C-77/19-1

Appeal number: TC/2017/07278

FIRST-TIER TRIBUNAL
TAX CHAMBER

KAPLAN INTERNATIONAL COLLEGES UK LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

Having heard Raymond Hill, counsel, for the Appellants and Owain Thomas QC for the Respondents and having read the draft terms of order agreed between the parties

IT IS ORDERED AS FOLLOWS

1. The questions set out in the Schedule attached hereto are to be referred to the Court of Justice of the European Union pursuant to article 267 of the Treaty on the Functioning of the European Union.
2. All further proceedings in this action shall be stayed until after the Court of Justice of the European Union has given its ruling on the questions referred to it or until further order.
3. The Registrar of the First-tier Tribunal (Tax Chamber) is to send a copy of this Order and the Schedule to the Registrar of the Court of Justice of the European Union.
4. There be no order as to costs

PHILIP GILLETT

TRIBUNAL JUDGE
RELEASE DATE: 30th January 2019

Registered at the
Court of Justice under No. 1104504
Luxembourg, - 1. 02. 2019 For the Registrar
Fax / E-mail:
Received on: 01.02.19 Lynn Hewlett Principal Administrator

CURIA GREFFE
Luxembourg
Entrée - 1. 02. 2019

SCHEDULE TO THE ORDER FOR REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

Introduction

1. By this request for a preliminary ruling by the FTT of the United Kingdom, the Court of Justice is asked to clarify the interpretation of Article 132(1)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (the "**Principal VAT Directive**"). In particular, the issues in the national proceedings concern whether a number of subsidiaries of a single corporate group, which are all established in the United Kingdom - and which are each members of an entity in Hong Kong, also part of the corporate group, which supplies them with services, can benefit from an exemption from VAT on those services pursuant to Article 132(1)(f).

The Parties

2. The Respondent, Her Majesty's Revenue and Customs ("**HMRC**"), are the authority responsible for the assessment and collection of VAT in the UK. HMRC are represented by Owain Thomas QC, barrister, instructed by the Commissioners' General Counsel and Solicitor, HMRC Solicitor's Office, 4th Floor West, Ralli Quays, 3 Stanley Street, Salford M60 9LB.

3. The Appellant, Kaplan International Colleges UK Limited ("**KIC**") is the representative member of a VAT group. It operates as a holding company of other companies in the Kaplan group. KIC is represented by Raymond Hill, barrister, and by DLA Piper UK LLP, Solicitors, 160 Aldersgate Street, London EC1A 4HT.

The History of the Proceedings in the Domestic Courts

4. By a Notice of Appeal generated on 28 September 2017 KIC appeals against decisions of HMRC, as follows: (i) Assessment letter dated 21 April 2017 in respect of periods from 10/14 to 07/16 in the sum of £5,252,264; (ii) Assessment letter dated 22 May 2017 for period 10/16 in the sum of £590,000.

5. The decisions give effect to two further decisions of HMRC to the effect that services received by KIC from Kaplan Partner Services Hong Kong Limited ("**KPS**") do not fall within the scope of the exemption from VAT for Costs Sharing Groups ("**CSGs**") and hence are subject to the reverse charge provisions in the domestic legislation on VAT contained in the Value Added Tax Act 1994 ("VATA 1994").

6. The result of that analysis is that KIC is obliged to account for VAT on those supplies under the reverse charge. Its outputs are predominantly exempt and hence the input tax it incurs which is attributable to its educational activities is irrecoverable. KIC contends that the services supplied by KPS fall within the scope of the exemption for services supplied by CSGs to their members and hence there is no liability for it, as the representative member of the VAT group, to account for those supplies under the reverse charge provisions.

7. The case came before the First-tier Tribunal (Tax Chamber) on 15 and 16 January 2019 which decided to make this reference to the CJEU.

Legislation

The Principal VAT Directive

8. The exemption for CSGs is set out in Article 132(1)(f) of the Principal VAT Directive ("**PVD**") and provides:

> "1. Member States shall exempt the following transactions:

[...]

(f) 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".

9. The members of the relevant entity in the present case carry out exempt educational activities. Article 132(1)(i) PVD exempts:

"the provision of ... university education ... by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects".

10. The present case also raises issues as to the interrelation between the CSG exemption and VAT grouping. Article 11 PVD permits (but does not require) Member States to "regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links". The United Kingdom permits VAT grouping (see the domestic legislation set out below) and KIC is registered for VAT in the UK as the representative member of the VAT group.

Domestic Legislation

11. The exemption for CSGs is implemented into domestic law by Group 16, Schedule 9 VATA 1994 which provides:

"Item No

1 The supply of services by an independent group of persons where each of the following conditions is satisfied—

(a) each of those persons is a person who is carrying on an activity ("the relevant activity") which is exempt from VAT or in relation to which the person is not a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,

(b) the supply of services is made for the purpose of rendering the members of the group the services directly necessary for the exercise of the relevant activity,

(c) the group merely claims from its members exact reimbursement of their share of the joint expenses, and

(d) the exemption of the supply is not likely to cause distortion of competition".

12. Further relevant provisions in relation to the place of supply, reverse charge and the exemption for educational services are set out below.

13. Section 7A VATA 1994 provides in material part:

"7A Place of supply of services

(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.
(2) A supply of services is to be treated as made—
(a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and
(b) otherwise, in the country in which the supplier belongs.
(3) The place of supply of a right to services is the same as that in which the supply of the services would be treated as made if made by the supplier of the right to the recipient of the right (whether or not the right is exercised); and for this purpose a right to services includes any right, option or priority with respect to the supply of services and an interest deriving from a right to services.
(4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person—
(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,
(b) is registered under this Act,
(c) is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom, or
(d) is registered under an Act of Tynwald for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to value added tax,
and the services are received by the person otherwise than wholly for private purposes".

14. Section 8 VAT makes provision for the reverse charge mechanism and it provides in material part:

"(1) Where services are supplied by a person who belongs in a country other than the United Kingdom in circumstances in which this subsection applies, this Act has effect as if (instead of there being a supply of the services by that person)—
(a) there were a supply of the services by the recipient in the United Kingdom in the course or furtherance of a business carried on by the recipient, and
(b) that supply were a taxable supply.
(2) Subsection (1) above applies if—
(a) the recipient is a relevant business person who belongs in the United Kingdom, and
(b) the place of supply of the services is inside the United Kingdom,

and, where the supply of the services is one to which any paragraph of Part 1 or 2 of Schedule 4A applies, the recipient is registered under this Act.
(3) Supplies which are treated as made by the recipient under subsection (1) above are not to be taken into account as supplies made by him when determining any allowance of input tax in his case under section 26(1)".

15. Section 43 makes provision for VAT groups. It provides:

"(1) Where under [sections 43A to 43D] any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—

(a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and

(b) any supply which is a supply to which paragraph (a) above does not apply and is a supply 2 of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and

(c) any VAT paid or payable by a member of the group on the acquisition of goods from another member State or on the importation of goods from a place outside the member States shall be treated as paid or payable by the representative member and the goods shall be treated—

(i) in the case of goods acquired from another member State, for the purposes of section 73(7); and

(ii) in the case of goods imported from a place outside the member States, for those purposes and the purposes of section 38,

as acquired or, as the case may be, imported by the representative member;
and all members of the group shall be liable jointly and severally for any VAT due from the representative member."

16. Section 43(1AA) provides that where

(a) it is material, for the purposes of any provision made by or under this Act ("**the relevant provision**"), whether the person by or to whom a supply is made, or the person by whom goods are acquired or imported, is a person of a particular description,
(b) paragraph (b) or (c) of subsection (1) above applies to any supply, acquisition or importation, and
(c) there is a difference that would be material for the purposes of the relevant provision between–

(i) the description applicable to the representative member, and

(ii)the description applicable to the body which (apart from this section) would be regarded for the purposes of this Act as making the supply, acquisition or importation or, as the case may be, as being the person to whom the supply is made,

the relevant provision shall have effect in relation to that supply, acquisition or importation as if the only description applicable to the representative member were the description in fact applicable to that body."

17. Section 43(1AB) then provides:

"Subsection (1AA) above does not apply to the extent that what is material for the purposes of the relevant provision is whether a person is a taxable person."

18. The exemption for supplies of education is contained in Group 6 of Schedule 9 VATA 1994 and provides (in material part) exemption for:

"GROUP 6 – EDUCATION

Item No.

1 The provision by an eligible body of–

(a) education;

Notes:

(1) For the purposes of this Group an "eligible body" is–
(b) a United Kingdom university, and any college, institution, school or hall of such a university;"

Relevant Facts and the Issues in the Proceedings

19. The First tier Tribunal (Tax Chamber) has heard witness evidence, but not yet made definitive findings of fact in this case pending the ruling of the CJEU on the questions referred. However, the issue of distortion of competition has not yet been examined given the need for clarity as to the test which should be applied in the circumstances of this case.

20. KIC is a member of the Kaplan corporate group, which provides educational and career services. It has nine UK subsidiary companies (**"the Kaplan colleges"**), each of which runs a higher education college (**"the international colleges"**) in the UK in collaboration with 17 UK universities.

21. HMRC have confirmed to KIC that its subsidiaries currently qualify as "colleges of a university" under the UK implementation of Article 132(1)(i) PVD. Therefore, the

Kaplan colleges are currently entitled to treat the educational services which they provide to students as exempt from VAT.

22. Each international college is 100% owned by KIC, save for the University of York International Pathway College (**"UYIPC"**), in which the majority share (55%) is owned by the University of York. The University of York approached KIC to seek this joint venture.

23. The international colleges prepare students almost exclusively from non-EU states for entry to both undergraduate and graduate programmes at the relevant universities. The majority of their students are recruited from states in South East and East Asia.

24. Other significant educational groups run similar international colleges in the UK – as well as some smaller businesses. Each collaborates with a different group of UK universities to prepare international students for those universities. KIC competes with those groups to attract international students to study at its international colleges and then progress on to courses at its partner universities. A number of UK universities operate their own international colleges independently of the main educational groups.

25. Each of KIC's international colleges has its own management and governance structure. Each has a separate Joint Management Board, which is chaired by the university partner and consists of representatives from both the Kaplan college and the relevant university – and each has a Joint Academic Board, which is also chaired by the relevant university with representatives from both KIC and the university concerned. For each international college, the university partner will approve the educational programmes taught, which are distinct for each college on the basis that they are preparing students for specific degree courses at that specific university.

26. The international colleges recruit 85% of their students through a network of 500 educational recruitment agents (**"the agents"**) in 70 countries. They play a vital role in student recruitment, marketing the courses, providing advice and information to

prospective students and their families and supporting students in applying for visas to live and study in the UK. None of the agents has an exclusive relationship with the members of the Kaplan CSG and they are also entitled to work for the Kaplan colleges' direct competitors, as well as the universities directly. In return for their services, the agents receive a commission.

27. Prior to October 2014, the agents contracted directly with KIC in the UK. The agents liaised directly with the marketing and admissions teams at KIC in London in order to recruit students to the international colleges.

28. Prior to October 2014, KIC supported its agent network through a number of representative offices in some of its key markets, including China, Hong Kong, India and Nigeria. The representative offices provided the agents with operational support, including marketing materials, training as to the institutions and courses being marketed and the admissions and compliance procedures, face to face meetings with prospective students and parents, help answering specific questions raised by prospective students as well as support at promotional events. Prior to October 2014, the representative offices were also managed from KIC's London office. The representative offices made supplies of services to KIC for payment. The representative offices are members of the Kaplan corporate group save for one representative office in Vietnam.

29. Prior to October 2014, KIC was liable to UK VAT under the reverse charge on both the services provided by the agents and those provided by the representative offices.

30. In October 2014, the Kaplan Group established KPS in Hong Kong, with 20 employees there (as of December 2018). Following the establishment of KPS, KIC continues to operate through a network of local representative offices and third party agents. However the contractual arrangements with the local representative offices and third party agents now sit with KPS. KPS is a company limited by shares. It is established in Hong Kong. The members of the company each hold one share. KPS operates under the terms of a membership agreement. The current members of KPS are the 9 Kaplan colleges (including UYIPC) – so KIC indirectly owns just under 94% of KPS, with the remainder

being indirectly owned by the University of York, through its majority ownership of UYIPC. KPS does not provide services to non-members of the CSG, save that it does provide agent and representative office services to Kaplan's North American Pathway business. The membership agreement was changed in 2015/16 to allow UYIPC to join, even though it is majority owned by the University of York.

31. Since 2014, both the representative office network and the independent agents have contracted with, and rendered their recruitment services to, KPS in Hong Kong. KPS has taken on responsibilities which were formerly carried out by KIC in London and also it centralises some functions previously carried out by each of the representative offices. KPS is also responsible for managing the representative office network worldwide. Since 2014, the representative office network has expanded and there is an increased level of activity between KPS and the representative offices, with the latter focusing now on the day to day management of agents. Therefore, there are three types of supplies made by KPS to KIC which form part of the dispute, first the services which KPS procures from the agents, second the services which KPS procures from the representative offices and finally services dealing with matters such as compliance, together with the other activities discussed above such as supporting the agents, which KPS itself supplies to KIC.

32. KPS is also responsible for agent management in East and South East Asia. KPS provides an agent service centre which is geographically close and in the same time zone as the international colleges' largest recruitment markets.

33. It is common ground that there were sound commercial reasons for setting up KPS in Hong Kong. It is not alleged that KPS is an artificial entity and there is no suggestion by the UK tax authorities that the establishment of KPS gives rise to an abuse of rights.

34. KIC has given evidence to the national tribunal that the Kaplan international colleges would not seek to obtain recruitment services from another entity, other than KPS, even if KIC was not entitled to VAT exemption on the services provided to it by KPS.

35. Each of the Kaplan colleges also forms part of a VAT group, save for UYIPC. As UYIPC was not a wholly or majority owned subsidiary of KIC, it could not form part of the VAT group registration.

36. Each agent invoices KPS directly. KPS then pays each agent. Although KIC is the representative member of the VAT group, of which the Kaplan colleges are members, in practice KPS charges each Kaplan college separately for the money due to agents for the services provided to the relevant Kaplan college. KPS charges each Kaplan college both for its own services (e.g. compliance) and those procured from the representative offices on the basis of the number of students recruited for that college. KPS calculates the charges by pooling the costs and then dividing them on the basis of student numbers. It then invoices each Kaplan college separately. Agents' marketing expenses are managed in the same way. However, agent commissions are directly attributable to individual students and are charged to the destination college for the student.

37. No VAT is charged on the services provided by the agents to KPS, from the representative offices to KPS and from KPS itself. KIC argues that the supply between KPS and KIC is exempt, applying the CSG exemption in Article 132(1)(f) PVD. Therefore, although there were commercial reasons for establishing KPS in Hong Kong, the establishment of KPS also had the effect that (if KIC is correct that it is entitled to exempt the services received from KPS) there is a VAT saving on the services formerly provided directly by the agents and representative offices to KIC. However, as stated above, it is not alleged that KPS is an artificial entity and there is no suggestion by the UK tax authorities that the establishment of KPS gives rise to an abuse of rights.

38. Turning to the issues, it is not in dispute that KPS provides its members, the Kaplan colleges, with the services directly necessary for the exercise of their exempt activities. It is also not in dispute that the method of charging adopted by KPS provides for exact reimbursement of each member's share of the joint expenses.

39. Four key matters remain in dispute:

(a) Whether or not the exemption from VAT for services supplied by a CSG to its members applies in circumstances where the CSG belongs, and is resident, outside the UK.

(b) The manner in which the national tribunal should assess whether or not any such exemption, if available, is likely to lead to a distortion of competition;

(c) Whether or not the supply of services by the CSG in this case can qualify for the exemption in circumstances where the CSG is a separate taxable entity from its members, but the members are part of the same corporate group and are therefore related to each other independently of their membership of the CSG;

(d) Whether the exemption can apply whilst all of the members of the CSG are also members of a VAT group and are therefore only one taxable person and where the single taxable person for the purposes of the VAT Directive is not a member of the CSG.

The Appellant's arguments in outline

40. KIC submits that the exemption for cost sharing groups in Article 132(1)(f) can apply in cross-border cases. It can apply both in cases where the CSG is established in one Member State of the EU and the members are established in another EU Member State, or indeed in several Member States. It can also apply (as in KIC's case) where the CSG is established in a non-Member State of the EU and the members are established in an EU Member State (or more than one EU Member State). There is support for this submission in European Commission VAT Committee working papers 450, 654, 856 and 883.

41. Although Advocate General Kokott expressed the view in Case C-605/15 *Aviva* and Case C-326/15 *DNB Banka* that the exemption in Article 132(1)(f) could only apply where both the CSG and its members were established in the same EU Member State, that view was not endorsed by the Court in either case. As the learned Advocate General herself

accepted, the wording of Article 132(1)(f) does not contain a restriction requiring both the CSG and its members to be established in a single Member State – whereas other provisions of the Principal VAT Directive which have a limited territorial scope (such as Article 11) expressly indicate so in their wording.

42. To restrict the exemption to CSGs and members who are all established in the same Member State would be contrary to the fundamental freedoms (as regards cross-border supplies between Member States). It would also be contrary to the purpose of the exemption (both as regards cross-border supplies involving CSGs established in Member States and non-Member States) which was to ensure that services provided by a CSG are not subject to VAT where the provision of those services contributes directly to the exercise of the activities in the public interest of its members (see the Court's judgment in *Aviva* at paragraphs 28-29 and *DNB Banka* at paragraphs 33-34).

43. Granting the exemption to the supply of services from a CSG established in a non-Member State to members in a Member State will not cause difficulties in evaluating distortion of competition. The Court has already held in Case C-8/01 *Taksatorringen* that distortion is to be assessed at the level of alternative suppliers to the members of the CSG and cannot exist if, irrespective of any taxation or exemption, the CSG is assured of keeping its members' custom. On that view, distortion is to be assessed by reference to the members' likelihood of purchasing alternative supplies in their Member State of establishment. Even if distortion is to be assessed by looking at the effect of the exemption on recipients of similar services who are not members of the CSG, distortion cannot occur if those recipients can either apply to join the CSG or join or set up another CSG, or take advantage of any other VAT efficiency, such as headquarters to branch supplies. That question is again to be assessed by reference to the market in the Member State of the members.

44. As to the requirement that the CSG be an "independent group of persons", KIC submits that this requires the CSG to be a taxable person which is separate from its members. The members do not have to be free from close financial, economic or organisational links

with each other. This interpretation is required for four reasons. First, the wording of Article 132(1)(f) in the English, French, Spanish and German language versions all make clear that it is the group which has to be independent and not the persons. Secondly, that interpretation is consistent with the Court's previous case law. In neither *Aviva* nor *DNB Banka*, which each concerned CSGs whose members were drawn solely from a single corporate group, did either the Court or Advocate General Kokott suggest that the "independent group of persons" condition required the members of the CSG to be wholly unrelated to each other, as well as the CSG itself. Thirdly, to require the members of the CSG to be independent of each other, as well as the CSG itself, is not required by the purpose of the exemption. The purpose of the exemption is satisfied, even where the members of the CSG are all members of the same corporate group, where the members need to pool their resources to purchase input goods and services – and the provision of those services by the CSG contributes directly to the exercise of the activities in the public interest of its members. Fourthly, it would lead to practical problems in determining the level of independence required between members of the CSG for the exemption to apply. To counter these practical problems, the legislation itself would surely have contained specific requirements as to the extent of the permissible relationship between the members of the CSG, if such a condition had been intended.

45. KIC submits that the exemption remains available, even where the members of the CSG are all members of a single VAT group and therefore a single taxable person. Although the CSG itself has to be a separate taxable person from the members, the members themselves do not have to be taxable persons at all, as is clear from the wording of Article 132(1)(f) itself. Therefore, all that is needed for the CSG to be an "independent group of persons" is for two or more natural or legal persons to be members of the CSG. Again, that is consistent with the purpose of the exemption.

46. The fact that, in national law, the single taxable person to whom the supplies were made was KIC, which was not itself a member of the CSG, is irrelevant to the application of the EU exemption in Article 132(1)(f). It is the UK which has chosen to implement VAT grouping, using the fiction that supplies are received and made by the representative

member, even though they are in fact used by the Kaplan colleges. And it is the UK which has provided a solution to this problem by recognising in section 43(1AA) VATA that the legal fiction created by VAT grouping can be dispensed with when other provisions of the UK VAT legislation require it.

HMRC's arguments in outline

47. There are two Advocate General opinions in Cases C-326/15 *DNB Banka* and Case C-605/15 *Aviva* which directly address the question of whether the CSG exemption can apply in a cross border scenario. The AG opinion in *Aviva* contains a detailed account of why the exemption should be interpreted so as to preclude its application to cross border transactions between CSGs which are not situated in the same Member State as their members (or some of them) and in addition why the application of the exemption beyond the EU is even less tenable. HMRC relies on the opinion in *Aviva* at 36-67 and DNB Banka at paragraph 47. It is important to recognise that the AG Opinion in *Aviva* was delivered against the context of the factual scenario in both *Aviva* and *DNB Banka*.

48. HMRC submits that this case graphically illustrates the tension between the provisions of Article 11 which allows VAT groups, and which allows groups of companies which are closely bound together to be treated as one taxable person for the purposes of VAT, and the provisions of the CSG exemption. The companies in the VAT group in this case are part of a corporate group. Such a group which imported services from a Hong Kong entity such as KPS would be liable to VAT on those services as a result of the reverse charge. Such an entity, even it if it were within the same corporate group as KPS, would not be able to join the VAT group and the provisions which effectively ignore the transactions between members of the same group, because they are the same taxable person, would not apply. By making KPS into a CSG the reverse charge is entirely avoided in circumstances where the supplies remain between entities in the same corporate group.

49. This inconsistency is referred to at paragraphs 46-49 of the AG Opinion in Aviva and HMRC submits that it is starkly illustrated by the facts of this case.

50. In relation to distortion of competition, the CJEU has already indicated that the issue of whether the exemption is likely to give rise to distortions of competition is to be resolved by analysing whether it is the conferring of the exemption itself which is produces a real possibility of such distortion. The issues in this case, if the CSG exemption applies at all, is how that test should be applied to a case where the CSG entity is situated in Hong Kong whereas the group members are in the UK. KIC suggests that this can be resolved simply by reference to whether the group members would seek these services elsewhere even if there were no exemption. There is no reason to adopt such a narrow approach. The analysis should be conducted at the national level relevant to the suppliers who make similar types of supplies (see Case C-288/07 *Isle of Wight Council*, see also paragraph 123 of the AG Opinion in Case C-8/01 *Taksatorringen*). At paragraphs 50 et seq of the AG Opinion in Aviva, she refers to the many difficulties in adopting this approach if the CSG is situated outside the EU.

51. The third issue is whether the CSG exemption can apply to groups which are already constituted as members of a corporate group and which are therefore linked by legal, financial and organisational ties. The purpose of the exemption is to avoid the distortion of competition which independent operators face when, probably because of their size, they are unable to source services from internal resources and are instead forced to seek them on the open market. Such traders suffer the VAT burden on those services where they are engaged in exempt activities but are relived of this burden if they co-operate with others and set up a structure to make such supplies to the members on a not for profit basis. HMRC submits that the application of the exemption to persons who are already constituted as a group plainly goes beyond this purpose and does not fall within the scope of the exemption.

52. The fourth issue is that for some of the periods covered by the assessments in this case there was only one taxable person to whom the supplies of KPS were made. The supplies were not therefore made to the members of the group but to one person. That falls outside the scope of the exemption which requires that the services are supplied to the members. Furthermore, KIC, which was the single taxable person in the UK to whom the supplies were made, was not itself a member of the CSG. For this reason too, the exemption cannot apply.

Relevant case law

53. The Court has not hitherto had an opportunity to clarify the territorial scope of the CSG exemption or therefore to address the correct application of the requirement that the exemption should not be likely to cause distortion of competition in a cross border supply where the CSG is established outside the EU. The Advocate General in Cases 326/15 *DNB Banka* and Case C-605/15 *Aviva* addresses the territorial scope of the CSG exemption in the course of answering questions concerned with the meaning of distortion of competition in the CSG exemption but the issues raised were not addressed by the court in its judgment since it was unnecessary to do so. The issue of distortion of competition has been considered by the Court previously in Case C-8/01 *Taksatorringen,* as well as by the Advocate General in *Aviva.*

The FTT's order

54. Having considered the issues raised in the appeal at a hearing on 15 and 16 January 2019 the First-tier Tribunal decided that the disposal of the appeal rested on several issues concerning the interpretation of the CSG exemption and that it should make a reference for a preliminary ruling from the CJEU to answer the following questions.

Questions referred

1. What is the territorial scope of the exemption contained in Article 132(1)(f) of Council Directive 2006/112/EC? In particular (i) does it extend to a CSG which is established

in a Member State other than the Member State or Member States of the members of the CSG? And if so, (ii) does it also extend to a CSG which is established outside of the EU?

2. If the CSG exemption is in principle available to an entity established in a different Member State from one or more members of the CSG and also to a CSG established outside the EU, how should the criterion that the exemption should not be likely to cause distortion of competition be applied? In particular,

(a) Does it apply to potential distortion which affects other recipients of similar services which are not members of the CSG or does it only apply to potential distortion which affects potential alternative providers of services to the CSG's members?

(b) If it applies only to other recipients, can there be a real possibility of distortion if other recipients who are not members of the CSG are able either to apply to join the CSG in question, or to set up their own CSG to obtain similar services, or to obtain equivalent VAT savings by other methods (such as by setting up a branch in the Member State or third state in question).

(c) If it applies only to other providers, is the real possibility of distortion to be assessed by determining whether the CSG is assured of keeping its members' custom, irrespective of the availability of the VAT exemption – and therefore to be assessed by reference to the access of alternative providers to the national market in which the members of the CSG are established? If so, does it matter whether the CSG is assured of keeping its members' custom because they are part of the same corporate group.

(d) Should potential distortion be assessed at a national level in relation to alternative providers in the third state where the CSG is established?

(e) Does the tax authority in the EU which administers the VAT Directive bear an evidential burden to establish the likelihood of distortion?

(f) Is it necessary for the tax authority in the EU to commission specific expert evaluation of the market of the third state where the CSG is established?

(g) Can the presence of a real possibility of distortion be established by the identification of a commercial market in the third state?

3. Can the CSG exemption apply in the circumstances of this case where the members of the CSG are linked to one another by economic, financial or organisational relationships?

4. Can the CSG exemption apply in circumstances where the members have formed a VAT group, which is a single taxable person? Does it make a difference if, KIC, the representative member to whom (as a matter of national law) the services are supplied, is not a member of the CSG? And, if it does make a difference, is this difference eliminated by national law stipulating that the representative member possesses the characteristics and status of the members of the CSG for the purpose of applying the CSG exemption?

Dated this 29th day of January 2019