ESPANHA e associados
sociedade de advogados, RL
Rua Castilho, nº 75, 8º Dto. 1250-068 Lisboa, Portugal tel + 351 21 3038705 fax: + 351 21 3143704 geral@espanhaassociados.pt
www.espanhaassociados.pt NIPC 507 133 757 Registo O.A. 6404 Capital social 10.000,00 euros

Shared services: tax clouds on the horizon

The Portuguese Complementary Business Grouping (ACE) and the European Economic Interest Grouping (EEIG) have been the chosen way for many groups of companies, particularly in the financial area, to organize their shared service centers. When the members of the Grouping are taxable persons who carry out, in whole or in part, VAT exempt transactions, their ability to deduct input tax is set aside or significantly reduced, so that for such entities the establishment of an 'autonomous group' "(ACE or an EEIG) whereby certain activities shared by the grouped companies would be economically prohibitive, if it was not for the VAT exemption ruled by Article 132(1)(f) of the VAT Directive (transposed by Article 9 (21) and (22) of the Portuguese VAT Code).

It is true that this exemption may confer some tax advantage on the establishment of an 'autonomous group' against the subcontracting of services. To that extent, three requirements are laid down for the exemption of VAT to be possible, namely:

a) that the services provided by the "group" are directly necessary for the exercise of the activity of its members;

b) that the "group" merely requires from its members the exact reimbursement of the share of the common expenses which each member respects;

c) that the exemption is not liable to distort competition.

This exemption, originating from the VAT Directives, has not until recently received much attention either from the Member States or from the European authorities. In the meantime, there has been a proliferation of domestic and EU-wide shared service centers - a move from which Portugal has benefited from, particularly as it has been selected for the location of *back-office* services of several European multinationals.

Recently, however, this exemption has been the subject of not only a Working Paper (No 856) of the Commission's VAT Committee but also of several judicial initiatives before the ECJ - and in particular the latter raise issues of concern. By way of an example, let us look at some highlights of the opinion of Advocate General Juliane Kokott in Case C-605/15 (AVIVA):

> *25. From a schematic point of view, it is safe to say that Article 132(1)(f) of the VAT Directive is not a general provision applicable to all exemptions in the same way as Article 131 of the VAT Directive. Article 132(1)(f) of the VAT Directive does not appear under the 'General provisions' heading to Chapter 1 of Title IX ('Exemptions').*

26. The legislature chose instead to put Article 132(1)(f) of the VAT Directive in Chapter 2, under the heading 'Exemptions for certain activities in the public interest'. The exemptions covered by Article 132(1) of the VAT Directive are intended to relieve consumers of those and other services of the burden of VAT on public-interest grounds, be it because the services are typically supplied to persons in need (for example, subparagraph (g) — social welfare), because the costs of vital medical treatment are not taxed (for example, subparagraphs (b) and (c)), or in order to make the education necessary to a society easier to afford (for example, subparagraphs (i) and (j)).

29. The legislature clearly wished to include not only groups of doctors but also groups of educational establishments and so on. The drafting history does not, however, support the inference that groups of banks or insurance companies were also to be included. Even the Court of Justice itself considers the schematic position of the exemption provisions to be significant from the point of view of interpretation.

65. It must be concluded that, even in the light of the fundamental freedoms, Article 132(1)(f) of the VAT Directive is to be interpreted strictly, as meaning that only the services which a group supplies to those of its members that are situated in the (same) territory of a Member State are covered by the exemption.

It is, therefore, a topic to be followed with great attention.

ESPANHA e associados
sociedade de advogados, RL
Rua Castilho, nº 75, 8º Dto. 1250-068 Lisboa, Portugal tel + 351 21 3538705 fax: + 351 21 3143704 geral@espanhaassociados.pt
www.espanhaassociados.pt NIPC 507 133 757 Registo O.A. 6404 Capital social 10.000,00 euros