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Opinion Statement FC 7/2016

on the consequences of the CJEU judgment in joined cases C-536/08 and C-539/08, *Facet et al.* on the right to VAT input deduction

Prepared by the CFE Fiscal Committee
Submitted to the European Commission in May 2016

The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries with more than 200,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe. The CFE is registered in the EU Transparency Register (no. 3543183647-05).

We will be pleased to answer any questions you may have concerning CFE comments. For further information, please contact Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, CFE Tax Policy Manager, at brusselsoffice@cfe-eutax.org.

Introduction:

On 22 April 2010, the EU Court of Justice rendered its judgment on joined cases C-536/08 and C-539/08, *Facet* i.a.¹.

In that case the Court considered the consequences of what is now articles 40-42 of Directive 2006/112/EC on a common VAT system. These articles apply when a trader makes supplies in a different EU member state but cannot establish that VAT has been properly accounted for in that state. In such circumstances, the Court considered that a trader was provisionally liable to account for VAT in the state where it is registered, but had no right to deduct input tax against that liability.

CFE comment:

The CFE has considerable concerns about the practical consequences of the judgment, for a number of reasons.

Firstly, the financial costs of a trader having to account for VAT on supplies without any right to deduct input tax can frequently be to drive it into insolvency. The Court has on a number of occasions stated that the right to deduct input VAT is fundamental principal of the VAT system: see for example paragraph 26 of Case c-277/14², *PPUH Stehcemp*. This aspect of the judgment is not consistent with that principle;

Secondly, a state relying on the judgment to recover VAT will be receiving a windfall at the expense of the tax authority where the supply in fact took place, and where the tax ought to therefore be paid. While this windfall may be intended to be provisional, in reality it is likely to become final if the business becomes insolvent as a result of the claims, so any tax is just paid to the authorities where it is registered, even though the supplies in fact took place in a different state. This is because the insolvency will in practice make it impossible to ever fully regularise the position and thereby provide an opportunity to nullify the provisional liability.

Given these unfortunate consequences, the time has surely come when these rules should be reconsidered. With improved procedures for mutual enforcement and exchange of information between tax authorities, there is no reason why the tax should not be due to the tax authority where the supplies in fact took place. Ensuing the tax is just due in the jurisdiction where the supply in fact took place will have the benefit of preventing tax authorities receiving windfalls at the expense of other tax authorities. Because input tax can be deducted from the demands, it may also have the benefit of preventing businesses being driven into insolvency as a result of innocent errors.

¹ *Staatssecretaris van Financiën v X; Staatssecretaris van Financiën v fiscale eenheid Facet BV and Facet Trading BV*, [2010] ECR I-3581: <http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=C-536/08>.

² Judgment of 22 October 2015, *PPUH Stehcemp sp. j. Florian Stefanek, Janina Stefanek, Jarosław Stefanek v Dyrektor Izby Skarbowej w Łodzi*: <http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=C-277/14>.

Even if such a change is considered too radical, limiting the provisional liability to a sum that takes account of the input tax incurred will at least ensure a more proportionate demand and reduce the dangers of businesses becoming insolvent in consequence of the demands.