Taxable Event and Taxable Base for VAT of Artistes and Sportsmen under the Sixth Directive

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I. Preliminary remarks

This thesis discusses the value added taxation of international performing artists and sportsmen. It should first be noted that the value added taxation[1] of internationally performing artists and sportsmen complies with the general provisions of the Sixth Directive. This thesis focuses on the provisions regarding taxable events and taxable bases for VAT under the Sixth Directive, with particular emphasis on the treatment of artists and sportsmen.

Pursuant to Art.4 para.1 of the Sixth Directive, VAT for artists and sportsmen is only an issue if the artist or sportsman independently carries out economic activity,[2] in any place, irrespective of the purpose or result of that activity. If this condition is met, an examination has to be made as to which supplies are taxable. Afterwards, in the case of taxable supplies, the taxable base has to be determined.[3]

II. Historical developments and the structure of the Sixth Directive

2.1 Legal Basis

Under Art. 99 EC, the Council is required to adopt measures for the harmonisation of "turnover taxes, excise duties and other indirect taxes" where this is "necessary to ensure the establishment and functioning of the Internal Market".

2.2 Objectives

Among the 38 Directives on harmonisation of the legislation of Member States concerning turnover taxes enacted by the Council of Ministers since 1967, the Sixth Directive passed on 17 May 1977 was, apart from the First and Second Directive of the year 1967, the most substantial legal act of the European Community in this area.[4] Although there are 38 European Directives on VAT, the Sixth Directive is the paramount one in the course of harmonisation of VAT because the current status of harmonization is widely based on it.

The First Directive, which lays down the principle underlying the system and characteristics of the VAT system, obliged the Member States of the European Community to adopt a standardised common system of VAT applying a proportional consumption tax to the supplies of goods and to the supplies of services.[5]

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1 Hereinafter referred to as VAT.

2 See Art. 4 para.2 for a precise definition of the term "economic activity".

3 The applicable tax rate and possible exemptions are not the subject of this thesis.

4 Schwarz, Die 6. Umsatzsteuer-Richtlinie im Lichte der Rechtssprechung des EuGH – Eine kritische Auseinandersetzung mit ausgewählten Judikaten (1995) 7.

5 First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (67/227/EEC).

The Second Directive then provided for a solid structure and procedures for wide-ranging applicability.[6]

In April 1970 the decision was taken to finance the European Economic Community Budget from the Communities' own resources. These included payments based on a proportion of value added tax and "obtained by applying a common rate of tax on a basis of assessment determined in a uniform manner according to Community rules". Therefore, the primary objective of the Sixth Directive was to ensure that each Member State had a broadly identical "VAT base": i.e. levied VAT on the same transactions.[7] To put it another way, the Sixth Directive sets out detailed rules for the common VAT system. It has since undergone a number of amendments. The most important amendments are:

- Eighteenth Council Directive of 18 July 1989 on the harmonization of the laws of the Member States relating to turnover taxes – Abolition of certain derogations provided for in Article 28(3) of the Sixth Directive, 77/388/EEC (89/465/ EEC),
- Council Directive of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (91/680/EEC),
- Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax,
- Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC (approximation of VAT rates),
- Council Directive 94/5/EC of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388/EEC –Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques,
- Council Directive 94/4/EC of 14 February 1994 amending Directives 69/169/ EEC and 77/388/EEC and increasing the level of allowances for travellers from third countries and the limits on tax-free purchases in intra-Community travel.

The Sixth Directive lays down substantive law. It determines the scope of the VAT system (Art. 2), which covers the supply of goods (Art. 5) and services (Art. 6), performed by a taxable person (Art. 4) within the territory of the country (Art. 3), and the importation of goods (Art. 7). This framework is completed by regulations determining the place of taxable transactions (Arts. 8 and 9) and the

[6] Second Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (67/228/EEC).

[7] http://www.europarl.eu.int/factsheets/3_4_5_en.htm, 10.2.2006.

origin of the chargeable event as well as the chargeability to tax (Art. 10). In addition, the Sixth Directive determines the taxable amount (Art. 11), contains some general guidance on VAT rates (Art. 12) and enumerates exemptions (Arts. 13–16). The regulations about deductions of input tax (Arts. 17–20) deal with the origin and scope of the right to deduct, the rules governing the exercise of the right to deduct, the calculation of the deductible amount, if any, and the adjustments of deductions. The regulations regarding the person liable for payment for tax (Art. 21) and its obligations (Arts. 22 and 23) are followed by special provisions for small undertakings (Art. 24), farmers (Art. 25), travel agents (Art. 26), second-hand goods, works of art, collectors' items and antiques (Art. 26a), investment in gold (Art. 26b) and non-established taxable persons supplying electronic services to non-taxable persons (Art. 26c). Supplementing provisions are provided by Arts. 27–38.

III. Taxable Event for VAT under the Sixth Directive

3.1 Delimitation of domestic transactions

Under the Sixth Directive, the VAT is levied according to the territoriality principle of Art. 3. That implies that in a Member State – irrespective whether supplied or performed by a resident taxpayer or a non-resident taxpayer – only domestic transactions may be subject to VAT. Because of the necessity of distinguishing between residence-based transactions and foreign-based ones the place of transaction (Art. 8) has to be determined. If the place of transaction of an artist or sportsman is abroad, the artist or sportsman may only be taxed abroad.

3.2 Taxable Events

According to Art. 2, the following is subject to VAT:

- The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;
- The importation of goods.

Furthermore, according to Art.28a, certain intra-Community acquisitions are subject to VAT.

The distinction between goods and services is relevant since different place-of-supply rules apply[8] and since services may be neither imported nor be subject to an intra-Community acquisition. In addition, different rates may apply depending on the characterization as a supply of goods or as a supply of services.[9]

[8] See point 4 below.

[9] Terra/Kajus, A Guide to the European VAT Directives (2005), Introduction to European VAT and other indirect taxes 2005, Volume 1, 497.

3.2.1 Supply of Goods

Art.5 defines the "supply of goods" as the transfer of the right to dispose of tangible property as owner.

Examples:

- *A sculptor produces a sculpture and sells it in the course of an art exhibition to an art collector.*
- *A painter paints a picture and sells it to a gallery.*

It should be taken into consideration that Art. 5(1) is based on the economic substance principle. It is not the conveyance of the legal title to ownership but the transfer of the economic ownership that constitutes the taxable event. If the legal transfer were decisive for the occurrence of a taxable supply, VAT would be imposed at different points in time in the various Member States depending on whether property was transferred by contract (*e.g.* as in France, Italy and Belgium) or by the formal act of delivery (*e.g.* as in the Netherlands).[10] It is clear from the wording of Art. 5(1) that "supply of goods" does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but rather covers any transfer of tangible property by one party that empowers the other party actually to dispose of it as if he were the owner of the property.[11]

3.2.2 Supply of services

Pursuant to Art.6, the "supply of services" means any transaction that does not constitute a supply of goods within the meaning of Art.5. This means that the subject matter of "supply of services" is not the transfer of the right to dispose of tangible property as owner.

Examples for the area of art:

- *Giving an artwork as a loan for the purpose of an art exhibition;*
- *Granting copyrights with regards to works of art;*
- *Transferring broadcasting rights;*
- *Allocating copyrights to a publishing company;*
- *Author's granting of the right to perform a play;*
- *Sale of tickets for an event.*[12]

Examples for the area of sport:

- *Selling the broadcasting rights of the Olympic Games to a TV station;*
- *Sale of tickets for a soccer game;*
- *A tennis player in debt to the promoter of a tournament to play.*

[10] ECJ 8. February 1990, C-320/88 Shipping & Forwarding Enterprise (SAFE) [1990] ECR I-0285.

[11] ECJ 8. February, C-185/01 Auto Lease Holland BV, [2003] ECR I-1317.

[12] Kalteis, Die Besteuerung international tätiger Künstler und Künstlerbetriebe (1997), 37.

3.2.3 Importation of goods

The transfer of goods from one Member State into another Member State is regarded as intra-Community acquisition. An importation for the purpose of VAT only occurs if goods are brought into the Community from a third country (Art. 7). Third countries are all countries that are not members of the European Union. It is irrelevant whether goods imported by artists and sportsmen are used to carry out their business or not. In either case VAT for the importation of goods accrues. The difference between the two cases lies in the fact that the entertainer or sportsman using the imported goods for carrying out his business is entitled to a deduction for the purpose of calculating his own VAT liability.[13]

Regarding the importation of goods whose production, possession and placing on the European market is prohibited neither VAT nor import duties may be imposed.[14]

Example:

- Importation of an artwork that constitutes an act of *"Wiederbetätigung"*.
- Importation of performance-enhancing drugs that sportsmen are not allowed to use.

Goods, however, that are imported from a third country into the Community only for temporary use result either in a whole or partial exemption from import duties. This is also true for VAT on importation because it is regarded as an import duty.

Examples:

- *Importation of an artwork for an art exhibition;*
- *Importation of musical instruments (e.g. guitars, drum sets) of a foreign pop group playing a concert;*
- *Importation of the stage set and costumes of a theatre troupe;*
- *Importation of the equipment of a soccer team (e.g. football, dresses) playing an UEFA Cup Game;*
- *Importation of the equipment of a tennis player (e.g. rackets) playing a tournament.*

All the examples given above imply that the imported goods are held in the respective country only for a limited period of time.

3.3 Principle of unity of supply

The principle of unity for VAT purposes means that a supply may only qualify either as supply of goods or as supply of services, irrespective of the fact that

[13] Ehrke/Freudhofmeier/Linzner-Strasser/Toifl/Vrignaud, Künstler und Sportler im nationalen und internationalen Steuerrecht (2004), 187.

[14] ECJ 6. December 1990, C-343/89, Witzemann [1990] ECR I-04477.

supplies of goods may involve the rendering of services as well. For the purpose of determining whether a supply of goods or a supply of services occurs, it must be determined which of the two elements preponderates.[15]

Ancillary supplies share the fiscal fate of the principal supply. The purpose of the ancillary supply is to supplement, to facilitate and to perfect the principal supply.[16] It has a supporting function relating to the principal supply.[17]

Examples:

- *A writer transmits his manuscript to a publisher. In this example the main element is the permission to use this manuscript for the purpose of editing a book. The supply of the paper is not decisive. Therefore, a supply of services takes place (the same is true for the transfer of an audio tape for the purpose of its duplication).*[18]
- *A sculptor hands over a statue cut out of wood to the buyer and invoices the transport separately. The transport itself qualifies as supply of services. However, in combination with the principal supply, the supply of the statue, it is regarded as an ancillary supply. Therefore, it shares the fiscal treatment of the principal supply. Thus, looking at the supply as a whole it qualifies as a supply of goods in its entirety.*[19]

3.4 Place of supply

The supply of goods or services is only subject to VAT if it is effected within the territory of the respective country. The following article in this book considers the question of determination of the place of supply.[20]

3.5 Private use

VAT must also be paid for "self-supply". Self-supply refers to the transfer of goods or services from taxable business activities to the private use of the taxpayer. In such a case the taxpayer must be regarded as the ultimate consumer who has to bear the final tax burden of VAT. Accordingly, private use occurs if the taxpayer uses goods or services outside his proper business. The Sixth Directive does not use the term "self-supply" as such (Art. 5 (6)) but has developed its own terminology to achieve equal treatment of the sale of goods within the ordinary course of

15 VwGH 14. March 1980, 2045/79.
16 Doralt, UStR (2000) Art. 3 MN 347.
17 ECJ 25. February 1999, C-349/96, Card Protection Plan [1999] ECR I-973; ECJ 22. October 1998, C-94/97, Madgett [1998] ECR I-973.
18 VwGH 29. July 1959, 2466/57; VwGH 5. June 1963, 1870/61.
19 Ehrke/Freudhofmeier/Linzner-Strasser/Toifl/Vrignaud, Künstler und Sportler im nationalen und internationalen Steuerrecht (2004) 145.
20 See topic 26 in this book.

the enterprise and the usage for private purposes. In this context comparable treatment is required when the taxpayer is leaving business assets at the disposal of his staff. Or to put this in a more general form, the use of business assets that have given rise to a deduction of input VAT must be treated as a taxable supply if such assets are put to private use of the entrepreneur or of his staff or more generally for purposes other than those of the business; the same treatment is provided for the supply of services by the taxpayer for his own private use or that of his staff (Art. 6 (2)).

In this way, equal treatment of business activities and the use of goods actually forming part of the assets of a business for the private use, on the one hand, and the supplies of services carried out free of charge for the private use, on the other hand, is guaranteed.[21]

According to the jurisprudence of the ECJ, the equal treatment of private use and the supply of services and goods is dependent on the enjoyment of input tax relief in the form of at least a partial deduction.[22] The wording of the Sixth Directive, however, does not require an actual deduction. Nevertheless, the ECJ decided regarding the principle of neutrality of VAT that taxation of private use may only take place insofar as input tax has actually been deducted for the good in question.[23] However, it has to be taken into consideration that this is not true for supplies of services carried out free of charge for purposes other than those of the business (Art. 6 (2b)).

Whether a taxable event occurs depends furthermore on the fact of whether the private use takes place in the residence country or abroad. Only if it takes place in the residence country may it be subject to VAT there. According to the general VAT principles, the decisive point is where the good is located when being used outside the business or where, in the case of service supply, the cost for the private use arises.[24]

Examples:

- *A racing cyclist gives his racing bike free of charge to a sports museum located abroad. Because of the fact that the wilful act of extracting the bike from the business has taken place in the home country, this occurrence is considered to constitute private use in the home country.*
- *Considering the foregoing case: if the bike is located in a third country and not in the country of the cyclist, the wilful separation from the business is not considered to take place in the country where the cyclist is at home and therefore such a private use is not taxable at home.*

21 ECJ 26. September 1996, C-230/94, Enker [1996] ECR I-4517.
22 ECJ 25. May 1993, C-193/91, Mohsche [1993] ECR I-2615; ECJ 27. June 1989, C-50/88, Kühne [1989] I-1925; ECJ 5. December 1989, C-165/88, ORO Amsterdam Beheer and Concerto [1989] I-4081.
23 ECJ 17. May 2001, C-322/99 and C-323/99, Fischer [2001] I-4049.
24 Ruppe, UStG (1994) Art. 1 MN 318.

If the private use constitutes an act that comprises elements of a supply of goods as well as elements of a supply of services for the scope of VAT, a division has to be made: whereas the supply attributable to the good has to be characterized as supply of goods, the work performance has to be regarded as private use by supply of services.[25]

Example:

An artist instructs his artist workers to cut a statue out of wood and intends to give it to his friend as a birthday present. The use of the material they need for his purposes constitutes a private use of goods, which has to be treated as a taxable supply made for consideration. The work performed by the workers, however, must be treated as a taxable supply of services for consideration.

3.5.1 Private use with respect to supply of goods

The Sixth Directive does not consider the taxable event of self-supply as a stand-alone taxable event. However, the same purpose is served by applying Art. 5 (6), according to which the private drawing of a taxable person is treated the same as the supply of goods.[26] From the foregoing consideration, it follows that the private use by a taxable person or other application of non-business purposes must also be treated like a supply made for consideration, which necessarily corresponds with the term "self-supply". Such a deemed taxable supply of goods has to meet certain conditions before qualifying as taxable event for the scope of Art. 5 (6). The first requirement that has to be fulfilled is that the person applying, transferring or disposing of the goods has to be a taxable person and, secondly, the goods applied for private use must also be part of the assets of the respective business and VAT on the goods in question must have been at least partially deductible.[27]

Examples that illustrate the use of goods outside the business within the meaning of Art. 5 (6):

- A professional soccer player gives away his soccer boots to a fan;
- After having played a concert, a musician gives away his guitar to a fan;
- A scriptwriter gives his computer, which he used to write his scripts, to his wife, who uses the computer for her own work.

3.5.2 Private use with respect to the supply of services

According to Art. 6 (2), the following must be treated as supplies of services for consideration:

[25] Ruppe, UStG (1994) Art. 1 MN 330.

[26] This regulation complies with the common autonomous treatment of self-supplies in most national tax laws.

[27] Terra/Kajus, A Guide to the European VAT Directives (2005), Introduction to European VAT and other indirect taxes 2005, Volume 1, 502.

(a) the use of goods forming parts of the assets of a business for the private use of the taxable person or of his staff, or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

To put it simply, for the purposes of this thesis, according to this provision, private use outside the business occurs, if:

- the artist or sportsman temporarily uses an asset outside his proper business (Art. 6 (2a));
- the artist or sportsman temporarily allows third parties to make use of the asst without pursuing any economic purposes (Art. 6 (2a));
- the artist or sportsman performs services on his own or let services be performed through his staff without pursuing any economic purposes to third persons (Art. 6 (2b));
- the artist or sportsman performs services on his own or lets services be performed through his staff for a private event (Art. 6 (2b)).

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to a distortion of competition.

Because the private use of goods is only taxable in exceptional cases, the term "use of goods" in Art. 6 (2a) must be interpreted narrowly. It comprises only the proper use of the good attributable to the artist or sportsman but not ancillary supplies.

Examples of private use within the meaning of Art. 6 (2a):

- *A musician lends his children his guitar for a certain period of time;*
- *A rally driver gives someone permission to use his rally car over the weekend for test runs on a race circuit;*
- *A sculptor lends his friend, who does sculpting as a hobby, some of his professional equipment.*

Example of no private use within the meaning of Art. 6 (2a):

There is no use outside the business if a sculptor gives a sculpture as a loan for an art exhibition with the intention of increasing his fame. Such an action is considered to occur within the business and is therefore not taxable.

Examples of private use within the meaning of Art. 6 (2b):

- *The soccer club Bayern Munich gives away tickets for a Champions League Game;*
- *Two tennis stars play an exhibition match without being paid;*
- *A music group gives a benefit concert.*

Examples of no private use within the meaning of Art. 6 (2b):

- A musician who performs in a TV show for free in order to enhance the extent of his fame. The scope of his free performance may not be considered to be outside the business;
- The same is true for a writer, who gives a reading performance for free with the intention of promoting his book.

3.6 Exemption for certain cultural services and goods closely linked thereto

It is necessary to standardize exemptions for VAT in order to achieve a common basis of assessment within the Community. It has to be distinguished between exemptions without the right to deduct input-VAT and exemptions with the right to deduction, which is in fact zero-rating. Exemptions relating to domestic transactions as enumerated in Art. 13 entail the loss of the right to deduct input-VAT whereas exemptions relating to international transactions, especially the exportation of goods (Art. 15), still retain the right of deduction in order to ensure full tax relief in the country of origin and thus to avoid double taxation in relation to the country of destination.[28]

The provisions on exemptions relating to domestic transactions carried out within the territory of the country comprise two lists of exemptions, one concerning activities exempted in the public interest (Art. 13A) and one concerning other exempt activities (Art. 13B). The first one includes, *inter alia*, certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned. This respective article (Art. 13 A), which seems to be drafted rather vaguely, usually affects supplies of services effected by theatres, orchestras, chamber-music ensembles and choirs.

It is debatable whether the exemption from VAT provided for cultural activities applies only to "bodies", as this may be deducted from the wording of the provision. If not, the exemption from VAT would apply also to individual artists. In 2003 this moot point came before the ECJ. In this particular case, the German Bundesgerichtshof asked the ECJ whether Art. 13A (1)(n) is to be interpreted as meaning that the term "other cultural bodies recognised by the Member State" used therein also covers a soloist who supplies cultural services. In reaching its decision the Court recalled a previous decision, in which it maintained that the term "organisation" within the meaning of the Sixth Directive could include natural persons. Accordingly, the benefit of exemptions for bodies are not confined to activities carried on by legal persons, but may extend to activities carried

[28] Terra/Kajus, A Guide to the European VAT Directives (2005), Introduction to European VAT and other indirect taxes 2005, Volume 1, 743.

on by individuals.[29] In the ECJ's view, there was no reason to deviate from this view in relation to cultural services, with regard to performers supplying individual services such as solo singers. Accordingly, the ECJ held that the exemption from VAT for cultural activities applies not only to "bodies" but also to individual artists. The ECJ justified its decision by the principle of fiscal neutrality, which requires that individual performers, as long as their services are recognised as cultural, may be regarded, like cultural groups, as bodies similar to public-law bodies, which are in general exempt from VAT. However, according to the ECJ, it has to be considered that an exemption from VAT for individual artists as well as for cultural groups other than public-law groups is only given if there is no systematic profit-making aim and the cultural services are chiefly rendered in an honorary capacity.[30]

IV. Taxable Amount for VAT under the Sixth Directive

Pursuant to Art. 11A (1)(a), the taxable amount in respect of supplies of goods and services comprises everything that constitutes the consideration, which has been, or is to be effectively obtained by the supplier from the purchaser, the customer or a third party, including subsidies directly linked to the price of such supplies.[31] In other words, the taxable amount includes everything that, as consideration, is directly linked to the supply, which has monetary worth and to which, from a subjective point of view, a value may be assigned. According to Art. 11A (2), taxes, duties, levies and charges excluding VAT are also part of the taxable base as well as incidental expenses such as commission, packing, transport and insurance costs charged by the supplier to the purchaser or customer.[32] However, according to Art. 11A (3), the taxable base does not include price reductions by way of discount for early payment, price discounts, and rebates allowed to the customer and accounted for at the time of the supply and the amount received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account.

Separate provisions deal with private use of goods and services belonging to the enterprise. The taxable amount for the application of business assets for private

[29] ECJ 7 September 1999, C-216/97 Gregg & Gregg [1999] Slg I-4947.

[30] ECJ 3. April 2003, C-144/00 Hoffmann [2003] Slg I-2921. See also Terra/Kajus, A Guide to the European VAT Directives (2005), Introduction to European VAT and other indirect taxes 2005, Volume 1, 769 et seq. It has to be considered that the ECJ was not always that "generous" when interpreting the terms which paraphrase exemptions according to Art. 13 (ECJ 15. June 1989, C-348/87 Stichting [1989] Slg I-1737; ECJ 11. August, C-453/93 Bulthuis-Griffioen [1995] Slg I-2341.

[31] See also ECJ 23. November 1988, C-230/87 Naturally Yours Cosmetics [1988] and ECJ 24. October 1996, C-317/04 Elida Gibbs [1996].

[32] See also ECJ 3. June 2001, C-380/99 Bertelsmann [2001].

use is the purchase price of the goods or similar goods or, in absence of a purchase price, the cost price, determined at the time of supply (Art. 11A(2)). The taxable amount for private use with respect to services is the objective open market value of the services supplied (Art. 11A(2)).[33] Private use with respect to supply of goods and services is only taxable if an input tax relief has been obtained. Therefore, where appropriate, the taxable amount has to be split between costs that qualify for an input tax relief and costs that do not qualify for an input tax relief.[34]

In principle, a consideration may constitute the taxable amount even if it is unreasonably low. Only in the case of an attempt to evade or avoid taxes are Member States entitled to determine a higher taxable amount (Art. 27). However, such a deviation is only permitted where this is required.[35]

According to Art. 11B, the taxable amount for the importation of goods is the value for customs purposes, determined in accordance with the Community provisions in force, including taxes, duties, levies and other charges due outside the importing Member State and those due by reason of importation, excluding the VAT to be levied. The taxable base of the importation of goods also comprises incidental expenses.

In the case of intra-Community acquisitions, the taxable base is established on the same basis of the same elements as used in accordance with Art. 11 (A) to determine the taxable amount for supply of the same goods within the territory of the country.

When determining the taxable base for VAT for artists and sportsmen, the issue of exchange of services constitutes a matter of particular interest. This is the subject matter of the following chapters. As a result special emphasis will be put on subsidies, sponsoring and compensation payments and reimbursements for expenses.

4.1 The required "Do-ut-des" (service against consideration)

According to Art. 2 (1), a supply of goods or services is only subject to VAT if it is effected for consideration. It is essential that there is a causal connection between the supply, on the one hand, and the incident which constitutes the consideration.[36] The consideration may consist of monetary payments or a consideration in kind which may also be another service.

[33] *"Open market value" of services shall "mean the amount which a customer at the marketing stage at which the supply takes place would have to pay to a supplier at arm's length within the territory of the country at the time of the supply under conditions of fair competition to obtain the services in question."*

[34] ECJ 25. May 1993, C-193/91 Mohsche [1993] Slg I-2615; ECJ 17. May 2001, C-322/99 Fischer [2001] Slg I-4049.

[35] ECJ 9. July 1992, C-131/91 „K" Line Air Services Europe BV [1992].

[36] Melhardt, Umsatzsteuer-Handbuch 2005 (2005) § 1 MN 1; Doralt/Ruppe, Steuerrecht I (2003) 419; Ehrke/Freudhofmeier/Linzner-Strasser/Toifl/Vrignaud, Künstler und Sportler im nationalen und internationalen Steuerrecht (2004) 147; Doralt, UStR (2000) MN 1.

The required causal connexion is missing, for example, in the case of compensations for damages, membership fees and subsidies.[37] Particularly with regard to artists and sportsmen, who may receive subsidies, trophy money or who receive considerable sponsorship, the issue of causal connexion is of great significance. For instance, a causal connexion was denied by the ECJ in the case of a busker, who made music in a public place and received monetary compensation for it from passers-by on a voluntary basis. In doing so, the ECJ held that there was no contract between the concerned parties, because – as mentioned before – the payment was made voluntarily and the amount of the contribution could be determined by the passers-by. Furthermore, the decision was justified by the fact that the passers-by did not ask the busker to perform music.[38]

The amount or the counter-value of the consideration is irrelevant, i.e. the supply of goods or services and the consideration do not have to be necessarily equivalent.[39]

4.1.1 Subsidies as taxable event for VAT

Pursuant to Art. 11A (1), the taxable amount is everything that constitutes the consideration, which has been or is to be obtained by the supplier from the purchaser, the customer or a third party, including subsidies directly linked to the price of such supplies.[40] In examining whether a subsidy is of relevance for VAT purposes, it is essential to find out whether the subsidy is subjected to certain conditions. Only in this case may a taxable event be assumed. Therefore, it must be determined whether a subsidy has to be considered to be consideration. This is only the case if the subsidy is paid to the supplier

- directly by the purchaser (direct consideration) or
- by a third party or
- the purchaser is granted a subsidy in order to enable him to receive a certain supply.

If a subsidy cannot be considered consideration, it cannot lead to a taxable event. Such a subsidy has no VAT implications.

[37] Ehrke/Freudhofmeier/Linzner-Strasser/Toifl/Vrignaud, Künstler und Sportler im nationalen und internationalen Steuerrecht (2004) 148; Melhardt, Umsatzsteuer-Handbuch 2005 (2005) § 1 MN 1.

[38] ECJ 3. March C-16/93, Tolsma [1994] ECR I-743.

[39] VwGH 12. December 1952, 2757/50.

[40] Community law does not contain a definition of what is a subsidy (Terra/Kajus, A Guide to the European VAT Directives (2005), Introduction to European VAT and other indirect taxes 2005, Volume 1 669). However, in 1961 the ECJ came up with a definition of subsidy. The ECJ held that a subsidy is a payment in cash or in kind made (by the state) in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces (ECJ 23. February 1961, C-30/59, De Gezamenlijeke Steenkolenmijnen in Limburg).

4.1.1.1 The subsidy as direct consideration

A direct consideration is at hand if the entrepreneur receives the subsidy in return for a certain supply. The supply of the recipient of the subsidy satisfies an economic interest of the subsidy grantor or is otherwise of economic benefit to him.[41] Therefore, a taxable event is given that includes the granting of the subsidy.

Example:

A theatre troupe does not charge any admission fees but collects voluntary donations. In this case the Austrian Administrative Court held that the performance constitutes a taxable supply because a causal connexion exists between the performance of the theatre troupe and the voluntary donation.[42]

4.1.1.2 The subsidy as consideration from a third party

The subsidy may be assumed to be a consideration from a third party if the entrepreneur receives it in return for a taxable supply rendered to a purchaser who is not the grantor of the subsidy. However, there must be a direct economic connexion between the granting of the subsidy and the supply. In other words, the grantor awards a subsidy only under the condition that the entrepreneur renders a supply.[43]

4.1.1.3 The subsidy as consideration of the purchaser

If the subsidy is granted to the purchaser in order to enable him to receive a certain supply, this does not constitute a consideration from a third party but a consideration of the purchaser (because he uses the subsidy to finance the purchase), which is subject to VAT in the hands of the supplier. This also holds true if the subsidy (whose beneficiary is the purchaser) is not paid to the purchaser but for reasons of administrative simplicity directly to the supplier.

4.1.1.4 Subsidy not being in the nature of a consideration

If the subsidy does not fall in one of the above-mentioned categories, a genuine subsidy is at hand, which is paid without any economic connexion to a supply of goods or services. A genuine subsidy – as already mentioned – is not of any concern for VAT purposes.[44] In case of doubt, in order to identify the character of a genuine subsidy, whether or not the subsidy would have also been granted without any service in return of the beneficiary must be examined.[45]

41 Ruppe, UStG (1994) Art. 4 MN 115.
42 VwGH 22. April 1955, 1251/52.
43 ECJ 22. November 2001, C-184/00 Office des produits wallons [2001]; ECJ 13. June 2002, C-353/00 Keeping Newcastle Warm Ltd. [2002].
44 ECJ 22. November 2001, C-184/00 Office des produits wallons [2001].
45 VwGH 17. September 1990, 89/14/0071.

Examples of a genuine non-taxable subsidy:

- *The state grants subsidies from public funds to theatres.*
- *The municipality grants a local football club a subsidy for the construction of a new stadium.*

4.1.2 Sponsoring as a taxable event for VAT

Sponsoring is typical in the field of sports and art and is therefore of great significance there. In the case of sponsored sports or artistic events, a taxable supply for consideration occurs if the sponsor is prepared to pay certain amounts of money in return for performances of the sportsman or the artist. It must be noted that only the amount that has to be spent by the sponsor to receive a service in return (especially advertising through the performance) is subject to VAT.[46] There must be an economic connection between the sponsoring and the advertising performance although, as a matter of principle, there is no requirement of equivalence between the two elements of the taxable transaction. Only in the case of a blatant disproportion must a proportional allocation in a taxable consideration and a non-taxable donation be made.[47]

Example:

A bank sponsors the Vienna Philharmonic Orchestra with EUR 100,000. In return the Vienna Philharmonic Orchestra is obliged to mention the bank on the front page of the accompanying brochure of each concert for one year. In this case a direct exchange of services is given. However, it may be that the sponsoring is in blatant disproportion to the advertising performance. If this is the case the amount of EUR 100,000 has to be split up into a taxable consideration and a non-taxable donation.

It is apparent in practice that the objective assessment of what may be considered as taxable or non-taxable consideration is difficult to determine. This is a problem not to be underestimated.

In general, the performer receives cash payments under a sponsorship agreement. Should the sponsorship, however, consist in payments in kind the subjective value which the sponsor has to spend is crucial, i.e. the actual costs are decisive to determine the taxable amount.[48]

4.1.3 Trophy money as a taxable event for VAT

Trophy money only plays a role in the "world of VAT" if it may be considered as a service in return for a concrete performance in the course of a competition. The

46 Ruppe, UStG (1994) Art. 1 MN 210.
47 Ehrke/Freudhofmeier/Linzner-Strasser/Toifl/Vrignaud, Künstler und Sportler im nationalen und internationalen Steuerrecht (2004) 148; Kalteis, Die Besteuerung international tätiger Künstler und Künstlerbetriebe (1997), 79; Ruppe, UStG (1994) Art. 1 MN 210.
48 This approach was confirmed by the EC (ECJ 2. April 1994, C-33/93, Empire Stores [1994]).

artist or sportsman acts with the intention to win the trophy money. Prizes received ex post for certain performances that were not given with the intention of receiving any consideration for them are not subject to VAT.

Examples:

- *A skier takes first place in a ski race. For his outstanding achievement he receives trophy money that amounts to EUR 20,000. The trophy money is linked to a concrete performance. The trophy money is therefore subject to VAT.*
- *A writer wins the Ingeborg Bachmann literary prize for his outstanding piece of work and receives EUR 10,000 for it. As the writer entered into the contest with the intention of winning the prize a causal connexion may be affirmed. The amount of 10,000 is subject to VAT.*
- *If a movie star is awarded for his lifework a causal connexion must be denied. The prize he receives for his lifework is not subject to VAT.*

4.1.4 Compensation as taxable event for VAT

Compensations in the field of sport, art and music are an issue for VAT especially in the case of breach of contract. The question that always has to be clarified is whether or not the compensation may be regarded as VAT-triggering consideration. This may be answered in the affirmative if there is an economic interrelationship. If this is true the compensation is subject to VAT.

4.1.4.1 Defective contract fulfilment

Defective contract fulfilment occurs if hindrances occur and obligations entered into cannot be fulfilled. This especially refers to cancelling performance, to delaying it or to performing in a defective manner.[49]

4.1.4.1.1 Legal repudiation due to defective fulfilment

If the contractual supplier of a service (an artist) withdraws from delivering such service because of his contracting partner's fault, the former may claim damages for non-fulfilment of the contract. From a VAT point of view, such damages for non-performance may not be seen as consideration because the repudiation to perform does not constitute a supply, as it is only in the interest of the rescinding artist.[50] There is no consideration in return for such non-performance in this case.

Example:

A concert agency signs a contract with a famous musician, who agrees to play in a concert. After signing the contract but before the performance, the leading sponsor extricates itself from supporting the performance. As a result, the performance of the musician is no longer payable. The musician may legally rescind his

[49] Koziol/Welser, Bürgerliches Recht II (2001), 41 et seq.
[50] Ruppe, UStG (1994) Art. 1 MN 217.

performance. The compensation payment, to which the musician is entitled, is not subject to VAT as this compensation is not given as a consideration for a service received from the artist.

4.1.4.1.2 Impossibility of supply due to reasons for which the recipient of the service is responsible

If a supply becomes impossible to render for reasons that occurred in the sphere of the contractual recipient of the service the contractual supplier gets released from his obligation whereas the contractual recipient remains still liable to pay what has been agreed as consideration under the contract. In order to determine the appropriate VAT treatment of such a fact pattern, it must be clarified whether or not a performance has taken place.

With regard to the supply of goods, Art. 5 (1) provides that such a supply has taken place when a transfer of the right to dispose of tangible property as its owner has taken place. For that purpose it is sufficient that the recipient (the purchaser) factually receives the possibility of disposing of the good. This is the case as soon as the contractual transferor has fulfilled his contractual obligations properly, which means that the tangible asset is ready to be taken in possession. If the purchaser is in default in taking possession as agreed, the supply nevertheless has to be regarded as having taken place and VAT tax liability is generated.

The same is supposed to be true for supplies of services. If the supplier has fulfilled his obligations properly, the supply of services may be regarded as being liable to VAT as soon as the contractual recipient of the service can factually make use of the supplied service. If this is not the case, any compensation payments may not be subject to tax.[51]

Example:

A sculptor makes a sculpture for a customer. The customer does not like the sculpture and refuses to accept it as fulfilment of the contrace. After the refusal of acceptance the sculpture perishes. As the sculptor has fulfilled his contractual obligations properly, he was entitled to keep the payments already made as consideration and the beneficiary is in default of acceptance of the consideration for the destroyed sculpture; such payment constitutes a compensation payment, which is in direct connexion to the supply so that VAT liability exists.

4.1.4.2 Tortuous compensation

A tortuous compensation does not form part of a taxable supply of goods or services within the meaning of Art. 5 or Art. 6, because this kind of compensation is not based on a supply for consideration. The injured party does not supply any goods or services in return for the indemnity payment received. There is no supply to which such compensation payment may be assigned.

[51] Ruppe, UStG (1994) Art. 1 MN 224.

Example:

An art collector awards a sculptor a contract to restore a sculpture. Because of inattention on part of the sculptor, the sculpture gets completely damaged. The liability of the sculptor is ex delicto. No exchange of services takes place – the compensation paid by the sculptor is not subject to VAT.

4.1.4.3 Contractual compensation

In the case of contractual compensation payments a distinction must be made between compensation payments because of non-performance or default, on the one hand, and compensation payments for defective performances, on the other hand. If the compensation payment is made because of non-performance or default this is not of any concern for VAT,[52] because this kind of compensation is not based on an exchange of services – the injured party does not supply any goods or services in return. There is no supply to which the compensation payment may be assigned.

Example:

Bayern Munich contracts to play a friendly match and agrees on a contractual compensation in the case of non-performance. The contract penalty constitutes a non-taxable compensation.

In contrast, according to prevailing opinion, compensation payments for defective performance reduce the taxable base for VAT. However, the ECJ dissents from this opinion and has held differently: it held that interest for delays do not share the tax treatment of the principal supply, but constitute a non-taxable compensation payment.[53]

Example:

An art collector awards a sculptor with a contract to restore a sculpture. The contractor and the sculptor agree on a contract penalty of EUR 1,000 in the case of exceeding the period fixed for completion. According to prevailing opinion, the amount of EUR 1,000 constitutes a reduction of the taxable base for VAT. The ECJ, on the other hand, holds that the contract penalty is a compensation payment which does not reduce the tax base for the sculptor who was unable to accomplish his work in time.

4.2 Reimbursement for expenses

In the framework of an engagement of an artist (or sportsman) various costs may be incurred that were originally paid by the artists and have to be reimbursed to them. For instance, this is the case for travel and hotel expenses. In this context the

[52] Ruppe, UStG (1994) Art. 1 MN 252.
[53] ECJ 1. July 1981, C-222/81, Bausystem [1982].

question comes up whether these costs are part of the artist's taxable base for VAT or not.

A treatment as non-taxable transitory item should only be taken into consideration if costs are met a priori in the name and for the account of the purchaser or customer (Art. 11A (3)(c)).

In contrast, an service against consideration is given, if the artist or sportsman intends to receive only the costs in return that relate to the supply effected. However, if only the effective expenses are reimbursed and no other service in return is required (e.g. travel costs, hotel costs), a consideration in return is not given.[54]

[54] Ruppe, UStG (1994) Art. 1 MN 183.