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International cooperation to avoid double taxation in the field of VAT: does the Court of Justice produce a revolution?

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The EU Court of Justice recently confirmed that EU Member States have a duty to cooperate to help ensure that VAT is correctly assessed. In the Court's view, this implies that they have to exchange information whenever a request for information may prove expedient, or even necessary for determining where the VAT is due. This judgement deviates from former case-law. It may considerably affect the rights of taxable persons facing a double VAT taxation of their transactions. This article provides an overview of (possible) implications of this judgement.

1. Member States have a duty to cooperate to help ensure that VAT is correctly assessed

a. International cooperation to avoid double taxation

1. The Court of Justice of the EU recently rendered a judgment in a VAT case about the artificial fixing of a place of supply by means of an arrangement not reflecting economic reality (judgement of 17 December 2015, C-419/14, WebMindLicenses). In line with its well-established case law, the Court of Justice confirmed that where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that practice. This implies that the place of supply of services must be rectified if it has been fixed in a Member State other than the Member State where it would have been fixed in the absence of an abusive practice and that VAT must be paid in the Member State where it should have been paid even if it has been paid in the other State. Consequently, the fact that VAT has been paid in that other Member State in accordance with its legislation does not preclude an adjustment of that tax in the Member State in which the place where those services have actually been supplied is located.

2. In this regard, the referring national judge also raised a question whether Regulation No 904/2010 concerning administrative cooperation in the field of VAT must be interpreted as meaning that the tax authorities of a Member State which are examining whether VAT is chargeable in respect of supplies of services that have already been subject to VAT in other Member States are required to send a request for cooperation to the tax authorities of those other Member States.

3. Advocate General Wathelet, following the observations of the Hungarian authorities and the European Commission, was of the opinion that there was no obligation to send such a request to the tax authorities of the Member State in which the taxable person forming the

1 Cf. EUCJ 21 February 2006, C-255/02, Halifax and Others, para. 98, and EUCJ 20 June 2013, C-653/11, Newey, para. 50.
2 Para. 52-54 of the judgement.
subject of the tax inspection had already fulfilled his obligation to pay VAT. In his view, Regulation 904/2010 confers a right on the tax authorities to send such a request to another Member State but it does not impose an obligation on it.³

4. The Court of Justice however took another view. It decided that, having regard to the duty, set out in recital 7 in the preamble to Regulation 904/2010,⁴ to cooperate to help ensure that VAT is correctly assessed, such a request may prove expedient, or even necessary. That may be so, in particular, where the tax authorities of a Member State know or should reasonably know that the tax authorities of another Member State have information which is useful, or even essential, for determining whether VAT is chargeable in the first Member State. Consequently, the Court concluded that "Regulation No 904/2010 must be interpreted as meaning that the tax authorities of a Member State which are examining whether VAT is chargeable in respect of supplies of services that have already been subject to that tax in other Member States are required to send a request for information to the tax authorities of those other Member States when such a request is useful, or even essential, for determining that VAT is chargeable in the first Member State".⁵

b. A new trend?

5. This decision of the Court of Justice is rather surprising. It deviates from the approach previously adopted by the same Court. In this regard, reference can be made to the Ryborg judgement of 23 April 1991.⁶ In that case, Mr Ryborg, a Danish national, was prosecuted for bringing into Denmark a private car purchased and registered in Germany and for using it in Denmark without having paid VAT on it and without having registered it in Denmark. He had purchased the new car and registered it in Germany, where he worked and lived for almost ten years. In the meantime, he started a relationship with a Danish girl and he often returned to her in Denmark. The Danish authorities confiscated his car in 1984, on the ground that he again had his normal residence in Denmark, so that his car had to be registered in Denmark and that VAT was due in that country.

Mr Ryborg argued that the VAT on the purchase of the car had already been paid in Germany and that the Danish authorities' claim was not in conformity with Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another. He also observed that Art. 10(2) of this Directive provided that: "Where the practical application of this Directive gives rise to difficulties, the competent authorities of the Member States concerned shall take the necessary decisions by mutual agreement, particularly in the light of the Conventions and Community Directives on mutual assistance." On the ground of this provision, he contended that the Danish authorities could not require, without prior agreement with Germany, to register the car and pay additional VAT in Denmark.

The Danish Supreme Court asked the Court of Justice whether Article 10 of this Directive created rights for citizens which could be relied on before the national Court.

³ Points 96-98 of the opinion of the Advocate General.
⁴ Recital 7 in the preamble to Regulation 904/2010 states: 'For the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed. They must therefore not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State.'
⁵ Para. 57-59 of the judgement.
⁶ Case C-297/89.
At that time, the Court decided that this provision did not require the Member States to consult each other in such a specific case: "Article 10(2) thus requires the competent authorities of the Member States, where the practical application of the directive gives rise to difficulties, to take the necessary decisions by mutual agreement, which will enable them to cope with any future difficulties which may arise in individual cases. It must therefore be stated in reply to the second question that Article 10(2) of Directive 83/182 does not require the Member States to cooperate in each individual case in which the application of that directive raises difficulties".7

6. It is also interesting to compare this new judgement with the Court of Justice's decision of 27 September 2007 with regard to the proof of intra-Community supplies of goods.8 In this case, a Dutch company, Twoh International, supplied computer parts to undertakings established in Italy. According to the sales contracts, the parties were to use the ‘ex-works’ (EXW) delivery method, which meant that the Dutch company was required only to place the goods at the buyers’ disposal at a warehouse situated in the Netherlands, responsibility for transport to Italy being a matter for the buyers. Following an accounting enquiry, the Dutch tax authorities took the view that the Dutch company had not demonstrated that the goods had been dispatched or transported to another Member State. Therefore, it was considered that these supplies should not have been exempted from VAT. The company lodged an objection against the additional VAT claim and requested the Dutch tax authorities to gather from the competent Italian authority, pursuant to the mutual assistance Directive 77/799 and the administrative cooperation Regulation 218/92, information capable of establishing the intra-Community nature of its supplies. The preliminary question that thus arose before the Court of Justice was whether those tax authorities were required to accede to such a request. On that occasion, the Court held:9

"The answer to that question may be deduced from the purpose and content of the mutual assistance directive and the administrative cooperation regulation. (...) Concerning the content of those Community measures, it is clear from the titles of the mutual assistance directive and the administrative cooperation regulation that they were adopted in order to govern cooperation between the tax authorities of the Member States. As both the Commission and the Advocate General, in point 23 of her Opinion, have pointed out, those legal measures confer no right on individuals other than that of obtaining confirmation of the validity of the ‘value added tax identification number of any specified person’ in accordance with Article 6(4) of the administrative cooperation regulation. The mutual assistance directive does provide, with a view to preventing tax evasion, for the possibility of national tax authorities requesting information which they cannot obtain for themselves. Thus, the fact that, both in Article 2(1) of that directive and in Article 5(1) of the administrative cooperation regulation, the Community legislature used the word ‘may’ indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State."

7 Para. 34-35 of this judgement.
8 EUCJ 27 September 2007, C-184/05, Twoh.
9 Para. 29-32 of the judgement.
7. The legal instruments discussed in this Ttwoh case are of course different from the current EU Regulation 904/2010 on administrative cooperation and combating fraud in the field of VAT. It is nevertheless surprising to see the change in the Court's interpretation. In the WebMindLicenses judgement, the Court entirely relies on recital 7 of the preamble of the administrative cooperation Regulation 904/2010, which states that: "for the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed." However, the same purpose was already expressed in the former legal instruments: when Directive 77/799 was adopted on 19 December 1977 – at that time, it did not cover VAT – recital 6 of the preamble stated that "the Member States should exchange, even without any request, any information which appears relevant for the correct assessment (of taxes on income and on capital)". The scope of Directive 77/799 was extended to VAT by Directive 79/1070 of 6 December 1979. Recital 3 of the latter Directive confirmed that: "such mutual assistance should be extended to cover indirect taxes in order to ensure that these are correctly assessed and collected". It could thus be concluded that the purpose, expressed in the former legal instruments, was not really different from the purpose expressed in recital 7 of the current Regulation 904/2010.

2. Scope of the obligation to cooperate

8. In its recent WebMindLicenses judgement, the Court of Justice emphasized that Member States have a duty to cooperate to help ensure that VAT is correctly assessed. But what if the competent authorities of the Member States concerned have a different view on the VAT assessment of a case? This may lead to a situation where both Member States claim that the same transaction is deemed to take place in their territory. A double taxation would of course be contrary to the EU VAT system. The EU VAT Directive contains rules for determining the place where taxable transactions are deemed to take place for tax purposes. The object of those provisions is to avoid conflicts of jurisdiction which may result in double taxation (or non-taxation).10

The Court did not explicitly confirm that Member States' tax authorities have to come to an agreement with regard to the VAT treatment of the transactions concerned. It could however be argued that Member States fail to "cooperate" if they do not adopt the same view with regard to the place where the transactions at stake should be taxed. And if the Court's judgement in this particular case implies that Member States have to come to an agreement on the VAT treatment of cases relating to (possible) abuse of the VAT rules, it would be unreasonable not to impose the same obligation with regard to non-abusive situations where taxpayers are also confronted with a threat of double taxation.

3. Interference with Member States' voluntary initiative to discuss double taxation issues

9. The cooperation obligation imposed by the Court of Justice interferes with another initiative that was recently taken within the EU VAT Forum. At its meeting on 11 May 2015, twelve Member States have agreed to allow taxable persons to ask for a dialogue between the

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Member States concerned in case of double taxation of a single transaction. In this regard, the EU VAT Forum reports that "such a dialogue between the competent VAT authorities of different Member States may help to solve issues of double taxation of transactions that took already place in the past. However, there is no guarantee (and no obligation) that the Member States concerned come to an agreement on the VAT treatment of the transactions at stake. (...) The dialogue commitment is based on a voluntary cooperation".

10. The WebMindLicenses judgement makes it clear that this commitment of twelve EU Member States is not sufficient:

- all Member States should be cooperating;
- moreover, the judgement clearly states that the tax authorities of a Member State which "are examining whether VAT is chargeable" in respect of supplies of services that have already been subject to VAT in another Member State, have to contact the authorities of that other Member State. This means that the cooperation between the Member States concerned should take place before the second taxation;
- further, as already mentioned, the Court of Justice's decision seems to imply that the Member States concerned have an obligation to come to an agreement with regard to the question where the transactions at stake are deemed to be supplied.

4. Other consequences of this judgement

a. Effect on the burden of proof concerning intra-Community supplies?

11. This recent judgement also raises some further questions with regard to the burden of proof concerning intra-EU supplies of goods. As already mentioned above, the Court of Justice in its Twoh judgement decided that the former administrative cooperation Regulation was not adopted for the purpose of establishing a system for exchanging information between the tax authorities of the Member States allowing them to establish the intra-Community nature of supplies made by a taxable person who is not himself able to provide the necessary evidence for that purpose. In that case, the Court's decision may have been influenced by the fact that the taxable person concerned did not dispose of any evidence relating to the cross-border transport of the goods.

In other cases, taxable persons may have some element of proof that the goods actually left the territory of the dispatching Member State, but there may still be discussion whether that proof is sufficient and can be accepted.

In principle, the Court's decision in the WebMindLicenses case cannot be extended to situations where a VAT exemption in just one Member State is under discussion. However, if the exemption for an intra-Community supply were refused in the Member State of dispatch, while the correlated intra-Community acquisition is taxed in the Member State of destination, this would in practice lead to a double taxation of a single sales agreement.

11 Twelve Member States currently support this initiative to have a dialogue between tax authorities of different Member States in view of solving VAT double taxation issues: Belgium, Denmark, Estonia, Ireland, Spain, France, Latvia, Lithuania, Netherlands, Finland, Sweden, United Kingdom (see EU VAT Forum, document II-1 (VATForum)-4 of 14 October 2015).
12 EU VAT Forum, First mandate report (2012-2015), point 3.1.2 (where it was observed that some Member States already have such a dialogue practice).
The Court could certainly continue to hold, as in the *Twoh* case, that this problem of the intra-Community supplies is only a matter of burden of proof, which still falls upon the taxable person. In those situations where the taxable person has done his utmost to collect the available proof of the transport, the Court may however consider, as in the *WebMindLicenses* case, that administrative cooperation is needed in order to avoid a double taxation of a single transaction.

**b. And what about the burden for the administrative authorities?**

12. The Court of Justice's conclusion that a Member State who envisages to tax a transaction that has already been subject to VAT in another Member State is required to send a request for information to the tax authorities of that other Member State "*when such a request is useful, or even essential, for determining that VAT is chargeable in the first Member State*" also raises questions with regard to the administrative capacity in the requesting and the requested Member States.

It is true that the obligation of the requested authority to provide assistance entails an obligation to communicate the information requested, "*including any information relating to a specific case or cases*." The Regulation on administrative cooperation in the field of VAT also confirms that for the purpose of forwarding the requested information, "*the requested authority shall arrange for the conduct of any administrative enquiries necessary to obtain such information*". However, Articles 7(4) and 54(1) of this Regulation explicitly state that the requested authority may refuse to provide a requesting authority in another Member State with the information requested – and refuse an administrative enquiry – if the number and the nature of the requests for information made by the requesting authority within a specific period impose a disproportionate administrative burden on that requested authority.

This refusal right of the requested authority may conflict with the taxable person's right to have an administrative cooperation in order to avoid double taxation of his specific transaction(s).

**5. Conclusions**

13. The EU VAT system is designed in such a way that a single transaction should only be subject to VAT in one Member State. Double taxation however occurs. It results from different appreciations of the factual circumstances or different understandings of the EU VAT rules or the national rules implementing the EU provisions. The Court of Justice's recent decision that Regulation 904/2010 obliges the Member States to cooperate in order to avoid such double taxation situations can be welcomed as a positive action to facilitate the functioning of the VAT system. Further clarification will however be needed with regard to the scope and the result that is expected from this administrative cooperation.

The Court's decision anyhow contributes to the pressure on the EU legislator to simplify the current EU VAT rules: reducing the complexity of the VAT system would probably make an end to many discussions. It also pushes the national VAT authorities to apply more flexibility in the implementation and application of these VAT rules.

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13 Article 7(1) of Regulation 904/2010.
14 Article 7(2) of the same Regulation.