MALTA
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OF TAXATION

Position Paper 01/2020

Interpreting Regulation 7 of the VAT Grouping Regulations (S.L. 406.21 of the Laws of Malta)

12 June 2020

This Position Paper sets out the MIT's views on the interpretation of Regulation 7 of the VAT Grouping Regulations.

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Interpreting Regulation 7

"Notwithstanding that the provision of services by one establishment of a taxable person to another establishment of the same taxable person shall not constitute a supply of services for consideration by a taxable person acting as such for the purposes of article 4 of the Act, the provisions of regulation 6(1) shall not apply to supplies of services made by or to an establishment situated outside Malta if that establishment is a member of a VAT group in a Member State that operates a system of VAT grouping in terms of which the establishment alone, and not the entire enterprise of which it forms part, is incorporated in a VAT group, and, in such circumstances, supplies of services made by or to the establishment situated outside Malta shall be treated, for the purposes of the Act, as supplies made by or to a separate taxable person."

The following outlines the Malta Institute of Taxation's interpretation of the above-mentioned provision:

The relevance of 'establishment'

The VAT Grouping Regulations (S.L. 406.21) set out the rules and procedures for the registration of two or more persons as a single taxable person (VAT Grouping). One of the criteria for the formation of a VAT Group is that the members must be established in Malta (Regulation 3(1)). The term "established" has the meaning given in article 2 of the VAT Act, which provides that a taxable person is established in a country if he has established his economic activity (business establishment) or has a fixed place of establishment (fixed establishment) from which he carries on that economic activity in that country.

As clarified in the VAT Committee Consultation document of 16 March 2018 (WP 942), in the case of a legal person which has its main establishment in one country and its fixed establishment in another country, to the extent that one of the establishments is located in Malta and an application has been made for the formation of, or admission to, a VAT Group, Malta will consider the whole entity to form part of the Malta VAT Group. On this basis, we understand that Malta has adopted a 'whole-entity' approach to VAT Grouping, such that, when a Malta establishment of an entity having multiple establishments joins a Malta VAT group, the entire entity is considered to form part of the Malta VAT Group and not merely the Malta establishment. It is acknowledged that some Member States adopt an 'establishment-only' approach to VAT Grouping, such that, when an establishment located in that Member State joins a VAT group registered in that Member State, it is only that establishment that is treated as part of the VAT Group and not the whole entity.

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The introduction of Regulation 7

Further to the VAT Committee Consultation, Malta's draft VAT Grouping legislation was revised to include the following provision in Regulation 7:

"Notwithstanding that the provision of services by one establishment of a taxable person to another establishment of the same taxable person shall not constitute a supply of services for consideration by a taxable person acting as such for the purposes of article 4 of the Act, the provisions of regulation 6(1) shall not apply to supplies of services made by or to an establishment situated outside Malta if that establishment is a member of a VAT group in a Member State that operates a system of VAT grouping in terms of which the establishment alone, and not the entire enterprise of which it forms part, is incorporated in a VAT group, and, in such circumstances, supplies of services made by or to the establishment situated outside Malta shall be treated, for the purposes of the Act, as supplies made by or to a separate taxable person."

This provision would appear to have been introduced as an anti-abuse measure, addressing the decision of the CJEU in the *Skandia* case (C-7/13) which dealt with a fixed establishment of a US Company in an EU Member State which adopted the 'establishment-only' interpretation of VAT Grouping. In this case, the CJEU held that supplies of services from a main establishment in a third country to its branch in a Member State constitute taxable transactions **when the branch belongs to a group of persons which it is possible to regard as a single taxable person for VAT purposes**. In our view, the decision of the CJEU should be interpreted in the light of the specific facts and circumstances of the case – in particular, that the *establishment (i.e. the branch alone)* in the Member State, and not the entire entity, was considered to form part of the VAT Group in that Member State, and that consequently that establishment (i.e. the branch) was to be regarded as a separate taxable person from the Head Office in the third country.

Context

Regulation 7 is to be considered in the context of the following:

1. A legal person having multiple establishments is regarded as one single taxable person for VAT purposes. As maintained by the CJEU in the *FCE Bank* case (C-201/04), a fixed establishment is not a legal entity distinct from the company of which it forms part. As a result, transactions between a business establishment and its fixed establishment are typically not regarded as supplies between separate taxable persons for VAT purposes.

2. As mentioned above, Malta adopts a 'whole-entity' approach to VAT Grouping, such that, when a Malta establishment of an entity having multiple establishments joins a Malta VAT

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group, the entire entity is considered to form part of the Malta VAT Group and not merely the Malta establishment. It would follow that a supply of services by the entity (whether from its Malta establishment or its non-Malta establishment) to another member of the VAT Group, and vice-versa, would be disregarded for Malta VAT purposes. Likewise, the FCE Bank principle would apply to transactions between the Malta and non-Malta establishments of the entity.

3. Certain Member States adopt a 'whole-entity' approach to VAT grouping. As mentioned above, other Member States adopt an 'establishment-only' approach to VAT Grouping i.e. when an establishment located in that Member State joins a VAT Group registered in that Member State, it is only that establishment that is treated as part of the VAT Group and not the entire entity. Further to the decision of the CJEU in *Skandia* (C-7/13), in such a scenario, the establishment forming part of the VAT Group is to be considered to be a separate taxable person for VAT purposes from the entity of which it forms part. As a result, the *FCE Bank* principle does not apply in respect of transactions between the two establishments.

Interpretation of Regulation 7

It is understood that Regulation 7 constitutes an anti-abuse provision in the light of the decision of the CJEU in *Skandia* (C-7/13), and is being interpreted in this context. In summary, this provision – as we understand it – withdraws the application of the 'disregarded supply' rule (the rule in terms of which a supply between VAT Group members is disregarded) when a non-Malta establishment forming part of a Malta VAT Group supplies services to other VAT Group Members and vice-versa.

Break down of the provision:

Extract from Regulation 7	**Interpretation**
Notwithstanding that the provision of services by one establishment of a taxable person to another establishment of the same taxable person shall not constitute a supply of services for consideration by a taxable person acting as such for the purposes of article 4 of the Act,	Notwithstanding the *FCE Bank* principle
the provisions of regulation 6(1)	Reg. 6(1) establishes the 'disregarded supply' rule: *"any supply of goods or supply of services made by one member of a VAT Group to another member of that VAT Group shall be disregarded for the purposes of the Act"*
shall not apply to	The exclusion of the 'disregarded supply' rule. In other words, the 'disregarded supply' rule shall not apply to the following transactions:

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supplies of services made by or to an establishment situated outside Malta	Supplies of services made: - TO a non-Malta establishment forming part of a Malta VAT Group or - BY a non-Malta establishment forming part of a Malta VAT Group
if that establishment is a member of a VAT group in a Member State that operates a system of VAT grouping in terms of which the establishment alone, and not the entire enterprise of which it forms part, is incorporated in a VAT group	Where the non-Malta establishment: - Is also a member of a non-Malta VAT Group, **and** - The MS of the VAT group adopts an 'establishment-only' approach to VAT Grouping
and, in such circumstances,	As a result, where the above conditions subsist:
supplies of services made by or to the establishment situated outside Malta shall be treated, for the purposes of the Act, as supplies made by or to a separate taxable person	Supplies of services made: - TO a non-Malta establishment forming part of a Malta VAT Group or - BY a non-Malta establishment forming part of a Malta VAT Group shall be treated as supplies TO or BY a separate taxable person. In other words:- (i) the 'disregarded supply' rule shall not apply to supplies of services: - By a member of the Malta VAT Group to the non-Malta establishment forming part of the Malta VAT Group; and - By the non-Malta establishment forming part of the Malta VAT Group to another Member of the Malta VAT Group.
	Furthermore, it may be inferred (taking into consideration the decision of the CJEU in Case C-7/13) that: (ii) the *FCE Bank* principle shall not apply to 'supplies of services': - By a Malta establishment forming part of a Malta VAT Group to its non-Malta establishment; and - By the non-Malta establishment forming part of the Malta VAT Group to its Malta establishment.

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The application of Regulation 7, as outlined in the table above, may be illustrated as follows:

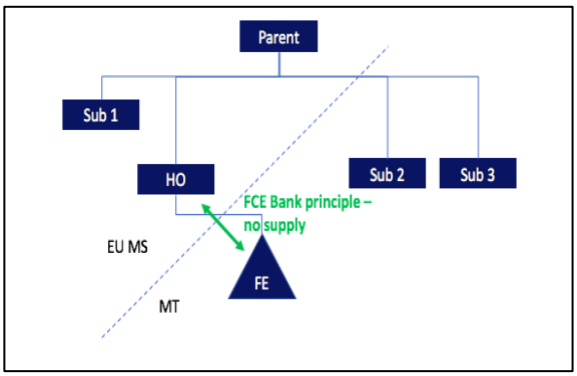


Fig. 1: *FCE Bank* principle – no supply between HO and Branch

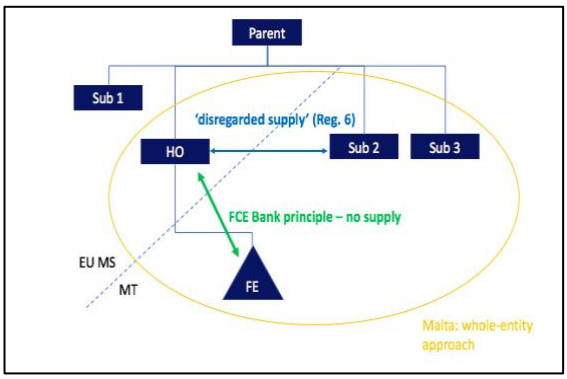


Fig. 2: 'Disregarded supply' between members of a VAT Group (Reg. 6)

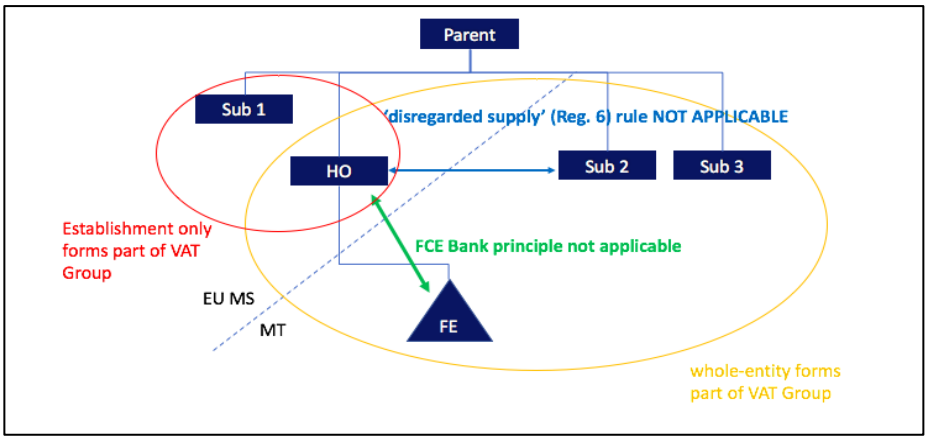


Fig. 3: Regulation 7 - 'disregarded supply' rule NOT applicable; *FCE Bank* principle also NOT applicable based on case C-7/13

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