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Giorgio Beretta (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) and Dennis Weber (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Loyens & Loeff) · Tuesday, October 25th, 2022

Highlights & Insights on European Taxation

Please find below a selection of articles published this month (October 2022) in Highlights & Insights on European Taxation, plus one freely accessible article.

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FREE ARTICLE

– ***Uniqa Asigur?ri* (C-267/21)**. Place of supply of insurance services. Claims settlement services. Court of Justice

(comments by **Kevin van Abswoude**) (H&I 2022/287)

The case at hand relates to claims settlement services supplied to Uniqa by its foreign partner companies and another company also established outside Romania (Coris International). The question is raised which VAT provision determines its place of supply: Article 43 or 56(1)(c) of VAT Directive 2006/112/EC, as applicable at the time of facts.

Relevant legislation

Before identifying the correct place of supply rule, the Court of Justice of the European Union (‘CJ’) considers which version of the VAT Directive is applicable in the case at hand. In its request for a preliminary ruling, the Romanian national court refers to Articles 46 and 59 of VAT Directive 2006/112/EC which, at the time of the facts (between 2007 and 2009), cover supplies of transport and telecommunications services to non-taxable persons. Given that these articles are redundant to the case at hand, the CJ assumed that the preliminary question relates to the rules as revised by VAT Directive 2008/8/EC. This amendment caused a significant shift from the origin to the destination principle. As Articles 46 and 59 of the VAT Directive as rephrased by Directive 2008/8/EC cover supplies by intermediaries and ‘services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information’, the preliminary question makes more sense. However, this amendment entered into force (in 2010) after the facts of the case took place (between 2007 and 2009). Consequently, it could not have been applicable. Moreover, Articles 46 and 59(1)(c) of the VAT Directive as rephrased by Directive 2008/8/EC relate to B2C supplies, and hence, are redundant to the case at hand. Therefore, CJ reformulated the preliminary question to Article 56(1)(c) of VAT Directive 2006/112/EC.

This approach shares similarities with *Nestrade* (CJ 14 February 2019, C-562/17 *Nestrade*, **ECLI:EU:C:2019:115**, paras 27-32), relating to a VAT refund to a Swiss company. Here, the national court refers to the VAT Directive 2006/112/EC, whilst the CJ reformulates the preliminary question to the Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes. – Arrangements for the refund of value added tax to taxable persons not established in Community territory *(OJ 1996 L 326, p. 40)*. Nonetheless, whilst in *Uniqa* the rectification is of a temporal nature, *Nestrade* concerns a material correction relating to the place of establishment. To my knowledge, *Uniqa* is truly unique as it is the first case in which the CJ has to remind the referring court of the timeline of the facts and VAT Directives.

However, arguing in the referring court’s defence, reformulation was not completely necessary. The original question referred, explicitly focused on the definition of ‘services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the provision of information’, which has not changed under the amendment. Perhaps, the referring court simply wanted to ‘convert’ the preliminary question to present-day legislation. Then, as long as it applies the correct VAT Directive (2006/112/EC) in the national proceedings, it does not matter under which Directive the CJ interprets the term. Hopefully, this hypothesis is accurate, and the referring court did not really intend to apply the VAT Directive as rephrased by Directive 2008/8/EC to the underlying case.

Article 56(1)(c) of VAT Directive 2006/112/EC

Although significantly reduced in scope over the years, Article 56(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, *OJ* L 347, 11.12.2006: the ‘VAT Directive 2006/112’) has survived the test of time and its remains can be found in Article 59(c) of the current consolidated VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, *OJ* L 347, 11.12.2006). Despite losing its importance to B2B, intra-EU and TBE services, the provision is far from redundant. Unfortunately, its interpretation has never been unambiguous (see Commission of the European

Communities. COM(83) 426 final. Brussels, 14 September *1983*. First report from the Commission to the Council, p. 15).

Therefore, the CJ started its analysis by repeating its doctrine that Article 56(1)(c) of VAT Directive 2006/112 refers to supplies of services, not professions, which simply serve as a means of defining the categories of services (issue clarified, for the first time, in *von Hoffmann* (C-145/96, para. 15). This preserves two crucial cornerstones in EU VAT law. First, disregarding the supplier's classification and focusing on the services adheres to the principle of fiscal neutrality, particularly its legal component preserving equal treatment (see CJ 27 October 1993, C-281/91 *Muys' en De Winter's Bouw- en Aannemingsbedrijf*, **ECLI:EU:C:1993:855**, paras 13-14). Irrespective of the professional status, supplies are similar and hence, should be treated equally if their quality is the same (see CJ 27 April 2006, C-443/04 and C-444/04 *H.A. Solleveld van den Hout?van Eijnsbergen*, ECLI:EU:C:2005:809, paras 40-41). Ignoring the professional classifications of taxable persons ensures equal treatment of similar supplies.

Second, disregarding the professional qualification guarantees the uniform application of EU VAT law across all the EU Member States. The conditions for obtaining the legal status as a lawyer might differ from country to country and tying Article 56(1)(c) of VAT Directive 2006/112/EC to such professions would create divergencies in its application (*cf*. the definition of 'supplies of goods' in CJ 8 February 1990, C-320/88 *Shipping and Forwarding Enterprise Safe*, **ECLI:EU:C:1990:61**, paras 7-8). Treating the term as a uniform concept of EU law ensures consistent interpretation across the EU Member States. Whilst never explicitly mentioned by the CJ in the decision at comment, disregarding the professional status in Article 56(1)(c) of VAT Directive 2006/112/EC (unintentionally) preserves these two important EU VAT theories.

Subsequently, the CJ repeats that the services should be principally and habitually carried out as part of the professions (issue clarified, for the first time, in CJ 6 March 1997, C-167/95 *Linthorst, Pouwels en Scheres*, **ECLI:EU:C:1997:105**, para. 18). This condition has also been mentioned twice in connection with Article 9(2)(c) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (*OJ* 1977 L 145, p. 1), covering services relating to scientific activities (see CJ 7 October 2010, C-222/09 *Kronospan Mielec*, **ECLI:EU:C:2010:593** para. 23; and CJ 6 March 1997, C-167/95 *Linthorst, Pouwels en Scheres* C-167/95, paras 14 and 18). However, as these cases also cover Article 56(1)(c) of VAT Directive 2006/112/EC, 'principally and habitually' does not seem to refer to scientific activities. Future case law might provide more clarity in this regard.

Subsequently, the CJ individually examined whether the claims settlement services are principally and habitually carried out by the professions in question. It concluded that, whilst engineers might assess damage resulting from road traffic accidents and may check patients in the context of medical insurance, they do not principally and habitually perform these activities. Similarly, it concluded that it does not concern 'services of lawyers', given that claims settlement services are not conducted in the field of litigation. Moreover, the supplies are not 'services of consultants, consultancy bureaux or accountants' due to the decision-making power in the underlying case. Finally, the Court concluded that the services in the case at hand cannot be likened to 'data processing and the provision of information', unfortunately without materially covering this definition. In this respect, I tend to agree with the CJ's arguments and its conclusion that the claims settlement services do not correspond to these specific services mentioned in Article 56(1)(c) of VAT Directive 2006/112/EC, in line with the strict interpretation adopted by the Court in earlier

judgments (*Linthorst, Pouwels en Scheres* (C-167/95), *von Hoffmann* (C-145/96) and CJ 6 December 2007, C-401/06 *Commission v Germany*, **ECLI:EU:C:2007:759**).

'Other similar services'

Instead, in my opinion, the Court has fallen short in its assessment of whether the services underlying the case at hand might be regarded as 'other similar services', within the meaning of Article 56(1)(c) of VAT Directive 2006/112/EC. As rightly observed, this requires the purposes of the claims settlement services on the one hand, and the individual services on the other, to be similar (paragraph 39). The professions mentioned in the provision concerned should be analyzed separately, not in conjunction (see *Commission v Germany* C-401/06, para. 31).

Consequently, the EU Court briefly elaborated upon the purpose of the claims settlement services (paragraphs 40-41). However, it did not reveal the purposes of the individual professions in Article 56(1)(c) of VAT Directive 2006/112/EC. The CJ simply concluded that none of the individual services pursues the objective of claims settlement services (paragraph 42). Regrettably, a comparison between the two purposes is not made. I identify two issues in this approach.

First, the CJ does not seem to completely adhere to its duties under the procedure for preliminary rulings. Its role is to elaborate on EU law (see CJ 11 March 1980, C-104/79, *Foglia v Novello*, **ECLI:EU:C:1980:73**, paras 11) and to leave the interpretation of the facts to the national court, as the latter 'must assume responsibility for the subsequent judicial decision' (see e.g., CJ 13 July 2000, C-36/99 *Idéal Tourisme*, **ECLI:EU:C:2000:405**, para. 20). However, in this case, instead of interpreting the purpose of the professions in Article 56(1)(c) of VAT Directive 2006/112/EC, it simply stated that these are not matched. Moreover, whilst it should refrain from interpreting the facts of the underlying case, it identified the purpose of the claims settlement services in the case at hand. In my opinion, this might be regarded as being at odds with the division of roles between the CJ and the referring court in EU law.

Second, instead of unveiling the purposes of the professions listed under Article 56(1)(c) of VAT Directive 2006/112/EC, the CJ simply stated it differs from those of claims settlement services. This prudent approach does not provide much legal certainty for taxpayers. Whereas it only helps suppliers of claims settlement services, the CJ could have provided clarity for more taxable persons. Instead of providing the referring court, tax authorities and taxpayers with the framework for solving the puzzle, it gives them only a single piece.

In addition, in my opinion, there might actually be some similarities between the purposes of the professions in Article 56(1)(c) of VAT Directive 2006/112/EC and the services in the underlying case. According to the CJ, the purpose of claims settlement services is 'to remedy damage suffered … in accordance with procedures with which that person is familiar' (paragraph 41). To some extent, lawyers also remedy damage (i.e., legal claims) in procedures less familiar to customers (i.e., the legal field). Moreover, 'the services provided by Coris International … are carried out for the purpose of lodging complaints … covering in particular the guarantee of assistance 24 hours a day to insured persons and the provision to insured persons of technical, organisational and legal assistance.' Similarly, engineers, consultancy bureaux or lawyers also provide (24 hours a day) technical, organizational or legal assistance. Whilst I admit that this interpretation might be somewhat broad, the EU Court has concluded that the scope of Article 56(1)(c) of VAT Directive 2006/112/EC is not to be construed narrowly (ibid, para. 12).

My opinion seems to be shared by the HM Revenue & Customs VAT *Notice 741 Place of supply of services, of March 2002,* section 13.5.8. These guidelines on the place of supply before 1 January 2010 provide an example of ‘other similar services’:

‘services of loss adjusters and assessors in assessing the validity of claims (except when these services relate to land). Such services may include examination of goods to establish a value for damage or deterioration as well as negotiating a settlement amount.’

When compared, the underlying facts in the case of Uniqa, especially the claims settlement services provided by its partner companies, resemble a compelling example of ‘other similar services’, according to the UK tax authorities. Although this notice has been withdrawn and only forms a source of soft law, it confirms the view that the services could (and perhaps should) have been covered under Article 56(1)(c) of VAT Directive 2006/112/EC.

This leaves me to conclude that, first, the CJ should have interpreted the purposes of the professions, not of the facts in the case at hand, instead of vice versa. Second, if unwilling to do so, the EU Court should have provided more elaboration on why the claims settlement services do not meet these purposes. The case at hand is not as clear-cut in stating that the purposes between the individual professions and claims settlement services differ. In contrast, there are compelling arguments for applying Article 56(1)(c) of VAT Directive 2006/112/EC. Hopefully, the CJ will provide more legal certainty in its next case relating to this provision. *Uniqa* is not unique, and whilst the scope of Article 56(1)(c) of VAT Directive 2006/112/EC has been significantly reduced over time, its remains are still alive and might come to haunt the Court in the future.

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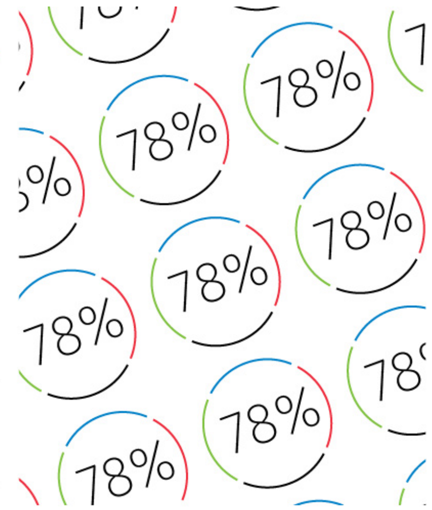

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