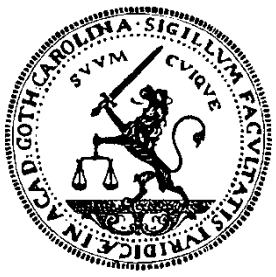

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The Concept of Taxable Transactions between Head Office and Branch - In the light of *Skandia America*

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Contents

Summary

On 17 September 2014 the CJEU delivered its decision in Case C-7/13 *Skandia America*. This ruling is an important contribution to the interpretation of supplies between a branch and its head office in scenarios involving VAT grouping arrangements. The case encompassed a complex situation with regard to the concept of 'single taxable person', as two previously determined decisions by the CJEU collided, namely Case C-210/04 *FCE Bank* and Case C-162/07 *Ampliscientifica*. The outcome of *Skandia America* therefore illustrates how these two judgments shall interact with each other. Consequently, the status of single taxable person in accordance with the VAT grouping provision as provided for in Article 11 of the VAT Directive was given precedence over the legal relationship between a branch and its head office as one single taxable person.

The ruling in *Skandia America* concerned the VAT treatment of cross-border supplies of services from a US holding company to its European branch as that branch was a member of a VAT group. In principle, the CJEU stated that services supplied by a main establishment in a third country to its branch located in a Member State constitute taxable transactions when the branch is part of a VAT group. Accordingly, transactions between a branch which is a member of a VAT group in a Member State and its head office located in a third state, may fall within the scope of VAT.

To fall within the scope of VAT the transaction need to fulfil all conditions laid down in Article 2(1)(c) of the VAT Directive. To constitute a taxable transaction in accordance with that article the supply must be made for consideration and take place within the territory of a Member State as well as it need to be performed by a taxable person acting as such. If all these conditions are present the transaction is taxable. Interestingly, the CJEU only explicitly analysed one of these criteria in its judgment, namely if the supplies were performed by a taxable person. This may imply that the CJEU assumed that the other requirements in Article 2(1)(c) of the VAT Directive were fulfilled for a transaction to be chargeable to tax. The analysis may have taken this path as the CJEU did not want to risk a scenario where non-taxation could occur.

Hence, this thesis intends to highlight some issues in the *Skandia America* judgment with regard to the requirement that supplies always need to be effected 'for consideration' to be taxable. This is an important issue as the facts in *Skandia America* implied that there was an allocation of costs between the head office and its branch. According to the CJEU's ruling in Case C-77/01 *EDM* an allocation of costs may be regarded as consideration. This thesis reveals that the relatively short ruling in *Skandia America* may have left out an important discussion on the fulfilment of the requirements as provided for in Article 2(1)(c) of the VAT Directive, for the existence of a taxable transaction.

Sammanfattning

Den 17 september 2014 meddelade EU-domstolen sitt beslut i mål C-7/13 *Skandia America*. Denna dom är ett viktigt bidrag till tolkningen av leveranser mellan filial och huvudkontor i scenarier som omfattar mervärdesskattegrupper. Fallet omfattade en komplex situation när det gäller tolkningen av begreppet en "enda beskattningsbar person", genom att två tidigare avgjorda domar av EU-domstolen kolliderade, nämligen mål C-210/04 *FCE Bank* och mål C-162/07 *Ampliscientifica*. Resultatet av *Skandia America* illustrerar därför hur dessa två domar skall samverka med varandra. Följaktligen har statusen som en enda beskattningsbar person i överrensstämmelse med reglerna om mervärdeskattegrupper som återfinns i artikel 11 i mervärdesskattedirektivet getts företräde framför det rättsliga förhållandet mellan en filial och dess huvudkontor som en enda beskattningsbar person.

Domen i *Skandia America* gällde momshanteringen vid gränsöverskridande tillhandahållande av tjänster från ett amerikanskt holdingbolag till dess europeiska filial vilken var medlem i en mervärdesskattegrupp. EU-domstolen konstaterade i princip att tjänster som tillhandahålls från ett huvudkontor i ett tredje land till dess filial i en medlemsstat utgör skattepliktiga transaktioner när filialen ingår i en mervärdesskattegrupp. Följaktligen kan transaktioner mellan en filial som är medlem i en mervärdesskattegrupp i en medlemsstat och dess huvudkontor som är etablerat i ett tredje land falla inom tillämpningsområdet för mervärdesskatt.

För att omfattas av mervärdesskatt måste transaktionen uppfylla alla villkor som återfinns i artikel 2(1)(c) i mervärdesskattedirektivet. För att utgöra en skattepliktig transaktion i enlighet med den artikeln måste leveransen göras mot ersättning och ske inom en medlemsstats territorium likväl som den måste utföras av en beskattningsbar person när denne agerar i denna egenskap. Om alla dessa villkor är uppfyllda är transaktionen skattepliktig. Det är intressant att notera att EU-domstolen endast uttryckligen analyserat ett av dessa kriterier i sin dom, nämligen att leveransen utfördes av en beskattningsbar person. Detta kan innebära att EU-domstolen i princip antog att de övriga kraven i artikel 2(1)(c) i mervärdesskattedirektivet var uppfyllda för att en transaktion ska vara beskattningsbar. Analysen kan ha tagit denna utformning genom att EU-domstolen inte vill riskera ett scenario där icke-beskattning skulle kunna inträffa.

Följaktligen avser denna uppsats belysa vissa frågor i och med *Skandia America* domen med särskilt avseende på kravet att tillhandahållandet av tjänster alltid måste ske "mot ersättning" för att vara skattepliktiga. Detta är en viktig fråga eftersom de faktiska omständigheterna i *Skandia America* antyder att det fanns en fördelning av kostnader mellan huvudkontoret och dess filial. Enligt EU-domstolens dom i mål C-77/01 *EDM* kan fördelning av kostnader komma att betraktas som erhållna mot ersättning. Den här uppsatsen antyder att det relativt korta avgörandet i *Skandia America* kan ha utelämnat en viktig diskussion angående huruvida de krav som uppställts i enlighet med artikel 2(1)(c) i mervärdesskattedirektivet för att begreppet skattepliktiga transaktioner ska vara uppfyllt verkligen föreligger.

List of Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
COM	Document of the European Commission
Commission	European Commission
EC	European Community/ Communities
ECR	European Court Reports
EU	European Union
HMRC	Her Majesty Revenue & Customs
IBFD	International Bureau of Fiscal Documentation
Implementing Regulation	Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax [2011] OJ L77/1
OJ	Official Journal of the European Union
Second Directive	Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax [1967] OJ 71/1303
Sixth Directive	Sixth Council Directive 77/88/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment [1977] OJ L145/1
TFEU	Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America
VAT	Value added tax
VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1

1 Introduction

1.1 Background

The judgment in *Skandia America* is an important contribution to the development of the Court of Justice of the European Unions (CJEU) case law concerning the concept of taxable transactions between branch and head office in scenarios including VAT grouping arrangements. Indeed, the circumstances of the case encompassed a very interesting situation, where the legal relationship among entities belonging to the same undertaking conflicted with their status as taxable persons in accordance with the VAT grouping provision as provided for in the VAT Directive[1]. The outcome of the case illustrates that the latter provision is more important and overrule the legal relationship between entities.

The ruling relate to the value added tax (VAT) treatment of cross-border supplies of services from a US holding company to its European branch as that branch was a member of a VAT group. In principle, the CJEU stated that services supplied by a main establishment in a third country to its branch located in a Member State constitute taxable transactions when the branch is part of a VAT group.[2] Moreover, as the branch belonged to a VAT group, that group became liable for the payment of VAT, not the branch itself.[3] Consequently, transactions between a branch which is a member of a VAT group in a Member State and its head office located in a third state, may fall within the scope of VAT.[4]

The scope of VAT is laid down in Article 2 of the VAT Directive. To fall within the scope of VAT a supply of services need to be made '*for consideration* within the *territory of a Member State* by a *taxable person acting as such*'.[5] Only if all these criteria are fulfilled the transaction is taxable. It can be derived from the reasoning by the CJEU in *Skandia America* that its analysis focused on one of these elements, namely if the supplies were performed by a taxable person. This may imply that the CJEU presumed that the other requirements in Article 2(1)(c) of the VAT Directive were fulfilled for the transaction to be subject to VAT.

The issue in *Skandia America* merely concern the collusion of two previously determined decisions by the CJEU. The outcome of *Skandia America* therefore illustrates the way these judgements shall interact with each other. Thus, the CJEU did not hesitate to rule that the branch and its foreign main establishment, in those circumstances, form part of two separate taxable persons. The argumentation by the CJEU mainly focused on the qualification of taxable person

[1] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1 (VAT Directive).
[2] Case C-7/13 *Skandia America Corp. (USA), filial Sverige v Skatteverket* [2014] OJ C421/7, para 32.
[3] *Skandia America* (n 2) para 38. This issue will not be discussed further, as it is outside the scope of analysis for this thesis.
[4] S Cornielje and I Bondarev, 'Scanning the Scope of Skandia', International VAT Monitor (2015) Volume 26, No. 1, p. 2.
[5] Emphasis added.

in the context of VAT groups. The viewpoint presented by the CJEU in this respect, confirming the position adopted by the Commission, is not consistent with the standpoint of Advocate General Wathelet.[6] The general impression from doctrine seem to imply that the ruling could have taken another form, or rather adhered to the findings as presented by Advocate General Wathelet. It can therefore be questioned why the CJEU adopted this approach, or rather, was it simply for the reason to avoid a situation where a risk of non-taxation of certain supplies between a third country establishment and its European Union (EU) based branch could have occurred.

Another yet unanswered question regards the scope of the decision. In this regard, this study will shed some light on the divergences among the adopted national VAT grouping schemes and what effect the judgment may have for jurisdictions practising different set of rules compared to the Swedish legislation which were at issue in the case. The decision, if interpreted extensively, may cause uncertainties among jurisdictions as to the legality of their VAT grouping schemes. Thus, due to a recently issued opinion of Advocate General Mengozzi in joined Cases C-108/14 and 109/14 *Larentia + Minerva and Marenave*, Member States may enjoy a margin of discretion as to their design of the VAT grouping option. According to Advocate General Mengozzi Member States are free to adopt this option and operate it in an independent manner, as long as it can be motivated by the objectives of Article 11 of the VAT Directive along with the principle of fiscal neutrality. It still remains to be observed if this opinion will be followed by the CJEU.

1.2 Purpose

The aim of this thesis is to analyze the fulfillment of the requirements for a taxable transaction to take place between a branch and its head office when one or both of them are part of a VAT group. In order to examine this issue, this thesis will elaborate upon the contribution of the judgment in *Skandia America* to the concept of a 'taxable person' and 'for consideration', as laid down in Article 2(1)(c) of the VAT Directive.

Firstly, with regard to the concept of a 'taxable person' it is necessary to investigate how many taxable persons the branch and head office will be regarded as, i.e. if they will be recognized as one single taxable person or two separate taxable persons. Furthermore, it must be clarified who is eligible to become a member of a VAT group and whether the Member States have any margin of discretion to decide upon the possibility for specific persons to become members of VAT grouping arrangements.

Secondly, the concept of a supply made 'for consideration' will be analyzed. Here it is relevant to discuss whether allocation of costs between two entities which belong to the same legal person are to be deemed as made 'for consideration'.

[6] Opinion of Advocate General Wathelet delivered on 8 May 2014 in Case C-7/13 *Skandia America Corp. (USA), filial Sverige v Skatteverket* [2014] OJ C421/7.

1.3 Method and material

In order to attain the aforementioned objectives the traditional legal dogmatic method will be applied in this research. In accordance with the method of interpretation of EU law a literal, purposive and contextual interpretation of the relevant provisions of the VAT Directive as well as other sources of law will be undertaken. The sources of law will be examined in their order of legal value, mainly focusing on the wording of the VAT Directive and relevant case law developed by the CJEU. Documents from the Commission and the VAT Committee will shed some light on the standpoint enacted by European authorities on issues related to VAT grouping and the *Skandia America* ruling. Additionally, other sources of law constituting scientific articles, doctrine and scholar's commentaries will also be reflected to enrich the discussion.

Case law of the CJEU will serve as an illustration of the applicability of the conclusions established in *Skandia America* to circumstances that differ from the facts of the case. Furthermore, the Swedish rules on VAT grouping will be contrasted and compared to the UK provisions, as these jurisdictions applies different VAT grouping schemes, especially with regard to the territoriality requirements regarding whom can be included in their national VAT group. The choice of jurisdictions merely have an exemplifying purpose to demonstrate the consequences of lack of consistency between the Member States different designs of VAT grouping schemes.

The ambition has not been to make a full review of secondary sources of law in this area of the tax system, as the ambit of this thesis mainly focuses on the CJEU's case law with regard to the notion of 'taxable person' and supplies effected 'for consideration' in the context of VAT groups. The selection of case law has occurred against the background of previous findings by the CJEU and discussions in literature.

1.4 Delimitations

This thesis will be dedicated to analyse the findings and scope of the CJEU's ruling in *Skandia America*. To be more precise, the first question referred by the national court in the judgment will be examined. Consequently, the reverse charge mechanism as considered by the CJEU in its reply to the second question will be excluded from the scope of this thesis. An in depth discussion on the concept of VAT grouping as derived from Article 11 of the VAT Directive and the CJEU's earlier case law in this area of the EU VAT legislation, will be undertaken. The requirement that a supply of services need to be made for consideration will be discussed in the light of the CJEU's conclusion in the first question of the *Skandia America* case.

Furthermore, regard will not be given to the concept of 'cost sharing arrangements' in Article 132(1)(f) of the VAT Directive, as they differ from VAT grouping provisions as they do not provide for the possibility to create a new single taxable person for VAT purposes.

This thesis will not present a full analysis of all Member States different VAT grouping schemes. Instead the study will focus on exemplifying a few national schemes. The exemplifying national VAT grouping provisions will not be subject to an in depth analysis, as this is outside the scope of this thesis. Domestic legislation will merely serve as illustrations to highlight diversities among the national provisions on VAT groups.

1.5 Disposition

Initially, to gain an understanding of the implication of the VAT grouping arrangement in the *Skandia America* case Chapter 2 will be devoted to present the common system of VAT as well as the concept of VAT groups as provided for in the VAT Directive. Furthermore, some issues with regard to the cross-border aspect of VAT grouping will be exposed. By way of introducing the reader to the issue raised in *Skandia America* an overview and an in depth description of the case will be presented in Chapter 3. The next part of this thesis consists of two main parts, both with the aim of realising the formulated questions as presented in Chapter 1.2.

Against this background Chapter 4 aims at clarifying the notion of a 'person' in relation to Article 11 of the VAT Directive. In Chapter 5 a discussion on the criteria as provided for in Article 2(1)(c) of the VAT Directive that a supply always need to be made 'for consideration' to qualify as a taxable transaction, will be undertaken in order to conclude if this element was present in *Skandia America* case as the CJEU did not explicitly discuss this issue in its ruling. The last Chapter will present the findings related to the objectives of this thesis.

2 VAT groups in the EU VAT Directive

2.1 The common system of VAT

One of the main objectives of EU is to realize an internal market without internal frontiers in which goods, persons, services and capital can circulate freely.[7] The common system of VAT has been introduced in the EU as a part of ensuring this motive, as taxation could be a factor that might bring free competition out of balance.[8]

European VAT is a general tax on consumption expenditure, exactly proportional to the price of goods and services, levied at each stage in the production and distribution chain.[9] VAT is an indirect tax, meaning that the burden of the tax is shifted from the producer to the final consumer.[10] Briefly, it can be described as taxing commodities on their way to the consumer, who ultimately pay the tax as part of the market price of the product or service.[11] The basic idea of the common system of VAT is to guarantee complete tax neutrality of all economic activities, provided that they are subject to VAT.[12] The principle of fiscal neutrality play an important role in that regard. It has been given the status of a fundamental principle in the area of VAT and it has been deemed to be a particular expression, in the area of taxation, for the general principle of equal treatment.[13] To ensure neutrality the deduction system play an important role, as it relive the trader entirely of the VAT burden. Accordingly, output VAT shall be chargeable after deduction of input VAT, borne directly by the various cost components on each transaction.[14]

The VAT Directive together with its Implementing Regulation[15], establishes the legislative framework of the EU VAT system. The VAT Directive recasts the Sixth Directive[16] and integrate its amendments.

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[7] See Article 3 of the Consolidated Version of the Treaty on the European Union [2012] OJ C326/1; Article 26 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).
[8] M Merkx, *Establishments in European VAT* (Volume 39, Kluwer Law International 2013) p. 29.
[9] Article 1(2) of the VAT Directive (n 1). See also Case C-89/81 *Staatssecretaris van Financiën v Hong-Kong Trade Development Council* [1982] ECR 1277, para 7.
[10] B Terra and J Kajus, *Introduction to European VAT (Recast)* (IBFD 2015) p. 241, 245.
[11] Terra and Kajus (n 10) p. 239, 245; A Schenk, V Thuronyi and W Cui, *Value Added Tax. A Comparative Approach* (2nd edn, Cambridge University Press 2015) p. 5.
[12] Case C-174/08 *NCC Construction Danmark A/S v Skatteministeriet* [2009] ECR I-10567, para 27.
[13] See Case C-454/98 *Schmeink & Cofreth AG & Co. KG v Finanzamt Borken and Manfred Strobel v Finanzamt Esslingen* [2000] ECR I-6973, para 59; Case C-162/07 *Ampliscientifica Srl and Amplifin SpA v Ministero dell'Economia e delle Finanze and Agenzia delle Entrate* [2008] ECR I-4019, para 25; *NCC Construction Danmark* (n 12) paras 40-41.
[14] Article 1(2) of the VAT Directive (n 1); *Hong-Kong Trade* (n 9) para 8. The aim of the deduction system has been explained in Case C-268/83 *D.A. Rompelman and E.A. Rompelman-Van Deelen v Minister van Financiën* [1985] ECR 655, para 19; Case C-98/98 *Commissioners of Customs and Excise v Midland Bank plc* [2000] ECR I-4177, para 19.
[15] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) [2011] OJ L77/1.
[16] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment [1977] OJ L145/1 (Sixth Directive).

2.2 Transactions subject to VAT

Article 2 of the VAT Directive lay down the scope of VAT. Transactions that fall outside the scope of application are not subject to tax. Pursuant to Article 2 of the VAT Directive there are four different kinds of taxable transactions i.e. supplies of goods, intra-community acquisition of goods, supplies of services and importation of goods.[17] Due to the purpose of this thesis, only transactions in the form of supplies of services will be discussed.

Following the definition laid out in Article 24(1) of the VAT Directive a 'supply of services' is any transaction which is not a supply of goods.[18] This notion is to be interpreted extensively, hence any transaction that involves a benefit or advantage for someone constitutes a service.

In accordance with Article 2(1)(c) of the VAT Directive 'the supply of services effected for consideration within the territory of a Member State by a taxable person acting as such' is subject to VAT. This implies that there are several requirements that need to be fulfilled for a supply of services to be taxable. Firstly, the supply need to be made for consideration. Secondly, the supply must take place within the territory of a Member State. Lastly, the supply need to be undertaken by a taxable person acting as such. In *Skandia America*, the CJEU found that the supplies performed by SAC to Skandia Sverige constituted taxable transactions in conformity with the VAT Directive. It can be questioned whether the CJEU did the full analysis required by the VAT Directive to establish that the transactions were subject to VAT or merely focused its analysis on one of the elements described above, namely if the supplies were provided by a taxable person. The CJEU subsequently found that SAC and its Swedish branch as a member of a VAT group constituted two different taxable persons, between whom taxable transactions took place. Therefore it is important to briefly introduce the legal framework of a taxable person in the context of VAT grouping.

The definition of 'taxable person' can be found in Article 9(1) of the VAT Directive. According to that provision taxable person means 'any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity'. Further, the other provisions under Title III 'Taxable Persons' in the VAT Directive provide for different kinds of taxable persons. One type of taxable person is a VAT group. VAT groups are special as they allow several legally independent persons to be treated as a single taxable person, for VAT purposes.[19] This means that the individual members ceases to exist for VAT purposes as they become part of the group in that regard. The following section will further develop the concept of VAT grouping arrangements as provided for in Article 11 of the VAT Directive.

[17] Article 2(1)(a)-(d) of the VAT Directive (n 1).
[18] For the definition of a 'supply of goods' see Article 14 of the VAT Directive (n 1).
[19] Article 11 of the VAT Directive (n 1). See also *Ampliscientifica* (n 13) para 19.

2.3 VAT grouping under Article 11 of the VAT Directive

2.3.1 Background and main objective of VAT groups

VAT grouping was firstly introduced in the EU legislation by the Second Directive[20]. It enabled Member States to consider legally independent persons who were closely linked to each other by economic, financial or organisational ties, as a single taxable person.[21] Thus, the VAT grouping provision was firstly materialised in the second sentence in Article 4(4) of the Sixth Directive. The objective of the provision as expressed in the explanatory memorandum to the proposal for a Sixth Directive was to give Member States the possibility to simplify administration for the parties dealing with the tax or for the reason to combat abusive practices.[22] Later, a third sentence of Article 4(4) was added,[23] which gave Member States the possibility to ensure that no unjustified benefits would arise from the exercise of grouping arrangements.[24]

On 1 January 2007 the current VAT Directive entered into force.[25] The field of application and the formal prerequisites of the provisions on VAT groups did not change due to the adoption of the present VAT Directive. Consequently, the original objective applies to Article 11 of the VAT Directive and should therefore be taken into account when applying that provision.[26]

2.3.2 The scope of Article 11 of the VAT Directive

In accordance with Article 11 of the VAT Directive each Member State may, after consulting the Advisory Committee on value added tax (VAT Committee)[27],[28] regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links. Furthermore, Member States may adopt any measures needed to prevent tax evasion or

[20] Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax [1967] OJ 71/1303 (Second Directive).
[21] See Article 4 and Annex A point 2 of the Second Directive (n 20).
[22] See Explanatory Memorandum regarding the proposal for a Sixth Council Directive on the harmonisation of Member States concerning turnover taxes - Common system of value added tax: uniform basis of assessment (COM(73) 950 final, 20.6.1973) p. 8.
[23] Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations [2006] OJ L221/9, p. 10.
[24] Proposal for a Council Directive amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion and avoidance, and repealing certain Decisions granting derogations (COM(2005) 89 final, 16.3.2005) p. 4.
[25] Article 413 of the VAT Directive (n 1).
[26] See Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax (COM(2009) 325 final, 2.7.2009) p. 4.
[27] Article 398 of the VAT Directive establishes the VAT Committee.
[28] *Ampliscientifica* (n 13) para 18.

avoidance arising from the use of that provision, in accordance with the second subparagraph of Article 11 of the VAT Directive. Empowering Member States to combat abusive practices is consistent with the CJEU's earlier case law and encouraged by the Commission in its Communication as the VAT grouping option should not give rise to any harm or unjustified gains.[29]

Article 11 of the VAT Directive is optional and it is at the Member States discretion to introduce VAT grouping schemes into their national legislation. Hence, not all Member States apply this group registration, but the European Commission has noted an increased interest among Member States in using the VAT grouping option.[30] Due to the optional character and brief wording of Article 11 of the VAT Directive a wide variety of interpretations of this provision can be seen among the Member States. This has caused divergences among the national VAT grouping schemes which may result in fiscal competition between Member States.[31] Although, Member States may continue to enjoy a margin of discretion when designing their VAT grouping schemes.[32] However, Member States must respect the objectives and the principles, as laid down in the VAT Directive when forming their national schemes.[33]

In Case C-162/07 *Ampliscientifica* the CJEU declared that by joining a VAT group a taxable person cannot be regarded as a separate taxable person anymore.[34] Thus, VAT groups exist only for VAT purposes. This means that members of a group maintains their legal form, but for VAT purposes they are part of a new separate taxable person.[35] In that regard, the group can only be identified by a single VAT number.[36]

In particular, transactions made for consideration between members of a VAT group are out of scope of VAT. This means that only transactions between the group and third parties are taxable. Consequently, in order to determine the existence and scope of the right to deduct input VAT only the group's transactions with third parties can serve as the basis for assessment.[37] VAT groups which include members with no right or partial right of deduction may enjoy cash

[29] Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECR I-1609, para 70; COM(2009) 325 (n 26) p. 12.
[30] In 2009 the European Commission announced that fifteen Member States, including Austria, Belgium, the Czech Republic, Cyprus, Denmark, Estonia, Finland, Germany, Hungary, Ireland, the Netherlands, Romania, Spain, Sweden and the United Kingdom, had introduced the VAT grouping option in their national legislation and Slovakia were about to implement it, see COM(2009) 325 (n 26) p. 2. Latvia is another country interested in implementing the VAT grouping option, see K Vyncke, 'EU VAT Grouping from a Comparative Tax Law Perspective', EC Tax Review (2009) Volume 6, pp. 299-309, p. 299.
[31] Vyncke (n 30) pp. 299-300; COM(2009) 325 (n 26) p. 2.
[32] Opinion of Advocate General Mengozzi delivered on 26 March 2015 in joined Cases C-108/14 and 109/14 *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham and Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG* [2015] OJ C159/12-13, paras 70-72. Others argue that the Member States margin of discretion in this regard should be limited, see A van Doesum and G-J van Norden, 'T(w)o become one: the Communication from the Commission on VAT grouping', British Tax Review (2009) Volume 6, pp. 657-667, p. 660.
[33] Vyncke (n 30) pp. 299-300; Opinion of AG in *Larentia + Minerva and Marenave* (n 32) paras 70-72; Case C-480/10 *European Commission v Kingdom of Sweden* [2013] OJ C171/2, para 33.
[34] *Ampliscientifica* (n 13) para 19.
[35] COM(2009) 325 (n 26) p. 5.
[36] *Ampliscientifica* (n 13) paras 19-20.
[37] Opinion of AG in *Larentia + Minerva and Marenave* (n 32) para 49; COM(2009) 325 (n 26) p. 11.

flow advantages as those transactions should have been taxable, but instead is categorised as internal transactions which are exempt from taxation.[38] Another advantage derived from VAT grouping is simplified VAT administration and reduced costs for the taxable persons in this regard, e.g. as only one VAT return for the whole group need to be submitted.[39]

2.3.3 The territorial scope of Article 11 of the VAT Directive

As stated in the previous section, Article 11 of the VAT Directive provides the possibility for 'any persons established in the territory of that Member State' to form a VAT group. This implies that the creation of VAT groups is limited to persons established in the territory of one Member State. A territorial restriction was not present in the first appearance of this option in the Second Directive, but was included in the version introduced by the Sixth Directive.[40] Consequently, it is not possible to form cross-border VAT groups.[41] The reasons underlying this territorial restriction is unclear, but could be derived for the sake of avoiding distortion of competition between Member States.[42]

Allowing groups to extend over national borders may result in situations of taxation without any right to deduct VAT, or reversely VAT deduction without taxation, which could lead to abuse.[43] Thus, some Member States deviate from the geographical limitation as different interpretations of its scope are practised among the Member States.[44] For example in the Netherlands foreign taxable persons which have a fixed establishment within the Netherlands are allowed to join a Dutch VAT group.[45] Services that are purchased by a foreign establishment are usually taxed in accordance with the place of supply rules under Article 44 of the VAT Directive, i.e. where he is established, and the right to deduct is determined by the law of the Member State of establishment in accordance with Article 169(a).[46] Contrary, if this establishment instead where located in the same Member State as the VAT group, the services

[38] See COM(2009) 325 (n 26) pp. 11-12; Opinion of Advocate General Jääskinen delivered on 27 November 2012 in Case C-85/11 *European Commission v Ireland* [2013] OJ C156/3, para 45. See also opinion of AG in *Larentia + Minerva and Marenave* (n 32) para 82; C Amand, 'VAT Grouping, FCE Bank and Force of Attraction – The Internal Market is Leaking', International VAT Monitor (2007) July/August, pp. 237-249, p. 238.
[39] COM(2009) 325 (n 26) p. 10; K Vyncke, 'VAT Grouping in the European Union: Purposes, Possibilities and Limitations', International VAT Monitor (2007) July/August, pp. 250-261, p. 252; Amand (n 38) p. 238; *Ampliscientifica* (n 13) paras 19-20.
[40] Merkx (n 8) p. 150.
[41] R Zuidgeest, 'Cross-Border VAT Grouping', International VAT Monitor (2010) January/February, pp. 25-30, p. 25; J Zutt, 'VAT on Intercompany Supplies: Why *Skandia* Is a Big Deal', Derivatives and Financial Instruments (2014) November/December, pp. 278-280, p. 279.
[42] Zuidgeest (n 41) pp. 25-26.
[43] Merkx (n 8) pp. 157-158, 178.
[44] See Vyncke (n 30) p. 302.
[45] A van Doesum, H van Kesteren and G-J van Norden, 'The Internal Market and VAT: intra-group transactions of branches, subsidiaries and VAT groups', EC Tax Review (2007) Volume 1, pp. 34-43, p. 36 footnote 20.
[46] In Case C-388/11 *Le Crédit Lyonnais v Ministre du Budget, des Comptes publics et de la Réforme de l'État* [2013] OJ C325/2, the CJEU held that a taxable person is not allowed to include the turnover of its fixed establishments located in another Member State or in a third country when calculating its deductible amount of input VAT.

would be subject to VAT in that Member State and that Member State determines the deductibility of VAT.[47] This may lead to unjustified, material VAT advantages.[48]

A controversy in doctrinal debate concern whether the geographical limitation in Article 11 of the VAT Directive is contrary to the freedom of establishment in Article 49 of the TFEU.[49] However, due to the wording of the provision and the potential effects cross-border VAT groups could have on Member States tax sovereignty, the Commission is of the opinion that only establishments that are located within one Member State should be eligible for inclusion in VAT grouping arrangements.[50] Further, the Commission implies that excluding a foreign establishment which constitutes a taxable person together with another establishment which is part of a VAT group in its Member State of establishment is not contrary to the *FCE Bank*[51] case, since that ruling did not concern the situation of VAT groups.

In *FCE Bank* the CJEU stated that a head office and its branch established in two different Member States are to be treated as one person with the consequence that no taxable supplies take place between them. Moreover, the Commission implies that by becoming a member of a VAT group, the entity does not exist for VAT purposes anymore. As such, the entity have dissolved itself from its head office, with the consequence that the supplies are deemed to happen between two separate taxable persons and therefore may be subject to VAT. Consequently, this situation is beyond the scope of the decision in Case C-210/04 *FCE Bank*.[52] In other words, an entity cannot be part of two taxable persons in the same time. By entering a VAT group the establishment becomes part of that taxable person for VAT reasons and the VAT group is more important than the relationship between the two establishments. This reasoning by the Commission is in line with the notion of single taxable person as established in *Ampliscientifica* where all individual taxable persons could exist for VAT purposes parallel with the group.

This interpretation has been confirmed by the CJEU in *Skandia America* where SAC and Skandia Sverige were found to be two different persons with respect to VAT, as Skandia Sverige were part of a VAT group. The inclusion of an entity in a grouping arrangement split the relationship between the head office and its branch for VAT purposes. Consequently, VAT is due on the transactions taking place between them, provided the other conditions for a taxable transaction are met. Such view was not expressed by the Advocate General Wathelet in *Skandia America*. He proposed that the branch could not be regarded as economically independent enough

[47] Merkx (n 8) pp. 158-159.
[48] Zuidgeest (n 41) pp. 29-30.
[49] See Doesum, Kesteren and Norden (n 45) pp. 37-41; Merkx (n 8) pp. 155-156 with further references. This is an important issue for cross-border VAT groupings, but will not be subject to further discussion in this thesis.
[50] COM(2009) 325 (n 26) pp. 6-7. See also Merkx (n 8) p. 159, 178.
[51] Case C-210/04 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v FCE Bank plc* [2006] ECR I-2803.
[52] COM(2009) 325 (n 26) p. 8. For more details about the ruling in *FCE Bank*, see section 4.1.2. The analysis of *FCE Bank* by the Commission has been criticized, see S Heydari, 'When One Becomes Two: The Forlorn Future of the Fixed Establishment', Derivatives and financial instruments (2014) May/June, pp. 149-152, p. 150.

from its head office and therefore the branch alone could not form part of a VAT group. Accordingly, the VAT group could have included an entity established in a third country or both the branch and the head office could be part of the VAT group with the result that the transactions would take place between the VAT group and the foreign establishment. In its ruling the CJEU replied to the precise question asked by the referring court, not elaborating upon other possible situations of cross-border VAT groupings. This means that we actually do not know how far the scope of *Skandia America* extends and what possible situations can fall under it.

The following chapter will be dedicated to investigate the *Skandia America* case. Consequently, the facts and circumstances of the judgment will be analysed closely, as well as the conclusion reached by the CJEU. The chapter will also shed some light on the concurring opinion delivered by Advocate General Wathelet.

3 The judgment in *Skandia America*

In September 2014 the CJEU delivered its decision in Case C-7/13 *Skandia America*. The case concerned the VAT treatment of cross-border supplies of services from a US holding company to its European branch as that branch was a member of a VAT group. In principle, the CJEU stated that services supplied by a main establishment in a third country to its branch located in a Member State constitute taxable transactions when the branch is part of a VAT group.[53] Moreover, as the branch belonged to a VAT group, that group were liable for the payment of VAT, not the branch itself.[54] Consequently, transactions between a branch which is a member of a VAT group in a Member State and its head office located in a third state, may fall within the scope of VAT.[55]

The ruling is considered as important as it is at the basis of current changes and developments in international tax law.[56] Thus, different views have been expressed regarding the scope of this decision. Some argue that the decision could have a major impact for the exempt business sector, particularly for the financial sector including bank and insurance companies.[57] Meanwhile, others are of the opinion that the case may have a wider area of application, including fully taxable head office to branch transactions.[58] Before presenting eventual implications that may be derived from the judgment, this chapter will present the specific circumstances in the case and discuss the CJEU's findings.

3.1 The facts and issue in *Skandia America*

During 2007 and 2008 Skandia America Corporation (SAC), a company incorporated in the United States, was the global purchasing company for IT services for the Skandia group. After acquiring the IT services, SAC distributed those to companies within the Skandia group. In Sweden, SAC distributed the IT services to its own branch Skandia Sverige, who were a member of a Swedish VAT group. Skandia Sverige processed the IT services into the final product, which subsequently were supplied to various entities in the Skandia group, both within and outside the Swedish VAT group. On each supply an additional mark-up of five per cent were charged. The costs derived from the purchased IT services were allocated between SAC and Skandia Sverige through internal invoices.[59]

[53] *Skandia America* (n 2) para 32.
[54] ibid, para 38.
[55] Cornielje and Bondarev (n 4) p. 2.
[56] O Courjon, 'New Rules for Head Office to Branch Scenarios – Comments on the Skandia Case', International VAT Monitor (2015) Volume 26, No. 1, p. 1.
[57] Cornielje and Bondarev (n 4) p. 1.
[58] Courjon (n 56) p. 1.
[59] Opinion of AG in *Skandia America* (n 6) paras16-17; *Skandia America* (n 2) para 17.

The Swedish tax authorities decided to charge VAT on the supplies made from SAC to Skandia Sverige, taking the view that those supplies constituted transactions subject to tax in Sweden.[60] This decision was appealed by Skandia Sverige before the Stockholm Administrative Court, which referred two question for a preliminary ruling by the CJEU:[61]

'(1) 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?

(2) If the answer to the first question is in the affirmative, is the main establishment in the third country to be viewed as a taxable person not established in the Member State within the meaning of Article 196 of [the VAT Directive], with the result that the purchaser is to be taxed for the transactions?'[62]

What the national court wanted to know by its first question was whether the scope of the principle as derived from the *FCE Bank* ruling, i.e. that a head office and its branch together constitutes one taxable person,[63] also cover situations where a branch of a company established in a third state belongs to a VAT group and as such forms part of another more complex person for the purpose of VAT.[64] In this regard, the decision in *FCE Bank* concerned whether a head office and a branch established in two different Member States were to be considered as two separate persons between which transactions could take place. In that case the CJEU clarified that transactions between a head office and a branch does not take place between two separate persons, as the branch is not economically independent enough to be a distinct person from its head office. As such, a head office and its branch are deemed to be considered as one taxable person for the purpose of VAT.[65] In *Ampliscientifica* the CJEU ruled that a VAT group is one single taxable person and its members cease to exist for VAT purposes.[66] Consequently, the ruling in *Skandia America* concerned a situation where these two notions of a single taxable person as established by case law, collided. Therefore, the main issue in *Skandia America* concerned how to reconcile these two judgments.

3.2 The CJEU's ruling and reasoning

With regard to the first question, i.e. whether the services supplied comprised taxable transactions, the CJEU noted that a legal relationship must exist between the service supplier and the recipient of the services for the supplies to be taxable.[67] In this regard, the CJEU

[60] *Skandia America* (n 2) paras 18-19.
[61] ibid.
[62] ibid, para 20.
[63] *FCE Bank* (n 51) para 41.
[64] Opinion of AG in *Skandia America* (n 6) para 25.
[65] *FCE Bank* (n 51) paras 14-15, 34-37, 41.
[66] *Ampliscientifica* (n 13) para 19.
[67] *Skandia America* (n 2) para 24; *FCE Bank* (n 51) para 34.

concluded that no legal relationship existed between SAC and Skandia Sverige, since the branch was not economically independent from its head office. This was so, due to the fact that Skandia Sverige did not bear the economic risk arising from its business and according to Swedish law could not have any endowment capital on its own. Consequently Skandia Sverige were dependent on SAC.[68] The circumstance that an agreement on the sharing of costs existed between SAC and Skandia Sverige, were found to be irrelevant as it had not been negotiated between independent parties.[69] Consequently, the branch and the head office were to be considered as one taxable person for the purpose of VAT, in conformity with the decision in *FCE Bank*.

However, as Skandia Sverige were a member of a VAT group and together with the other members of the group formed a single taxable person in accordance with Article 11 of the VAT Directive, Skandia Sverige ceased to exist as an individual taxable person for the purpose of VAT. Consequently, the supplies of services made by SAC to Skandia Sverige were to be considered as made to the VAT group and not to its individual member, Skandia Sverige.[70] Therefore, those supplies constituted taxable transactions under Article 2(1)(c) of the VAT Directive.[71] The answer to the first question, essentially states that services supplied by a main establishment in a third state to its branch in a Member State constitutes taxable transactions, when the branch is part of a VAT group.[72]

The CJEU did not follow the opinion of Advocate General Wathelet, who essentially considered that Skandia Sverige as a branch, could not be included in a VAT group independently from its head office.[73] Advocate General Wathelet found this conclusion to be in conformity with the ruling in *FCE Bank*, where the CJEU clearly stated that a branch could not be regarded as a separate taxable person from its head office.[74] Furthermore, Advocate General Wathelet supported his assessment with the argument that supplies of services between a head office and its branch cannot be taxable as they are performed within the same taxable person, which is not the case regarding supplies provided between the branch and its customers.[75] As such, the transactions between SAC and Skandia Sverige could not be taxable, as they both were to be included in the VAT group and consequently the supplies would be regarded as taking place within the same taxable person.

Neglecting the opinion of Advocate General Wathelet the CJEU instead adhere to the findings by the Commission in its Communication on VAT grouping, which confirm the inapplicability of the *FCE Bank* principle in circumstances involving VAT grouping arrangements, such as in *Skandia America*.[76] In its Communication, the Commission states that the ultimate consequence

[68] *Skandia America* (n 2) paras 25-26.
[69] See *Skandia America* (n 2) para 27; Opinion of AG in *Skandia America* (n 6) para 54. See also *FCE Bank* (n 51) para 40.
[70] *Skandia America* (n 2) paras 28-30. See also *Ampliscientifica* (n 13) para 19.
[71] *Skandia America* (n 2) para 31.
[72] ibid, para 32.
[73] Opinion of AG in *Skandia America* (n 6) para 79.
[74] ibid, paras 47-49; *FCE Bank* (n 51) para 41.
[75] Opinion of AG in *Skandia America* (n 6) para 49.
[76] COM(2009) 325 (n 26) p. 8.

of becoming a member in a VAT group is that the taxable person dissociate itself from its foreign fixed establishment for the purpose of VAT as it becomes part of a new separate taxable person in this regard.[77] In conformity with the ruling in *Ampliscientifica*, this means that services supplied to a member of a VAT group are deemed to be considered as made to the whole group. Consequently, those supplies are made between two persons, i.e. between the VAT group and the third party, i.e. the US head office, with the result that those supplies may be taxable.[78] This means that in a situation such as the one in *Skandia America*, where the head office is located in a third country supplies services to its branch which belong to a VAT group in the Member State of establishment, the ruling in *Ampliscientifica* is given precedence over the decision in *FCE Bank*, as the latter did not concern the situation of VAT grouping.

The CJEU then proceeded with the second question. That question concerned, in essence, whether the VAT group, to which the branch belonged, as the purchaser of the services could be held liable for the VAT payable. The CJEU pointed out that the VAT group was to be considered as the person to whom those services were supplied, since the branch receiving the services was a member thereof.[79] Consequently, the VAT group, as the purchaser of the services, was liable for the VAT payable.[80]

From the judgment it can only de derived that the supplies of services between SAC and the VAT group constitutes taxable transactions as the criteria of 'taxable person' in Article 2(1)(c) of the VAT Directive was fulfilled. On the other hand, it cannot be derived from the case that the supplies between SAC and the VAT group meet the other requirements for a taxable transaction as provided for in Article 2(1)(c), for example the condition that the supply need to be done for consideration. It seems that the CJEU merely assumed that the other criteria necessary for a taxable transaction to exist were satisfied. This issue will be discussed further in Chapter 5. The next Chapter will elaborate upon the concept of a 'person' in a VAT grouping context.

[77] COM(2009) 325 (n 26) p. 4, 8.
[78] *Ampliscientifica* (n 13) para 19.
[79] *Skandia America* (n 2) para 35.
[80] ibid, paras 37-38; Opinion of AG in *Skandia America* (n 6) para 87. This thesis will not discuss this issue further.

4 The concept of a 'person' in the context of VAT groups

As implied above, there are several requirements that need to be met for a supply of services to be subject to VAT in accordance with Article 2(1)(c) of the VAT Directive. This chapter will focus on one of the elements necessary for the existence of a taxable transaction, namely that the services has to be supplied by a taxable person.

Title III 'Taxable Persons' in the VAT Directive establishes who can be regarded as a taxable person for VAT purposes. Following the structure of the VAT Directive one type of taxable person is a VAT group. Pursuant to the first sentence of Article 11 of the VAT Directive, 'each Member State may regard as a single taxable person any *persons* established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links'.[81] The present chapter intends to investigate who can be regarded as a 'taxable person' in order for supplies to be taxable. In order to reach a conclusion in this matter a discussion of who are eligible to become a member of a VAT grouping arrangement in conformity with Article 11 of the VAT Directive, must be presented.

4.1 Issues of 'taxable person'

As mentioned above, services need to be supplied by a 'taxable person' to be taxable. By its case law the CJEU have developed several notions of taxable person. Below, a discussion on these different notions will be discussed in the context of VAT grouping.

4.1.1 VAT group as a separate taxable person

The status of a VAT group as one single taxable person was established in *Ampliscientifica*. In this case it was also stated that the ultimate effect of being a member of a VAT group and consequently regarded as a single taxable person is that the individual members cease to exist for VAT purposes.[82] Consequently, the members of a VAT group cannot submit separate VAT returns nor be identified for VAT purposes as separate taxable persons within or outside the group.[83] The ruling in *Ampliscientifica* has been confirmed by the Commission in its communication, where it held that entities that are members of a VAT group cease to exist as individual taxable persons for VAT purposes as they are deemed as one new taxable person.[84]

[81] Emphasis added.
[82] *Ampliscientifica* (n 13) para 19.
[83] See B Terra and P Wattel, *European Tax Law* (2nd edn, Kluwer Law International 2012) pp. 313-314; B Terra and J Kajus, *A Guide to the European VAT Directives – Introduction to European VAT 2013* (Volume 1, IBFD 2013) p. 396.
[84] COM(2009) 325 (n 26) p. 4.

4.1.2 Branch and its head office as one taxable person

The ruling in *FCE Bank* concerned whether services supplied within the same legal entity were to be treated as supplies of services for consideration chargeable to VAT. In the case, FCE Bank plc, a company established in the UK, supplied VAT exempt services to its Italian branch. The Italian branch accounted for VAT on the supplies from FCE Bank in accordance with Italian law. Following the payment of VAT, the Italian branch claimed for refund of the VAT charged on the ground that it lacked separate legal personality and that VAT were not to be chargeable on supplies between entities which together constitutes one single taxable person, which the Italian tax authorities refused.[85] The main issue in this case concerned whether the Italian branch of FCE Bank could be regarded as an independent entity with the consequence that the supplies between it and FCE Bank were subject to VAT.

With reference to settled case law, the CJEU stated that a legal relationship between the service provider and the recipient of the services must exist for a transaction to be taxable.[86] The CJEU concluded that no legal relationship for VAT purposes existed between the Italian branch and FCE Bank. This conclusion were reached since the branch did not carry out an independent economic activity, as it lacked endowment capital and did not bear the economic risk arising from its business. Consequently, the branch were dependent upon FCE Bank and together they constituted one single taxable person for the purpose of VAT.[87] This case confirms that supplies of services between a head office and its fixed establishment located in another Member State are outside the scope of VAT, as they are deemed to be made within one and the same taxable person. As those entities cannot be treated as separate individual taxable persons, the conditions for transactions subject to VAT in Article 2(1)(c) of the VAT Directive are not fulfilled and as a result, there are no supplies for VAT purposes between them.[88]

In *Skandia America* the CJEU found that the branch and its head office were two separate taxable persons, between which taxable transactions could take place, even though the branch were economically dependent on its head office. The decisive element in the case for the CJEU to reach this conclusion seem to be that the branch were part of a VAT group. This implies that the status as a taxable person in accordance with VAT grouping provisions are more important

[85] *FCE Bank* (n 51) paras 14-16, 19.
[86] ibid, para 34 with references.
[87] *FCE Bank* (n 51) paras 35-37; Opinion of Advocate General Léger delivered on 29 September 2005 in Case C-210/04 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v FCE Bank plc* [2006] ECR I-2803, para 46, 48.
[88] For the reason of legal certainty and to establish a uniform interpretation, the Commission proposed an amendment to the Sixth Directive that would clarify that supplies undertaken within the same legal entity are not supplies subject to VAT, see Proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services (COM(2003) 822 final, 23.12.2003) pp. 9-10. Due to lack of consensus the proposal was never adopted, see Commission Staff Working Document *Accompanying document to the* GREEN PAPER on the future of VAT - Towards a simpler, more robust and efficient VAT system (SEC(2010) 1455 final, 1.12.2010) p. 93.

than the legal relationship between SAC and Skandia Sverige.[89] It is evident from the ruling that the VAT group and its members are independent from the head office.[90]

If Skandia Sverige was not part of a VAT group, the supplies by SAC to Skandia Sverige may have been regarded as non-taxable supplies following the principle laid down in *FCE Bank*.[91] The fact that the branch belonged to a VAT group changed the whole scenario, as SAC had to provide taxable supplies to the VAT group since Skandia Sverige did not exist for VAT purposes anymore. Consequently, no transactions could take place between the branch and its head office. Instead, the transactions took place between the head office and the VAT group, in which the branch was a member. As a result, this case implies that the decision in *FCE Bank* is not applicable in a situation where the branch belongs to a VAT group. This is so as the head office and the branch cannot be considered as one person anymore.

In *Skandia America* the CJEU found that SAC and Skandia Sverige could not be regarded as a taxable person for VAT purposes as Skandia Sverige belonged to another single taxable person. This means that the judgment in *FCE bank* is not applicable in situations where the branch is a member of a VAT group. Instead, the VAT group acts as a single taxable person in accordance with the ruling in *Ampliscientifica*. Consequently, in a situation such as the one in *Skandia America* the principle established in *Ampliscientifica* overrules the ruling in *FCE Bank*. As such, when a branch belongs to a VAT group there is no longer any legal relationship between a branch and its main establishment.

Consequently, it could be argued that the ruling in *Skandia America* limit the material scope of the *FCE Bank* principle, i.e. that a head office together with its branch constitutes one taxable person with the result that no taxable supplies can take place between these entities as they constitute one person. Thus, it need to be stressed that the *Skandia America* case concerned certain specific circumstances, where the branch were located within an EU Member State, while the head office were located in a third country. Already with regard to this, it could have been questioned whether *FCE Bank* would be applicable, as that decision only concerned situations where both the head office and the branch is established within the territory of the EU, but in different Member States.[92] Consequently, *Skandia America* may not have overruled the *FCE Bank* case, just limited its scope. To put it differently, *Skandia America* may just have given another independent answer concerning head office to branch transactions.

As the *Skandia America* judgment concerned specific circumstances, the ruling itself may be limited in scope. This remains to be answered in the future. Thus, it is interesting to discuss the applicability of the case in circumstances that are different from those in the judgment. For example, how are transactions involving a branch which is established in a third state and its

[89] VAT Committee, Working Paper NO 845, taxud.c.1(2015)747072 – EN, 17.2.2015, p. 13.
[90] E Kristoffersson, 'Cross-border supplies and VAT groups: the Skandia America Corp judgment', World Journal of VAT/GST Law (2014) Volume 3, issue 3, pp. 219-223, p. 221.
[91] Observe the territorial scope of the ruling in *FCE Bank* (n 51), which concerned a branch and a head office both located within different Member States.
[92] For a discussion on the geographical limitation in Article 11 of the VAT Directive, see Chapter 2.3.3.

head office which is located within the EU going to be treated? Furthermore, the case does not answer the question of how to consider transactions when the head office is part of a VAT group and not the branch. This gives rise to the question if only a branch can be a member of a VAT group? To become a member of a VAT group, Article 11 of the VAT Directive states that '*any persons*' established within the territory of a Member State that are legally independent, but have a close relationship through financial, economic and organisational links can form a VAT group. The next section will shed some light on these kind of situations.

4.1.3 'Reverse' *Skandia* – is the branch an independent taxable person?

This section will elaborate upon the scope of *Skandia America*. More precisely, if the judgment can be applied in situations that are different from the circumstances of the case, e.g. where the head office, instead of the branch, is a member of the VAT group and where the branch is located in a third country. These circumstances would be a reversed *Skandia America* scenario. In this reversed situation, could taxable supplies still occur between the branch and the VAT group, i.e. can the branch be regarded as an independent taxable person?

The Swedish Supreme Administrative Court in 2006 ruled on a 'reverse' *Skandia America* situation, i.e. the branch were located in a third country and supplied services to its head office established in Sweden, which were a member of a Swedish VAT group.[93] The finding and reasoning by the Swedish Supreme Administrative Court reminds of the assessment made by the CJEU in *Skandia America*. The national court concluded that the supplies between the VAT group and the branch were to be taxable.[94] The Swedish legislation implementing the VAT Directive and the provision on VAT grouping only allow establishments which are physically located within Sweden to be members of VAT grouping arrangements.[95] Consequently, both the Swedish Supreme Administrative Court in the ruling from 2006 and the CJEU in *Skandia America* reached the conclusion that the entity belonging to the VAT group has to be separated from its other establishment as these entities were deemed to be two separate taxable persons between which supplies might be taxable.[96]

Some argue that the same principles as applied in *Skandia America* shall apply to situations where the circumstances in *Skandia America* are reversed.[97] As a result, a branch can be regarded as an independent taxable person distinct from its head office, as the branch constitutes a taxable person for VAT purposes. This has been motivated with the argument that the VAT group is a taxable person only from a VAT viewpoint, while at the same time also legal persons, individuals or other persons in a similar situation as a VAT group can be regarded as taxable persons. The fact that the branch can be regarded as a separate taxable person is supported by the CJEU in *Skandia America*, as it ruled that the *FCE Bank* principle, i.e. that the branch is not

[93] RÅ 2006 not 29.
[94] Kristoffersson (n 90) pp. 221-222.
[95] Swedish Value Added Tax Act (Mervärdesskattelag (1994:200)) Ch. 6 a § 2 para. 2.
[96] See *Skandia America* (n 2) paras 28-32; Kristoffersson (n 90) p. 222.
[97] Kristoffersson (n 90) p. 222.

independent enough from its head office, cannot apply where the branch is a member of a VAT group, because then it is part of another person and accordingly is independent enough from its head office from a VAT perspective.[98] When a VAT group is involved, the branch or the main establishment which does not form part thereof is to be regarded as independent from the entity belonging to the VAT group. Further it has been stated that the conclusions reached by the CJEU in *Skandia America* equally would apply to a situation where the head office would have been established in a Member State instead of a third country.[99] This interpretation is possible, since it has been stated that the scope of *Skandia America* is limited, but that the conclusions reached by the CJEU are formulated in a general manner. Consequently, it may be derived from the scope of *Skandia America* that also situations where services are supplied from the VAT group to an entity not forming part of that VAT group and situations when the services are supplied from another Member State, rather than from a third country are subject to the principles laid down in the judgment.[100]

4.2 Issues of a 'person' as a member of a VAT group

The purpose of the ruling in *Skandia America* was probably to avoid a scenario where transactions between a head office and its branch are not taxable because it is made within one single taxable person. This would have been undesirable as it would create a situation of non-taxation. Consequently, the CJEU found that transactions between a head office and its branch, when the latter is part of a VAT group, are taxable since they are provided between two different persons for VAT purposes. The CJEU did not have to go this way in its reasoning as it still could have concluded that SAC and Skandia Sverige were to be deemed as one person and that the transaction is non-existent for VAT purposes. This could have been done on the basis of another provision, i.e. Article 27 of the VAT Directive, where the transactions could have been taxable as internal supplies.[101]

In accordance with Article 27 of the VAT Directive Member States are able to treat internal supplies of services as a supply of services for consideration in order to prevent distortion of competition. Thus, this measure is only permissible if another person would have supplied those services and as a consequence VAT would not be fully deductible on the supplies.[102] This means that taxable supplies not only can take place between two different taxable persons, but also makes it possible for a Member State to tax transactions within one person. UK applies Article 27 of the VAT Directive and therefore transactions are treated in accordance with that provision in the UK.

[98] Kristoffersson (n 90) p. 222; *Skandia America* (n 2) para 26.
[99] Kristoffersson (n 90) p. 223.
[100] ibid.
[101] See B Terra and J Kajus, 'Commentary Case C-7/13 (Skandia America)', IBFD Commentary, pp. 5-6.
[102] Article 27 of the VAT Directive (n 1); B Terra, *VAT - The case of value added tax in the European Union* (Volume 5, Series on International indirect tax 2014) p. 82.

Under the Swedish VAT grouping provisions only physically located establishments in Sweden can be part of the Swedish VAT group.[103] As a result, the CJEU in *Skandia America* stated that the Swedish branch became part of the group separately from its US head office and these entities were to be regarded as two different taxable persons.[104] It must be stressed here that other Member States, such as the Netherlands, Ireland and the UK, applies different rules on VAT grouping and consequently do not consider supplies of services from a head office to its branch, which is a member of a VAT group, as taxable transactions.[105] The ruling in *Skandia America* may influence VAT costs in these Member States when only a limited right to deduction of input VAT is available. It is still unclear how far-reaching an eventual retrospective effect of new judgments from the CJEU will be.[106] The British provisions will be considered more in depth below.

The British rules on VAT grouping is different from the Swedish rules as applied in *Skandia America.* In accordance with the British legislation on VAT grouping, a body corporate, e.g. a company, need to either be established or have a fixed establishment in the UK to be able to join a VAT group.[107] Contrary to the Swedish VAT grouping provision, the UK allows the whole legal entity, i.e. both the head office and its branches, to be included in the VAT group.[108] As such, not only the British establishment is allowed to form part of the group. Consequently, transactions are not taxable between an overseas establishment and a British establishment which is part of the VAT group, as they are regarded to take place within the same taxable person.[109]

The reason the UK apply Article 27 of the VAT Directive is merely because also foreign establishments will be included in the VAT group. In consequence, transactions between those are not existent for VAT purposes. Due to the application of Article 27 of the VAT Directive, the transactions can still be regarded as deemed supplies and be subject to VAT.

Article 27 of the VAT Directive is not widely adopted and it has been implied that cross-border (i.e. between two different Member States) application of the provision could be problematic, as this would require a corresponding right to deduct input tax in the other Member State. Further it has been held that the application may just be complicated and contribute to tax neutrality.[110]

The UK's tax and customs authority (HMRC) is of the opinion that the judgment in *Skandia America* did not concern the British VAT grouping provisions, which substantially differs from

[103] Swedish Value Added Tax Act (n 95) Ch. 6 a § 2 para. 2.
[104] *Skandia America* (n 2) paras 28-32.
[105] Kristoffersson (n 90) p. 222.
[106] ibid, p. 223.
[107] UK Value Added Tax Act 1994, ss 43(1) and 43A.
[108] ibid.
[109] HMRC, Revenue and Customs Brief 2 (2015): VAT grouping rules and the Skandia judgment, https://www.gov.uk/government/publications/revenue-and-customs-brief-2-2015-vat-grouping-rules-and-the-skandia-judgment/revenue-and-customs-brief-2-2015-vat-grouping-rules-and-the-skandia-judgment, published 10 February 2015, accessed 17 May 2015.
[110] SEC(2010) 1455 (n 88) p. 98.

the Swedish rules applicable in *Skandia America*. Consequently, the case has been held to have no impact on the British provisions.[111] With regard to this statement of the HMRC one can start wondering whether the scope of the ruling in *Skandia America* is limited, as VAT grouping is an optional provision which also gives each Member State the discretion to determine the rules ramifications. As stated in section 2.3.2, it is evident that most of the Member States apply a unique design of their VAT grouping schemes.

Advocate General Wathelet in his opinion in *Skandia America* supported the view as presented by the UK government. Advocate General Wathelet namely considered that a third country establishment of an entity which is part of a VAT group must also be included in the group, since a branch cannot be regarded as independent from its head office in accordance with the ruling in *FCE Bank*.[112]

From my point of view, it could be concluded from the discussion above that both the Swedish and British provisions on VAT grouping are allowed. Firstly this conclusion has it basis in the fact that Article 11 of the VAT Directive is an optional provision. Furthermore, Article 11 of the VAT Directive is adopted with a brief wording, which gives the Member States a degree of discretion to form their own VAT grouping schemes. The general viewpoint in literature seem to be that the Member States want to have a certain degree of discretion when implementing this provision into their national legislation. Expressed differently, a more limited freedom for Member States to interpret this set of rules would not be successful, or at least not be easy to realize as the Member States would have to unanimously agree upon its terms. Secondly, due to the findings by Advocate General Mengozzi in *Larentia + Minerva and Marenave* Member States may apply provisions that restrict the inclusion of specific persons, if that could be motivated and justified by the reason of combating abusive practices and the principle of fiscal neutrality.[113]

The question of who can become a member of a VAT group was raised by the Commission in a proceeding against Ireland.[114] The dispute concerned whether the notion of 'any person'[115] as provided for in Article 11 of the VAT Directive entitled Member States to include non-taxable

[111] HMRC (n 109).
[112] Opinion of AG in *Skandia America* (n 6) paras 30-32, 46-49, 60, 64-72, 79.
[113] Opinion of AG in *Larentia + Minerva and Marenave* (n 32) paras 70-72.
[114] Case C-85/11 *European Commission v Ireland* [2013] OJ C156/3. The Commission also challenged the inclusion of non-taxable persons in VAT grouping arrangements in a number of other cases, namely Case C-109/11 *European Commission v Czech Republic* [2013] OJ C171/5; Case C-95/11 *European Commission v Kingdom of Denmark* [2013] OJ C171/4; Case C-74/11 *European Commission v Republic of Finland* [2013] OJ C171/3; Case C-65/11 *European Commission v Kingdom of the Netherlands* [2013] OJ C171/3 and Case C-86/11 *European Commission v United Kingdom of Great Britain and Northern Ireland* [2013] OJ C171/4. The CJEU decided to request only one opinion concerning the issue, why the opinion of AG in *Commission v Ireland* (n 38) is valid for all the above mentioned cases.
[115] In the English-language version the word 'any' has been added before the word 'persons'. This is not the case in the majority of the language versions of Article 11 of the VAT Directive, which refers only to 'persons', see for example the Swedish version 'personer', Danish version 'personer', French version 'les personnes' and the German version 'personen'. See *Commission v Ireland* (n 114) para 38.

persons[116] in their VAT grouping schemes. The Commission stated that only taxable persons could be part of a VAT group. Therefore, Ireland had failed to fulfil its obligations under Article 9 and 11 of the VAT Directive as the Irish legislation permitted non-taxable persons to be part of VAT groups.[117] Contrary to the Commissions standpoint, the CJEU followed the opinion of Advocate General Jääskinen and concluded that not only taxable persons can be members of a VAT grouping arrangement.[118]

In its judgment, the CJEU determined the scope of Article 11 of the VAT Directive by investigating its wording, context and objective.[119] The CJEU pointed out that the mere wording of Article 11 of the VAT Directive does not require each member of a VAT group, to fulfil the status of a taxable person within the meaning of Article 9(1) of the VAT Directive. As Article 11 states that 'persons' and not 'taxable persons' may be part of VAT grouping schemes. This particular provision does not differentiate between taxable and non-taxable persons.[120] Further, with regard to the context of Article 11 of the VAT Directive, the CJEU stated that Article 9(1) contain a general definition of a 'taxable person'. Considering the structure of Title III of the VAT Directive, the CJEU found that persons who do not fulfil the general definition not necessarily are excluded from being one of the persons referred to in Article 11. Consequently, it could not be derived from the context of Article 11 that non-taxable persons were excluded from being part of VAT grouping arrangements.[121] Lastly, the CJEU held that the objectives of Article 11 of the VAT Directive to simplifying administration or combat abusive practices, would not be negatively affected by allowing Member States to include persons who not independently have the status of a taxable person in their VAT grouping schemes. Rather, the inclusion of persons who are not independent taxable subjects in VAT groups, would contribute to administrative simplification and help to prevent abusive practices.[122] Accordingly, the CJEU found, with reference to the wording, context and objective of Article 11 of the VAT Directive, that also non-taxable persons are eligible for inclusion in a VAT group.

The Commissions standpoint that only taxable persons could be included in a VAT grouping arrangement was thereby overruled by the CJEU.[123] Member States are therefore permitted to allow several non-taxable persons to form a group of persons regarded as a single taxable person for VAT purposes. The CJEU did not explicitly define the term 'person' in Article 11 of the VAT Directive, instead it concluded that 'person' is not necessarily equivalent to a 'taxable

[116] For example, entities not fulfilling the criteria for being classified as a taxable person in accordance with Article 9(1), public bodies satisfying the condition in the first subparagraph of Article 13(1) of the VAT Directive and pure holding companies (Case C-60/90 *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen* [1991] ECR I-3111, paras 12-17) are regarded as non-taxable persons.
[117] See the Commission's reasoning in *Commission v Ireland* (n 114) paras 20-26. The Commission already expressed this viewpoint in its Communication, see COM(2009) 325 (n 26) pp. 5-6.
[118] *Commission v Ireland* (n 114) para 41, 46, 50; Opinion of AG in *Commission v Ireland* (n 38) para 36, 55.
[119] See *NCC Construction Danmark* (n 12) para 23. This is an accepted method of interpretation of law, see G-J van Norden, 'Commission v Ireland, Commission v The Netherlands, Commission v UK: persons eligible for inclusion in a VAT group', British Tax Review (2013) Volume 3, pp. 268-275, p. 270.
[120] *Commission v Ireland* (n 114) para 36.
[121] ibid, paras 44-46.
[122] ibid, paras 47-48.
[123] COM(2009) 325 (n 26) p. 5.

person' within the meaning of Article 9(1).[124] Advocate General Wathelet in his opinion in *Skandia America* emphasized that CJEU in Case C-85/11 *Commission v Ireland* held that a branch cannot be included in a VAT group separately from its head office.[125] According to Advocate General Wathelet, when a branch join a VAT group the head office also becomes a member of the group in line with the ruling in *FCE Bank*, where it was held that a branch could not be a taxable person independent of its head office.[126]

By permitting non-taxable persons to join a VAT group, they would benefit from the VAT deduction rights of the VAT group. This could result in less favourable treatment of non-taxable persons that are not part of a VAT group compared to non-taxable persons that are members of a VAT group. It has been questioned whether this aspect of unequal treatment was sufficiently taken into account by the CJEU in *Commission v Ireland*.[127] Another issue that has been raised in the doctrinal discussion, is whether all Member States that have introduced the concept of VAT grouping should allow non-taxable persons to join a VAT group. This question arose, since Article 11 is an optional provision and as such give the Member States discretion to exercise it and set out the conditions for its application in so far as these conditions do not materially alter the nature of the provision.[128] The standpoint seems to be that exclusion of non-taxable persons from being part of VAT grouping regimes is contrary to the objective of Article 11 of the VAT Directive, and therefore all Member States should allow these persons to become members in grouping arrangements.

I am of the opinion that the second subparagraph of Article 11 of the VAT Directive do not allow Member States to exclude non-taxable persons from inclusion in VAT groups merely by the will to disallow these persons input VAT deduction, as it cannot be argued that such measures will prevent tax evasion or avoidance.[129] My overall perception is that the VAT group provision should be interpreted in a similar way in the various Member States that have introduced the VAT grouping regime.[130] This argument may find support in the CJEU's ruling in Case C-480/10 *Commission v Sweden*. In this case the CJEU emphasized the importance of a uniform application of the VAT Directive and that the notion of 'taxable person' as defined in Title III of the VAT Directive were given an autonomous and uniform interpretation.[131]

Another issue regarding the interpretation of Article 11 of the VAT Directive concerned whether Member States are entitled to limit the VAT grouping schemes so that only certain business sectors can benefit from it. The matter appeared when the Commission issued infringement proceedings against Sweden and Finland, on the ground that these countries contrary to Article 11 and the principle of equality restricted their VAT grouping provisions to

[124] See opinion of AG in *Skandia America* (n 6) para 43.
[125] ibid, para 42.
[126] ibid, paras 46-47, 49.
[127] G-J van Norden (n 119) p. 272.
[128] ibid, p. 273 with reference to Case C-326/99 *Stichting "Goed Wonen" v Staatssecretaris van Financiën* [2001] ECR I-6831, para 34.
[129] ibid, pp. 272-273.
[130] ibid, p. 274.
[131] ibid.

entities in the financial and insurance sector.[132] By a literal interpretation of Article 11 of the VAT Directive, Advocate General Jääskinen concluded that the provision did not allow limitations of its scope to certain economic sectors.[133] By a literal and contextual interpretation of Article 11 of the VAT Directive, the CJEU found that the provision must not be interpreted narrowly.[134] Further, the CJEU stressed the importance of a uniform application of the VAT grouping provision among Member States. However, the CJEU held that Article 11 also permits Member States to implement any measures required to combat tax evasion and avoidance.[135] In *Commission v Sweden*, the Commission had failed to show that the national restriction of the VAT grouping provision to include only undertakings in the financial and insurance sector conflicted with EU law.[136] Consequently, Member States may limit the application of VAT grouping schemes to certain defined economic sectors, when this is motivated by the need to prevent tax evasion and avoidance.

4.2.1 Legally independent persons

The criteria in Article 9(1) of the VAT Directive that the economic activity need to be conducted 'independently' has been defined in Article 10 of the VAT Directive, as excluding the relationship of employer and employee from VAT liability.[137] There is an independent character of an activity when it is exercised by a person who is not incorporated into the undertaking, who has organizational freedom concerning human and material resources which are necessary for the activity to be carried out and who has the economic risk of that activity.[138] In the joined cases C-78/02 to C-80/02 *Karageorgou and Others*, the CJEU found that translators employed at the Translation Department of the Ministry of Foreign Affairs were not 'independently' carrying on an economic activity and could not be considered as 'taxable persons' within the meaning of Articles 9(1) and 10 of the VAT Directive (ex Article 4(1) and 4(4) of the Sixth Directive). As such the services provided by the translators to the Ministry of Foreign Affairs were not subject to VAT.[139]

In accordance with Article 9(1) of the VAT directive the notion 'taxable person' means any person. In Case C-436/10 *BLM* the CJEU laid down the principle of neutrality of legal form, as it stated that the status of 'taxable person' is linked to the transactions carried out by an economic operator and not to its legal form.[140] For an entity to be considered as a taxable person and fall under the notion of 'any person' it need to have its own legal personality or in fact be

[132] *Commission v Sweden* (n 33); *Commission v Finland* (n 114). In these cases, the CJEU restricted its request for one opinion of Advocate General Jääskinen which were delivered on 27 November 2012 in Case C-480/10 *European Commission v Kingdom of Sweden* [2013] OJ C171/2.
[133] Opinion of AG in *Commission v Sweden* (n 132) para 36.
[134] *Commission v Sweden* (n 33) para 36.
[135] ibid, para 34, 38.
[136] ibid, paras 39-40.
[137] See also Annex A point 2 of the Second Directive (n 20).
[138] See Opinion of Advocate General Tesauro delivered on 4 June 1991 in Case C-202/90 *Ayuntamiento de Sevilla v Recaudadores de Tributos de las Zonas primera y segunda* [1991] ECR I-4247.
[139] Joined Cases C-78/02 to C-80/02 *Elliniko Dimosio v Maria Karageorgou, Katina Petrova and Loukas Vlachos* [2003] ECR I-13295, para 40.
[140] Case C-436/10 *Belgian State v BLM SA* [2012] OJ C328/12, para 27.

able to act independently.[141] A business without legal personality can thus be deemed a taxable person if it possess de facto collective autonomy or have de facto independence of a company. This mean that the company need to visibly be performing as an economic unit by acting in its own name, on its own behalf and under its own responsibility, and therefore can carry out independent economic activities.[142] Consequently, transactions between a partner and a partnership is within the scope of VAT.[143]

The CJEU had to deal with the question of who is to be considered as an employee for VAT purposes in Case C-355/06 *Van der Steen*. In that case the CJEU held that an individual who is an employee of a company of which he is the sole shareholder, the sole manager and the sole member of staff, is not himself a taxable person in accordance with Article 9(1) (ex Article 4(1) of the Sixth Directive) instead he is to be considered as an employee for VAT purposes.[144] This conclusion was reached as the CJEU found that Mr Van der Steen and the company had a relationship of employer and employee for several reasons. As a starting point the CJEU declared that Mr van der Steen were dependent on the company to determine his remuneration. Further, the services he provided the company were made on behalf of and under the responsibility of the company. Lastly, referring to settled case law, CJEU held that Mr Van der Steen did not have any economic risk for the business as he was merely a manager and performed the company's businesses with third parties.[145] Additionally, the CJEU held that the judgment in Case C-23/98 *Heerma* could not affect this interpretation.[146] With regard to the latter case, Mr Van der Steen's situation could not be compared to the situation described in that ruling and as such the work he performed were within the scope of the contract of employment and excluded from VAT liability.[147] The question if only legal persons can become members of a VAT group has been before the CJEU. This situation occurred in *Heerma*, this case will be considered in depth in the section below.

4.2.2 Legal persons

Another issue regarding the notion of 'persons' in Article 11 of the VAT Directive concern whether only persons with legal personality can become a member of a VAT group. With regard to this the CJEU held in *Heerma* that entities without legal personality fell within the scope of

[141] Case C-25/03 *Finanzamt Bergisch Gladbach v HE* [2005] ECR I-3123, paras 46, 54-55.
[142] Opinion of Advocate General Cosmas delivered on 20 May 1999 in Case C-23/98 *Staatssecretaris van Financiën v J. Heerma* [2000] ECR I-419, para 10, 15; Case C-23/98 *Staatssecretaris van Financiën v J. Heerma* [2000] ECR I-419, para 8, 18.
[143] E Kristoffersson, *Groups of Companies and Intra-Company Dealings – A Comparison Between Income Tax and Value Added Tax* in M Lang, P Melz and E Kristoffersson, *Value Added Tax and Direct Taxation: Similarities and Differences* (IBFD 2009) p. 927.
[144] Case C-355/06 *J. A. van der Steen v Inspecteur van de Belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECR I-8863, para 21, 26.
[145] ibid, paras 22-25 with reference to Case C-202/90 *Ayuntamiento de Sevilla v Recaudadores de Tributos de las Zonas primera y segunda* [1991] ECR I-4247, para 13.
[146] For a description of the case see section 4.2.2.
[147] *Van der Steen* (n 144) para 30; Opinion of Advocate General Sharpston delivered on 14 June 2007 in Case C-355/06 *J. A. van der Steen v Inspecteur van de Belastingdienst Utrecht-Gooi/kantoor Utrecht* [2007] ECR I-8863, para 22.

this concept. As a result, not only natural and legal persons can be regarded as 'persons' as a result of the *Heerma* case.

The question in the case concerned whether Mr Heerma acted independently or on behalf of a taxable person (a partnership) as he leased tangible property to a partnership which were formed by him and Ms Heerma.[148] The CJEU noted that partnerships have de facto independence of a company and therefore may be considered as a taxable person.[149] The CJEU found that there were no employer and employee relationship between Mr Heerma and the partnership.[150] Furthermore, the letting of tangible property to the partnership were to be considered as an economic activity,[151] which Mr Heerma independently carried out as he operated in his own name, on his own behalf and under his own responsibility.[152] As such, Mr Heerma and the partnership were deemed to be two separate persons in respect of VAT liability. Moreover, the CJEU observed but did not need to consider the Member States possibility in Article 11 of the VAT Directive to treat Mr Heerma and the partnership as one single taxable person for VAT purposes, as the Netherlands tax authorities did not argue this point in the proceedings.[153] As a result from the case, a partnership without legal personality may be regarded as a taxable person. As a consequence, transactions between a partnership and its partners are within the scope of VAT.

A similar issue is pending before the CJEU in the joined cases *Larentia + Minerva and Marenave*.[154] These cases relate to, inter alia[155], whether the German rules applicable to VAT grouping are in conformity with Article 11 of the VAT Directive, as the national legislation only allow legal persons and denies entities which are not legal persons (e.g. partnerships) the right to form a VAT group and further requires members of the group to have a relationship of control and subordination. Another issue raised by the referring court concern if Article 11 of the VAT Directive has direct effect.

Both the joined cases essentially concern the right to full VAT recovery on costs for acquisition of shareholdings in certain subsidiaries by German holding companies.[156] In each case, full deduction was denied by the German tax authorities since the holding companies performed both economic and non-economic activities with the result that only the expenses by a holding company's economic activities could be recoverable.[157]

[148] *Heerma* (n 142) para 7, 9, 12.
[149] ibid, para 8.
[150] ibid, para 18.
[151] ibid, para 19.
[152] ibid, paras 17-18.
[153] ibid, paras 20-21. See also opinion of AG in *Heerma* (n 142) para 22.
[154] Currently only the opinion of AG in *Larentia + Minerva and Marenave* (n 32) is available.
[155] In this case the national court referred three questions for a preliminary ruling by the CJEU. Only the second and third questions will be discussed in this thesis as the first question, essentially, concern holding companies VAT recovery, which is outside the scope of this thesis.
[156] Opinion of AG in *Larentia + Minerva and Marenave* (n 32) paras 3-4, 6-7.
[157] ibid, para 5, 8.

Firstly, with regard to the legality of limiting the formation of VAT groups to only comprise entities with legal personality, Advocate General Mengozzi noted in his opinion that the VAT Directive does not permit exclusion of entities lacking legal personality from involvement in grouping arrangements.[158] He supported this conclusion by referring to the generality of the term 'persons' in Article 11 of the VAT Directive as found by Advocate General Jääskinen in his opinion in *Commission v Ireland* and the fact that the CJEU in that case stated that non-taxable persons can be included in VAT groups.[159] As such, Advocate General Mengozzi concluded that the scope of Article 11 of the VAT Directive extends to all persons.[160] Further, Advocate General Mengozzi discussed the Member States degree of discretion to determine who can be regarded as 'persons' qualified for participation in grouping schemes.[161] Considering the cases *Commission v Sweden* and C-74/11 *Commission v Finland*, Advocate General Mengozzi found that restrictions of the VAT grouping provision are allowed if they are motivated by the need to prevent tax evasion or avoidance.[162] Therefore, he concluded that Member States enjoy a margin of discretion to determine the limitations of 'persons' eligible to VAT grouping as long as those restrictions are justified by the objectives of Article 11 of the VAT Directive and the principle of fiscal neutrality.[163]

Secondly, Advocate General Mengozzi suggested that requirements imposed by a Member State indicating that members of a group need to have a relationship of control and subordination among each other, were legitimate if it was necessary and proportionate with regard to the objectives of preventing tax evasion or avoidance in compliance with the principle of fiscal neutrality.[164] This finding has been criticized as it never will be 'necessary' for the VAT grouping provision to be restricted to situations where there is a relationship of control and subordination between its members for the purpose of avoiding abusive practices.[165]

The other issue of interest for this thesis concern the possibility for Article 11 of the VAT Directive to have direct effect[166] if the referring court finds the measures discussed above as provided for in the national legislation incompatible with EU law.[167] A provision of the VAT Directive has direct effect if its subject matter is unconditional and sufficiently precise to be relied on by an individual against the state to declare a national provision incompatible with the Directive.[168] As the wording 'close' in Article 11 of the VAT Directive could not be objectively determined and since each Member State has the discretion to specify the substantive conditions

[158] ibid, para 59.
[159] ibid, para 60 with reference to opinion of AG in *Commission v Ireland* (n 38) paras 30-31; *Commission v Ireland* (n 114) paras 38-41.
[160] Opinion of AG in *Larentia + Minerva and Marenave* (n 32) paras 61-63.
[161] ibid, para 65.
[162] ibid, para 69.
[163] ibid, paras 70-72.
[164] ibid, para 100.
[165] See B Terra and J Kajus, 'Commentary Joined Cases C-108/14 and C-109/14 (Larentia + Minerva and Marenave) Opinion', IBFD Commentary, p. 5.
[166] The doctrine of direct effect was established in Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.
[167] Opinion of AG in *Larentia + Minerva and Marenave* (n 32) para 101.
[168] ibid, para 103 with further references.

laid down therein. Advocate General Mengozzi concluded that Article 11 of the VAT Directive does not have direct effect.[169]

From the opinion in *Larentia + Minerva and Marenave* it can be concluded that Article 11 of the VAT Directive does not allow conditions requiring all members of a group to have legal personality, unless it can be justified by the objective of that article, namely to prevent tax evasion or avoidance having due regard to the principle of fiscal neutrality. If necessary and proportionate to the pursuit of those objectives and in accordance with the principle of fiscal neutrality, national law incorporating Article 11 of the VAT Directive can be subject to conditions demanding a relationship of control and subordination between the members of a VAT group. Furthermore, taxable persons cannot rely directly on that provision.[170] As derived from this opinion not only persons with legal personality can be included in VAT grouping arrangements. It needs to be pointed out that the CJEU have not ruled on this issues yet. Therefore further developments concerning the notion of 'persons' and the possibility for membership in a VAT group depending on the entities legal status are still to be expected.

[169] ibid, paras 112-113, 120.
[170] ibid, para 121.

5 The concept of a supply 'for consideration' in the context of VAT groups

In *Skandia America,* the CJEU concluded that transactions between a head office and its branch which is part of a VAT group are subject to VAT. Reaching this conclusion, the CJEU merely discussed whether the branch as a member of a VAT group and its head office could be regarded as individual taxable persons or not. However, for determining if a supply of services constitutes a taxable transaction all elements in Article 2(1)(c) of the VAT Directive need to be fulfilled. To constitute a taxable transaction in accordance with that article the supply must be made for consideration and take place within the territory of a Member State as well as it need to be performed by a taxable person acting as such. If all these conditions are present a transaction is subject to taxation. The interesting thing in *Skandia America* is that the CJEU did not explicitly discuss the other requirements listed in that article. Instead the CJEU focused its analysis on whether the supplies were performed by a taxable person, basically assuming that the other criteria were fulfilled for the transaction to be chargeable to tax. The analysis may have taken this form as the CJEU did not want to risk a situation where non-taxation could occur. That would result in no taxation in all situations similar to the one described in *Skandia America*. Depending on the scope of the decision, that could either have a major or rather limited impact on intra-company transactions and it is possible to assume that the CJEU did not want to jeopardize a situation of non-taxation in the event the ruling would be given a wide interpretation. However, as the CJEU reached the conclusion that the supplies made from SAC to Skandia Sverige were taxable transactions, all the above mentioned criteria were deemed to be present in the case.

This chapter intends to highlight some issues in the *Skandia America* judgment with regard to the requirement that supplies always need to be effected for consideration to be taxable. This is an interesting subject to discuss as the facts in *Skandia America* implies that there was an allocation of costs between SAC and Skandia Sverige. This part of the thesis will be dedicated to investigate whether cost allocation between entities within the same undertaking may be regarded as consideration.

5.1 Supply of services 'for consideration'

As stated in section 5, it follows form Article 2(1)(c) of the VAT Directive that a supply of services must be effected 'for consideration' to be a taxable transaction. This requirement has been described as an essential component when determining the scope of application of the

VAT system.[171] The concept 'for consideration' was firstly introduced by Article 2(a) of the Second Directive by the wording 'against payment' and was later modified to its present phrasing by the Sixth Directive.[172] This notion has subsequently been developed through case law and a description of its scope will now be presented.[173]

As a starting point, the CJEU found that services provided for no consideration, i.e. free of charge, are not subject to VAT as there is no basis for assessment.[174] Services provided free of charge are therefore different from taxable transactions, in that the latter requires a price or consideration for its existence.[175] Another situation falling outside the scope of VAT is where payment has been received but no activity has been performed, e.g. a holding company which only possess interest in other companies.[176]

It is thus important to note that the requirement 'for consideration' is not limited to remuneration received in the form of money. This means that also barter is a form of consideration, as the remuneration is received in the form of the service rendered.[177] Though, it must be possible to assess the consideration in an amount of money.[178] To be able to evaluate the amount received as consideration (in another form than money) the value need to be subjective, i.e. it need to constitute the consideration actually received.[179] When a subjective value cannot be determined, the supply has not been provided for consideration and the transaction is not taxable.[180] The viewpoint derived from doctrine is that supplies made for a symbolic or even very low payment, as long as they are not for free, are to be regarded as considerations and consequently are within the scope of VAT.[181]

In addition to the condition that a taxable transaction need a price or consideration for its existence, there must also be a direct and immediate link between the services supplied and the compensation for VAT to be due.[182] If a transaction lack of an immediate and direct link between the payment and the supply, no tax can be charged, since it is outside the VAT scope

[171] O Henkow, *Mervärdesskatt i teori och tillämpning* (2nd edn, Gleerups 2013) pp. 53-54. With regard to the requirement of an immediate and direct link, see Case 154/80 *Staatssecretaris van Financiën v Association coopérative "Coöperatieve Aardappelenbewaarplaats GA"* [1981] ECR 445, para 12.
[172] The Dutch, French, German and Italian wording did not change, see Terra and Kajus (n 10) p. 301.
[173] This thesis does not aim to present a full description of its scope, instead the interested reader is directed to Terra and Kajus (n 10) pp. 297-312.
[174] *Hong-Kong Trade* (n 9) para 10.
[175] *Hong-Kong Trade* (n 9) paras 10-11.
[176] Case C-60/90 *Polysar* (n 116) para 6, 14, 17. See also Case C-442/01 *KapHag Renditefonds 35 Spreecenter Berlin-Hellersdorf 3. Tranche GbR v Finanzamt Charlottenburg* [2003] ECR I-6851; Terra and Kajus (n 10) pp. 299-300.
[177] Henkow (n 171) p. 50, 54.
[178] *Aardappelenbewaarplaats* (n 171) para 13; Case C-230/87 *Naturally Yours Cosmetics Limited v Commissioners of Customs and Excise* [1998] ECR 6365, para 16.
[179] *Aardappelenbewaarplaats* (n 171) paras 12-13; *Naturally Yours Cosmetics* (n 178) paras 16-17; Case C-16/93 *R. J. Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] ECR I-743, para 14.
[180] *Aardappelenbewaarplaats* (n 171) para 14.
[181] See Terra and Kajus (n 10) p. 298.
[182] See *Aardappelenbewaarplaats* (n 171) para 12; *Naturally Yours Cosmetics* (n 178) para 11; Case 102/86 *Apple and Pear Development Council v Commissioners of Customs and Excise* [1988] ECR 1443, paras 11-12; *Tolsma* (n 179) para 13, Case C-174/00 *Kennemer Golf & Country Club v Staatssecretaris van Financiën* [2002] ECR I-3293, paras 37, 39-40.

of application.[183] This is evident from the ruling in Case 154/80 *Aardappelenbewaarplaats* where the CJEU held that there were no consideration for the supply of services and consequently no taxable transactions existed.[184] The CJEU reached this conclusion as it could not establish any direct link between the storage service and the consideration, which basically constituted a reduction in share value for the members and consequently did not impose any charge on its associates.[185]

Beside these two requirements, there must also be a legal relationship between the person receiving payment and the person enjoying the service, for a supply of services to be effected for consideration. This element was developed in Case C-16/93 *Tolsma*. The issue at hand in *Tolsma* concerned whether Mr Tolsma by playing music on the public highway for which passers-by could make donations, supplied services for consideration.[186] In this respect the CJEU held that there need to be a legal relationship between the service provider and the recipient where there is a reciprocal performance, for a supply to be effected for consideration.[187] A legal relationship could not be established between Mr Tolsma and the passers-by and the supplies were accordingly not made for consideration.[188] The CJEU reached this conclusion since there were no direct link between the musical service and the payments derived from it, as the passers-by had not requested the music and might have made the donations for other purposes rather than for the music being played to them.[189] Moreover, the donations were of a voluntary nature and as such were uncertain and consisted of an unpredictable amount.[190]

In summary, for a supply of services to be considered as a taxable transaction it needs to be subject to a price or consideration and a direct and immediate link between supplied services and the consideration need to be established as well as a legal relationship between the service provider and the beneficiary. For example, since there is no legal relationship between a head office and its branch,[191] transactions between these entities are not made for consideration and consequently not subject to VAT.[192]

5.2 Cost allocation – a consideration?

This section will focus on whether allocation of costs between two entities belonging to the same company, namely between SAC and Skandia Sverige, can be regarded as a consideration.

[183] Henkow (n 171) pp. 53-54.
[184] *Aardappelenbewaarplaats* (n 171) paras 14-15.
[185] ibid, para 12.
[186] *Tolsma* (n 179) para 3, 8.
[187] ibid, para 14. See also *Kennemer Golf* (n 182) para 39; *FCE Bank* (n 51) para 34; *Skandia America* (n 2) para 24.
[188] *Tolsma* (n 179) paras 15-16, 20.
[189] ibid, para 17.
[190] ibid, para 19.
[191] See *FCE Bank* (n 51) para 37, 51.
[192] Terra and Kajus (n 10) p. 311.

Recalling the circumstances under which a supply of services can be taxable, Article 2(1)(c) of the VAT Directive set out the condition that the supplies need to be made for consideration. Further, that provision also requires that the supplies has to be undertaken by a taxable person acting as such[193]. In Article 9(1) of the VAT Directive a 'taxable person' is defined as anyone who 'independently' perform an economic activity. Pursuant to this, supplies of services can only be subject to tax if a legal relationship can be established between the provider of the service and its recipient with mutual obligations for those parties to perform.[194] In order for a legal relationship to exist between two parties, the entities have to carry out economic activities on an independent basis.[195] At this point it is interesting to note that there is no legal relationship between a head office and its branch.[196] A legal relationship does not exist since the branch cannot be regarded as economically independent enough from its head office and thus, together with the head office constitutes one and the same taxable person. Consequently, transactions between these entities do not exist for the purpose of VAT and no VAT is due. This reasoning as derived from the ruling in *FCE Bank* is followed by the CJEU in the first part of the first question in its analysis in *Skandia America*.[197] Due to the finding that taxable transactions cannot take place between a head office and its branch, the CJEU in both cases simply concluded that there were no need to rule upon the question whether allocation of costs between entities of the same company can be regarded as a consideration.[198]

Important to note is that the facts of *Skandia America* differ from the circumstances in *FCE Bank*, as the branch Skandia Sverige also were a member of a VAT group. Due to this, the branch and its head office were no longer to be regarded as the same taxable person for VAT purposes, as the branch were part of another taxable person in this respect. As a result, the supplies between the head office and its branch are deemed to be taxable. As the CJEU found the supplies being subject to VAT, this implies that the cost allocation between two entities within one company, where the branch is part of a grouping arrangement, must be regarded as consideration. Remarkably, this would not be the situation if the branch were not member of a VAT group, as the relationship between SAC and Skandia Sverige then would have been treated in accordance with the principle laid down in *FCE Bank*, i.e. that no taxable transactions occur between a head office and its branch.[199]

It can be derived from the facts in *Skandia America* that the question of cost allocation were undisputed as the focus of the ruling concerned the status as a taxable person.[200] According to

[193] I will not investigate this requirement further, the interested reader is directed to VAT Committee (n 89) p. 14.
[194] *Tolsma* (n 179) para 14; *Kennemer Golf* (n 182) para 39; *FCE Bank* (n 51) para 34; *Skandia America* (n 2) para 24.
[195] *FCE Bank* (n 51) para 35.
[196] ibid, para 37, 51.
[197] *Skandia America* (n 2) paras 22-26.
[198] *FCE Bank* (n 51) para 40; *Skandia America* (n 2) para 27. See also the second question referred in the *FCE Bank* ruling along with the first question referred in *Skandia America*.
[199] It is important to note that the principle established in *FCE Bank* only concerned two entities established within the EU, thus in different Member States. Contrary, in *Skandia America* the situation concerned two establishments, of which only one were located within the EU and the other establishment were located in a third country. As the territorial scope of *FCE Bank* in this regard is not clear, *FCE Bank* must be applied with caution.
[200] VAT Committee (n 89) p. 13.

the VAT Committee the only possibility for the CJEU to reach the conclusion that the transactions were taxable, was against the background that it considered that the allocation of costs between SAC and Skandia Sverige constituted consideration. If the CJEU would have reached the opposite conclusion, namely that cost allocation was not taxable, the finding that the transactions were taxable could not have been upheld.[201] This might have exposed a possible situation of non-taxation with regard to these kind of transactions, which might not have been a desirable outcome for the CJEU. It may be true that the CJEU must have concluded that the supplies were made for consideration to be able to declare the transactions taxable. Thus, I am not convinced by the CJEU's reasoning on this point and not by the path it decided to take to reach this conclusion.

Advocate General Wathelet in *Skandia America* reached another conclusion. Namely that Skandia Sverige not independently from SAC could be part of the Swedish VAT group as it was dependent upon SAC. Advocate General Wathelet considered the fact that the services were made for consideration as irrelevant to the outcome of the case. In his reasoning Advocate General Wathelet emphasized that agreements on the sharing of costs which has been negotiated between dependent parties, i.e. SAC and Skandia Sverige, are irrelevant when determining if a transaction is to be taxable, in accordance with the ruling in *FCE Bank*.[202] Further, the costs attributed on Skandia Sverige by SAC did not change the fact that the branch were to be regarded as dependent upon SAC and together, they would appear as one taxable person.[203] This mean that Advocate General Wathelet considered the allocation of costs between SAC and Skandia Sverige as irrelevant when it has been agreed upon between parties that are dependent upon each other.[204] In my understanding of the case, the CJEU states that SAC and Skandia Sverige are still dependent upon each other, even though they are to be regarded as separate taxable persons for VAT purposes. The remaining question is therefore if the reasoning as presented by Advocate General Wathelet may have been followed by the CJEU in this respect, namely by neglecting the discussion on whether cost allocation could be regarded as a consideration, since it actually did not matter for the outcome of the case. If this reading of the case is possible another question arises, merely what, if not the allocation of costs between SAC and Skandia Sverige, could compose consideration in the case? Maybe there were no consideration at all in the case and the CJEU choose not to discuss the issue as it was keen on making those transactions taxable.

In doctrine, the ruling in *Skandia America* has been described as unclear. This is understandable as the CJEU initially found that the cost allocations between the entities could not be seen as consideration in conformity with *FCE Bank*, while it simultaneously declared the transactions subject to tax. Consequently, it has been considered that the case does not clarify when allocation of costs are deemed to be regarded as a consideration.[205] Thus, the general view seem to be that the response to the second question in *Skandia America* implied that there were

[201] ibid.
[202] Opinion of AG in *Skandia America* (n 6) para 54; *FCE Bank* (n 51) para 40.
[203] See opinion of AG in *Skandia America* (n 6) para 54 footnote 19; *FCE Bank* (n 51).
[204] See also opinion of AG in *FCE Bank* (n 87) paras 65-66, 68.
[205] Terra and Kajus, 'Commentary Case C-7/13' (n 101) pp. 5-6.

actually a consideration in the case, as the CJEU stated 'where the main establishment of a company in a third country supplies services *for consideration* to a branch of that company …'.[206] Furthermore, it has been stressed that transactions between a head office and its branch under similar conditions as in *Skandia America,* not automatically are taxable.[207] As we have seen, respect must also be given to the other conditions to establish the existence of a taxable supply in accordance with Article 2(1)(c) of the VAT Directive. As such, the prerequisite that a legal relationship must be established between the service provider and the recipient for a consideration to be established,[208] has been held as 'necessary but not sufficient' to define if the transaction is taxable.[209]

It has been pointed out that too general conclusions should not be drawn from the case relating to allocation of costs. Instead, it has been proposed that a case-by-case analysis need to be undertaken in this regard, since it has been considered as too far reaching to derive from the conclusions in *Skandia America* that '*any* cost allocation between establishments of a company such as those in the case has to be seen as consideration'.[210]

I am prepared to endorse the conclusion reached by the VAT Committee that *Skandia America* should not serve as a guidance on whether cost allocation should be regarded as a consideration or not, but for the reason of CJEU's absence of discussion on this aspect. My reflection of the case is that CJEU does not give a clear answer to whether cost allocation is to be regarded as a consideration. Instead the CJEU assumed that the allocation of costs between SAC and Skandia Sverige are undertaken with some kind of reciprocal performance. From the facts of the case it cannot be derived that funds were transferred by the branch to its head office as a compensation for the supplies of services from SAC to Skandia Sverige for the purpose of allocating costs.[211] Therefore it is questionable whether any consideration took place in this case at all. On the other hand, we need to remember that there must have been a consideration in the case for the CJEU to reach the conclusion that there were taxable transactions. The remaining question is therefore rather, what constituted the consideration, the mere allocation of costs or the mark-up of five percent on each supply, i.e. both between SAC and Skandia Sverige as well as between Skandia Sverige and the other entities within the Skandia group.

A similar issue as presented with regard to cost allocation in *Skandia America*, was also present in Case C-77/01 *EDM*[212]. In accordance with that ruling, cost allocation could be regarded as consideration. Accordingly, the following section will discuss the *EDM* case.[213]

[206] Emphasis added. See Terra and Kajus, 'Commentary Case C-7/13' (n 101) pp. 5-6; *Skandia America* (n 2) para 38. See also VAT Committee (n 89) p. 13.
[207] VAT Committee (n 89) p. 13.
[208] *FCE Bank* (n 51) para 34; *Skandia America* (n 2) para 24.
[209] VAT Committee (n 89) p. 13.
[210] Emphasis added. See VAT Committee (n 89) p. 13.
[211] VAT Committee (n 89) p. 12 in footnote 25.
[212] Case C-77/01 *Empresa de Desenvolvimento Mineiro SGPS SA (EDM) v Fazenda Pública* [2004] ECR I-4295.
[213] Only the second question in the *EDM* case will be discussed in this thesis.

5.2.1 Cost allocation – a consideration according to the *EDM* case*?*

Empresa de Desenvolvimento Mineiro SGPS SA (EDM) was a holding company involved in the mining business.[214] Together with other undertakings, EDM was part of three consortia.[215] Acting as the manager of these consortia's, EDM received invoices for projects carried out within the consortium, containing costs related to those projects born by the members individually. Subsequently, the costs of the project were shared among the entities within the consortium in conformity with their pre-defined share as established in each consortium agreement.[216] With regard to the activities performed by EDM within the consortia, the referring court essentially asked the CJEU whether those projects constituted taxable transactions, in that they exceeded the pre-defined share and consequently, the part above the assigned share, were made against payment.[217] EDM argued that the performed operations could not be regarded as transactions 'effected for consideration' and as such were not subject to VAT.[218]

As a preliminary point, the CJEU held that VAT can only be chargeable on supplies which are effected for consideration.[219] In the light of this statement, the CJEU found that no taxable transactions existed where the activities performed by the members of the consortium related to their predetermined share assigned to them in the consortium agreement. This was so, as the activities performed within the assigned share were not made against payment. As such, the projects made by members of the consortium within their assigned share could not be regarded as supplies of goods or services made for consideration, within the meaning of Article 2(1) of the VAT Directive.[220] However, as payment were required when operations were carried out which exceeded the assigned share, those operations were found to constitute supplies made for consideration.[221]

From the *EDM* case it can be derived that allocation of costs among entities within the same undertaking could be seen as made for consideration.[222] In this case, the decisive criteria to determine if the projects were performed for consideration seem to be whether they were made against or without payment, or put it differently, whether the operations were performed under the consortium agreements or not. This is so, as the CJEU based its finding on the reasoning that no supplies were done by the members of the consortium to the extent they did not receive any payment for it, i.e. when the operations did not exceeded their pre-negotiated share as laid down in the consortium agreements. Consequently, where payment were required for the project to be carried out, i.e. where the operation exceeded the pre-determined share, it was subject to VAT. This implies that the consortium agreements which basically were aimed at

[214] *EDM* (n 212) para 13.
[215] ibid, para 17.
[216] ibid, para 18.
[217] ibid, para 28, 81.
[218] ibid, para 83.
[219] ibid, para 86.
[220] ibid, paras 87-88.
[221] ibid, para 89.
[222] VAT Committee (n 89) p. 14.

sharing costs among the entities involved may be seen as pure agreements on the sharing of costs.

Applied to the situation in *Skandia America*, this would mean that the agreement on the sharing of costs as assigned between SAC and Skandia Sverige cannot be seen as made for consideration as long as there is no reciprocal performance from Skandia Sverige to SAC. From the facts of the case, it cannot be derived that Skandia Sverige provided funds to its head office for the purpose of allocating costs between them. Even if funds would have been transferred to SAC in exchange for the services, this does not itself imply that any consideration actually took place. Also, as have been stated by the VAT Committee, transfer of funds does not automatically imply that there need to be a cost allocation between two entities. It is therefore important that the CJEU make an individual assessment to determine whether costs have actually been allocate between two entities to be able to reach the conclusion that supplies are made for consideration.[223] In this respect the CJEU in *Skandia America* may have disregarded this aspect when deciding the case.

Thus, it is important to remember that a consideration do not have to be of a monetary nature.[224] This could imply that any kind of compensation or performance in order to compensate the supplies could be regarded as a consideration. The only requirement is that the compensation must be measurable in an amount of money.[225] It is therefore likely that the CJEU reached the conclusion that these supplies were effected for consideration as the general viewpoint from doctrine seem to imply that merely a symbolic sum could constitute a consideration.[226] Assuming a transfer of funds actually took place between SAC and Skandia Sverige, the conclusion reached by the CJEU would be more likely. Thus, it is also important to state that not all transfer of funds between entities are undertaken with the aim to allocate costs between them, contrary it could be the result of a transfer pricing adjustment.[227] In this regard, the question remains if CJEU would have to consider the purpose of the supplies. This could be a method, but it would certainly invoke more uncertainty and new questions to solve in this respect. The ruling in *Skandia America* should be interpreted carefully as the facts of the case is not clear on this point, according to me. Thus, CJEU seem to clearly confirming that a consideration took place in the case at hand.

Due to the foregoing considerations, it is clear that the supplies between SAC and Skandia Sverige were made for consideration. The consideration could not constitute the mere allocation of costs, since there are uncertainties that can be derived from such an interpretation, e.g. as a cost allocation can be undertaken for purely transfer pricing adjustments. Considering the outcome of *EDM* case, this may also confirm that mere allocation of costs is not the determinative element for a consideration to exist, instead it may be the actual reciprocal performance. In this regard it seems most likely that the CJEU considered the actual mark-up

[223] ibid, p. 12 footnote 25.
[224] See for example *Naturally Yours Cosmetics* (n 178).
[225] *Aardappelenbewaarplaats* (n 171) para 13; *Naturally Yours Cosmetics* (n 178) para 16.
[226] Terra and Kajus (n 10) p. 298.
[227] VAT Committee (n 89) p. 12 in footnote 25.

of five percent as charged on each supply as the factor constituting the consideration. As the mark-up took place on all internal supplies, the taxable amount could be determined in accordance with Article 27 of the VAT Directive as deemed supplies. In that regard, the taxable amount of the internal supplies of services could be determined as the open market value of those supplies.[228] The open market value would be the amount a customer would be eligible to pay under fair market competition to obtain the services from an independent supplier in the Member State where the place of supply occurred. In case such a hypothetical supply cannot be ascertained, the open market value will be determined as not less than the cost as the taxable person providing the services had.[229] It is important to note that the taxable amount determined in this way is only applicable to transactions that are taking place within the same undertaking.

It has been suggested that the CJEU could have solved this case by applying another pattern of analysis, following the structure of the VAT Directive and tax internal supplies with reference to Article 27 at the discretion of each Member State. If this way of reasoning would have been complied with the issue of determining the taxable amount would be abolished,[230] as the taxable amount would be the open market value in accordance with Article 77.[231] Thus, it is beyond the scope of this thesis to undertake an in depth discussion on this alternative path, why I will leave it as a question for further research.

[228] Article 77 of the VAT Directive (n 1).
[229] Article 72 of the VAT Directive (n 1).
[230] The CJEU does not discuss this issue in *Skandia America*.
[231] Terra and Kajus, 'Commentary Case C-7/13' (n 101) pp. 5-6.

6 Concluding remarks

The judgment in *Skandia America* has contributed to the development of case law in the area of VAT grouping transactions between two legal persons. More precisely, to the situation where the head office is located in a third country and supplies services to its branch, which possess membership in a national VAT group. From the CJEU's established case law one can distinguish between two concepts of single taxable person. It has been held in *FCE Bank* that a head office and a branch which are located within the territory of different Member States are to be deemed as one single taxable person with the result that no taxable supplies can occur between these entities. Some years later, the CJEU stated in *Ampliscientifica* that by becoming a member of a VAT group, several independent persons are merged together for the purpose of VAT and consequently cease to exist separately for that purpose. In *Skandia America*, a clash of these two concepts of single taxable person were encountered. Advocate General Wathelet in his opinion in *Skandia America* advocated the safeguarding of the relationship between the branch and the head office in accordance with *FCE Bank* and accordingly concluded that no taxable supplies could be materialized between them. Contrary, following the principle set out in *Ampliscientifica* the CJEU reached the opposite conclusion, namely that the bounds created within a VAT group are stronger than the relationship between a branch and its main establishment. The decision has paved the way for the assessment of supplies of services in a situation where the scope of two diverse concepts of taxable persons conflicted. Accordingly, supplies of services from a head office to its branch which belongs to a VAT group must be regarded as taxable transactions, since the main establishment and the VAT group are considered as two separate taxable persons.

However, transactions can only be taxable if the other criteria in Article 2(1)(c) of the VAT Directive are met. In this regard, it can be questioned if the CJEU in *Skandia America* made the full analysis of the conditions laid out in that article. This implies that the CJEU considered that the supplies from SAC to Skandia Sverige must have been made for consideration in order to be chargeable to VAT.

However, I am prepared to endorse the conclusion reached by the CJEU in *Skandia America*, i.e. that the supplies in question were taxable, but I am not convinced that the mere allocation of costs between entities which are dependent upon each other, but are to be regarded as different taxable persons for VAT purposes, can constitute consideration. My doubts has its basis in the unclear circumstances of the case from which it cannot be derived that funds were actually exchanged between SAC and Skandia Sverige for the purpose of allocating costs among the entities. Furthermore, it is evident from the CJEU's ruling in *EDM*, that allocation of costs within the scope of consortium agreements could not be regarded as made for consideration. On the other hand, that judgment implies that the requirement for consideration is fulfilled when the performed operations exceeded the pre-defined share as laid down in the agreements. Thus, even if funds would have been transferred from Skandia Sverige to SAC as a consideration for the supplies, this does not automatically mean that the transactions are made

for consideration. Due to the circumstances and facts of the case, it seems more likely that the actual mark-up of five percent charged on each supply may constitute consideration for the services supplied. Nevertheless, the supplies must have been regarded as made for consideration by the CJEU as it otherwise would not be able to reach the conclusion that the transactions were subject to VAT. Moreover, it may be questioned if the ruling in *Skandia America* should serve as a guidance to the question whether allocation of costs between two entities belonging to the same undertaking shall be regarded as made for consideration.

Perhaps the CJEU could have solved this case in another way by referring to Article 27 of the VAT Directive. Consequently, the transactions would have been taxed as internal supplies.

My overall perception is that the relatively short ruling in *Skandia America* may not have given justice to all the questions that could have been clarified in the case. The ruling must therefore be interpreted with caution. It remains to be seen what scope the judgment will be given in the future.

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