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Input VAT newsletter

Independent Group of Persons: Opinion of the Advocate General of the Court of Justice of the European Union

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The European Commission has raised a challenge toward Luxembourg's transposition of the VAT exemption provided for services of independent group of persons (IGP) under Article 132(1)(f) of the EC VAT Directive 2006/112. This exemption is also often referred as the cost-sharing exemption.

Article 132(1)(f) of the directive stipulates what it means to be exempt from VAT for the Member States: "The supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition."

The IGP regime is of interest for taxable persons performing exempt activities, such as banks, insurance companies, and hospitals or for non-taxable persons such as non-profit organizations or public bodies when they want to share some resources. Two examples could be that insurance companies centralize the treatment of claims, or a group of hospitals acquire and exploit expensive machinery in an ad-hoc structure. Without the IGP exemption, this ad-hoc structure would have to charge VAT, which would be a (partial) cost for the members.

This regime is largely used in several EU Member States, the financial sector, and nonprofit organizations. However, the directive does not provide details regarding the conditions of application of this regime, and experience has indicated that Member States have foreseen very different conditions, making its use sometimes impracticable. In a 2010 document,[1] the Commission stated that the IGP regime is underused due to restrictive conditions imposed by some Member States or by lack of guidelines in other Member States. It was thus a surprise to see the Commission challenging the Luxembourg IGP regime, which is designed to offer a flexible and practical tool for sharing costs and resources, and brought the case to the Court of Justice of the European Union (CJEU).

On 6 October, the Advocate General (AG) delivered her conclusions. We summarize and comment on these conclusions hereafter.

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1. Services directly necessary to exempt or out-of-scope activities

Under the Luxembourg law, members could perform taxable activities for up to 30 percent of their turnover. This rule has been introduced because many companies in the financial sector and non-profit organizations have some activities subject to VAT. It is worth noting that the Belgian and French IGP regimes allow a similar threshold (respectively 10 percent and 20 percent).

The AG considers that an IGP could only render services that are directly necessary for exemption or out-of-scope activities undertaken by its members. The AG gave the example of accounting services that would be used for the global activity of the members, and additionally the example of exploiting medical machinery that will be of direct use for an exempt activity. According to the reasoning of the AG, the IGP exemption could be available only in the second situation.

2. Possibility for members to recover VAT incurred by the IGP

The Luxembourg law allows members to recover the VAT incurred by the IGP on its costs up to their VAT deduction right and their share of the services performed by the IGP. This specific rule aims to create a perfect neutrality of the tax. In this respect, Luxembourg has invoked that the CJEU, in its PPG case,[2] has allowed that a taxable person could recover the VAT incurred by the pension fund he has set up for his employees.

In her conclusions, the AG considers that a member could not recover the VAT on costs incurred by the IGP because the member is not the beneficiary of the service.

3. Contributions by members to the IGP

The Luxembourg regime gives the possibility for members to acquire goods and services in its own name, in the account of the IGP, and to pool these goods and services in the IGP in a VAT-free manner.

The AG considers that the IGP is a taxable person independent from its members. Consequently, the goods and services acquired by a member and pooled in the IGP should be treated as transactions in the scope of VAT.

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Comments

We have, of course, to await the decision of the court. However, should the court follow the opinion of the AG, this would represent a dramatic restriction of the scope of application of the IGP regime and will make it impractical in a lot of situations. This will be true not only in Luxembourg but also in many other Member States and will thus not satisfy the wishes of the Commission to see the IGP more broadly used. Any organization using the services of an IGP should be aware of this case and monitor its potential impact, including looking for a potential alternative, if any exist.

Your contacts

Raphael Glohr
Partner – VAT
T +352 451 452 665
rglohr@deloitte.lu

Christian Deglas
Partner - VAT Leader
T +352 451 452 611
cdeglas@deloitte.lu

Joachim Bailly
Partner – VAT
T +352 451 452 824
jbailly@deloitte.lu

Deloitte Luxembourg
560, rue de Neudorf
L-2220 Luxembourg

Tel: +352 451 451
Fax: +352 451 452 401
www.deloitte.lu

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