
C-388/11	<i>Crédit Lyonnais</i>	ECLI:EU:C:2013:541
C-605/12	<i>Welmory</i>	ECLI:EU:C:2014:2298
C-7/13	<i>Skandia America Corperation</i>	ECLI:EU:C:2014:2225
C-7/13	<i>Opinion by AG Wathelet</i>	ECLI:EU:C:2014:311
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