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Composite Supplies under EU VAT: Closer Encounters of the Third Kind?

Giorgio Beretta (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) · Friday, July 31st, 2020

Composite supplies are one of the most commonly debated issues under European VAT (EU VAT). Despite its unquestionable relevance as a topic, neither Directive 2006/112/EC (the VAT Directive) nor Council Implementing Regulation (EU) no. 282/2011 (the VAT Implementing Regulation) contain any settled rule providing a clear indication on how to deal with the issue of single or multiple supplies. Fortunately, some guidance on the VAT treatment of composite supplies have been provided, through the years, by the Court of Justice of the European Union (CJEU). Starting from its milestone decision in *Card Protection Plan* (Case C-349/96), the CJEU has in fact developed a specific doctrine on the treatment of transactions comprising 'a cluster of features and acts' **[1]**, i.e. composite supplies.

The CJEU's Doctrine on Composite Supplies

The CJEU's doctrine on composite supplies has a main rule and two exceptions. The main rule, as it follows from the second subparagraph of Article 1(2) of the VAT Directive, stipulates that every transaction must normally be regarded as distinct and independent for VAT purposes. This primary course is termed as 'splitting' **[2]**. Two notable exceptions, however, are generally acknowledged to this main approach. Under the first exception, a single composite supply exists where one or more supplies constitute a principal supply, while the other supply or supplies constitute one or more ancillary supplies which ought to receive the tax treatment of the principal supply **[3]**. As such, the VAT treatment under this first exception follows the Latin maxim '*accessorium sequitur principale*' or the 'principle of absorption' of the ancillary (or subordinate) supply into the main (or principal) supply **[4]**. However, a single supply also exists – and that is the second exception widely acknowledged – where two or more elements (i.e., the supplies) made by a taxable person are so closely linked that they form, objectively, a single, indivisible economic supply that would be artificial to split **[5]**. It is generally understood that no other types of situation with regard to composite supplies are contemplated under the current EU VAT framework beside those illustrated above **[6]**.

***BlackRock Management Investment (UK) (Case C-231/19)*: A New Exception for Composite Supplies Is Borne?**

However, *BlackRock Management Investment (UK)* (Case C-231/19), a recent case decided by the CJEU on 2 July 2020, seems to shed a fresh light on the supposedly settled doctrine of composite

supplies. The gist of the case relates to the scope of the exemption for 'the management of special investment funds' provided for in Article 135(1)(g) of the VAT Directive. In particular, the CJEU was asked to determine whether, and how, supplies of services made by a third party provider to a fund manager through the use of a software platform may be exempted under the aforementioned provision, given that those services were actually used for the management of both special investment funds and other funds. For carrying out such an assessment, however, the CJEU had to examine, first, whether the services in question could be considered a single composite supply for VAT purposes. The CJEU replied in the affirmative, but it is the analysis made which is most relevant here **[7]**. In this regard, the Court in fact maintained that the services provided through the software platform, i.e. '[t]he services of analysing markets, monitoring performance, evaluating risk, monitoring regulatory compliance and implementing transactions correspond to successive steps, all of which are equally necessary to allow investment transactions to be made under good conditions'. On this basis, the CJEU concluded that 'such a supply must be regarded as a single supply comprising *various elements of equal importance*' (paragraph 33, emphases added). The peculiarity of the case, and the one worth analysing in this note, relates to the fact that the Court affirmed the existence of a single composite supply, without, at the same time, calling into question either of the two exceptions mentioned above. Notably, the Court expressly ruled out the eventuality that a principal supply may be distinguished from another ancillary supply in the single supply of management funds at issue, as it was instead contendeded by the UK Government at the hearing (paragraph 32). As such, the conclusions of the CJEU follow closely the Opinion of Advocate General Pikamäe in the case at hand delivered on 11 March 2020, who submitted that 'the services of market analysis, monitoring performance, risk assessment, monitoring regulatory compliance and implementing transactions may be provided together, in a complementary fashion, and *placed on the same footing*' (paragraph 51 of the Opinion, emphases added). Thus, in his Opinion, Advocate General Pikamäe fundamentally adhered to the European Commission's observation at the hearing classifying the services at issue as an 'undifferentiated supply with no inherent distinction [with regard to the recipient]' (footnote 40 of the Opinion). As for the second exception – i.e., the one calling for the existence of a single composite supply where two or more elements made by a taxable person are so closely linked that they form, objectively, a single, indivisible economic supply that would be artificial to split – it was not specifically addressed by the CJEU, while Advocate General Pikamäe hinted at that exception and considered it applicable to the case at hand in a passage (paragraph 51 of the Opinion).

That being said, thus far the thing that is standing out most is that, although the exception for ancillary supplies cannot apply to a single supply comprised of 'various elements of equal importance' (to follow closely the language of the CJEU in *BlackRock Management Investment (UK)* (Case C-231/19)), those kinds of supplies may still be considered a single composite supply for VAT purposes.

A Single Supply Comprised of Equal Status Supplies: A Third Exception in Disguise?

As a matter of fact, it is not the first time that a situation involving a single supply comprised of several elements (i.e., supplies) which should be placed on the same footing occurs. As both Advocate General Pikamäe and the Court rightly observed in the case at hand (respectively, in paragraph 42 of the Opinion and in paragraph 34), a similar type of situation can in fact be retraced in *Deutsche Bank* (Case C-44/11), in which it was held that elements of a transaction may be 'not only inseparable', but also placed '*on the same footing*' if they are 'both indispensable in carrying out the principal service and the other as the ancillary service' (paragraph 27 of *Deutsche Bank*, emphases added). Another case in point – although not mentioned in the case at hand – is *Baštová*

(Case C-432/15), in which the CJEU had the following say: '[i]f it is not possible to determine, among the components of which the single composite supply consists, a main component and one or several ancillary components, the components of which that supply consists must be regarded as of *equal status*' (paragraph 72 of *Baštová*, emphases added). More in general, the circumstance that '[t]he principal/ancillary supply arrangement is only *one* scenario already recognised in case-law' has been duly emphasized in *Levob Verzekeringen BV and OV Bank* (Case C-41/04) by Advocate General Kokott, who also held that, from the fact that 'neither of the two main supplies … is subsidiary to the other in such a way that it clearly represents an ancillary supply … it cannot be concluded … that the two supplies cannot be regarded as a single comprehensive supply for value added tax purposes' (paragraph 68 of the Opinion of Advocate General Kokott in *Levob*, emphases original). The existence of multiple, not fully disclosed scenarios with regard to composite supplies has also been acknowledged outside the CJEU's case-law. In this connection, it is interesting to mention the House of Lords' judgment in *College of Estate Management (CEM)* ([2005] UKHL 62), in which Lord Rodger of Earlsferry, one of the learned judges sitting at the UK top-tier court, maintained that 'plainly, in cases *where there is no ancillary supply, a single supply may still be made up of more than one element*. So where a taxpayer is involved in a transaction in which he performs several services, none of which can be singled out as the dominant or principal supply, it may nevertheless be necessary to consider whether, for tax purposes, they are properly to be regarded as elements of a single supply' (paragraph 10 of *College of Estate Management (CEM)*, emphases added).

At this juncture, one may question the purpose of discussing at length whether 'the principal/ancillary arrangement' (to recall the expression used by Advocate General Kokott in *Levob*) or, instead, any other conceivable scenario applies if, after all, a transaction comprising 'a cluster of features and acts' is, any event, considered a single composite supply for VAT purposes. A reply to this observation is that the characterization of a single composite supply may well differ whether one or another scenario is involved and that, from such a different characterization, various implications follow, especially in terms of place of supply, applicable rates, exemption, chargeability and even VAT liability. For instance, whether a supply is ancillary to another principal supply is of importance for classifying a single composite supply as a supply of goods or a supply of services, insofar as the characterization of the whole single composite supply depends on whether the main supply within it is a supply of goods or a supply of services. This straightforward approach, however, is unavailable in the case of a single supply comprised of two or more equal status supplies, a circumstance that apparently occurred in *BlackRock Management Investment (UK)* (Case C-231/19). In such an event, no tie-breaker rule such as the principal/ancillary criterion exists. The only key lies in analysing closely the transaction at stake. In the words of the VAT Committee, this examination entails, notably, 'a comparative assessment of the respective importance, in each particular contractual situation, of the goods and the services supplied', in respect of which some guidance may only be retrieved from the CJEU's case-law **[8]**. Clearly, such an unsettled pattern for the examination of a single composite supply is problematic, not least because a different approach by two or more Member States as regards the characterization of a single composite supply may lead to situations of double (non-)taxation **[9]**.

All in all, it is unclear whether, by means of its decision in *BlackRock Management Investment (UK)* (Case C-231/19), the CJEU has intended to grant citizenship to 'a single supply comprising various elements of equal importance' as a third exemption in relation to composite supplies under EU VAT. What seems much more undoubted, instead, is that, due to the problems related to the characterization of a single composite supply discussed above, for VAT specialists to deal with these types of transactions may indeed be like having 'closer encounters of the third kind'.

[1] *Faaborg-Gelting Linien* (Case C-231/94), para. 14; equally referred to as 'a bundle of features and acts', *see*, e.g., *Card Protection Plan* (Case C-349/96), para. 28.

[2] *See* A. van Doesum, H. van Kesteren & G.-J. van Norden, *Fundamentals of EU VAT Law* (Kluwer Law International 2016), at p. 135.

[3] *See*, e.g., *Card Protection Plan* (Case C-349/96), para. 30.

[4] On this principle, *see* O. Henkow, *Chapter 15: Accessorium Sequitur Principale – The Issue of Defining the Tax Object for VAT Purposes*, in *Principles of Law: Function, Status and Impact in EU Tax Law* (C. Brokelind ed., IBFD 2014).

[5] *See*, e.g., *Levob Verzekeringen BV and OV Bank* (Case C-41/04), para. 22.

[6] For a closer examination of these and other issues relating to composite supplies, please *see* G. Beretta, *European VAT and the Sharing Economy (*Kluwer Law International 2019), at pp. 147-197.

[7] For a commentary on the other relevant aspects of the case, please *see* G. Beretta, *BlackRock Investment Management (UK). Exemption for the management of special investment funds – Single supply used for the management of special investment funds and for other funds – Supply of a package of services using a software platform. Court of Justice (comments by Giorgio Beretta)*, Highlights & Insights on European Taxation (2020) – *forthcoming*.

[8] In the CJEU's case-law, scattered indications may be found, in particular, in *Faaborg-Gelting Linien* (Case C-231/94); *Levob Verzekeringen BV and OV Bank* (Case C-41/04); *Aktiebolaget NN* (Case C-111/05); *Graphic Procédé* (Case C-88/09); *Bog and Others* (Case C-497/09).

[9] On double (non-)taxation as a result of different characterization of the same supply, *see*, e.g., EU VAT Forum, *'Prevention and Solution of VAT Double Taxation Dispute' Report*, Ref. Ares(2020)423263, at p. 24; European Commission, *Report on the Outcome of the Consultation on 'Introduction of a Mechanism for Eliminating Double Imposition of VAT in Individual Cases'*, TAXUD/D1/EWS/mav D(2007) 15925, at p. 3.

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