Single/multiple Supplies – Definition for VAT Treatment

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This article for Bloomberg BNA's Viewpoint series examines the Court of Justice's line of case law on single/multiple supplies following on from the *Tellmer* decision – and particularly the recent judgment in *Wojskowa*.

If there is one VAT issue on which the Court of Justice has had to provide guidance more than any other, it is single and multiple supplies. In most circumstances, a supply can only have one VAT treatment, be it standard-rated, exempt or zero-rated.

Therefore, it is critical to know what constitutes a separate supply. Is it necessary to divide up a transaction between any components having different VAT treatments and treat each element as a separate supply? Or do you treat all of the elements as a single supply and give the whole supply the tax treatment of the predominant element? The Court of Justice has, so far, given guidance on this question on nearly 20 occasions.

The general approach is clear. In the leading case – Case C-41/04 *Levob* – the Court of Justice emphasized that national courts should adopt an economic approach in analyzing whether there is a single supply. In particular, the relevant transaction should be assessed from the viewpoint of the typical consumer.

However, what has not been clear is to what extent it is necessary to take into account whether the consumer has a choice to obtain some of the elements separately or has to take all of the elements as a single package.

This debate was initiated by the Court of Justice's decision in Case C-572/07 *Tellmer* in 2009. In that case, the Court held that the cost of cleaning the common parts of an apartment block, such as the stairwells, was a separate supply from the leasing of the apartments. That was because the landlord invoiced the two supplies separately and because it was "undisputed that the cleaning services … can be supplied in various ways, such as, for example, a third party invoicing the cost of the service direct to the tenants or by the landlord employing his own staff for the purpose or using a cleaning company".

Since 2009, VAT advisers have puzzled over what that passage in the *Tellmer* judgment meant. In order for two elements to be separate supplies, was it sufficient to establish that the two elements could at least theoretically be supplied separately? Were there separate supplies in *Tellmer* because prospective tenants

who rejected the landlord's terms could have gone to a different landlord and obtained a different deal under which the lease of an apartment was not linked to obtaining cleaning services? The Court of Justice rejected that suggestion in Case C-117/11 *Purple Parking/Airparks* in 2012, given that for virtually any composite transaction it is likely to be possible to buy the component elements separately from different suppliers. This suggests that it is necessary to look at the objective features of the actual transaction in question and not some alternative hypothetical supply.

What if the supplier insists on the consumer taking both elements as a single package – is that always a single supply? The Court held in Case C-392/11 *Field Fisher Waterhouse,* later in 2012, that this pointed to there being a single supply. But it would not necessarily be decisive if the supplier insisted on the purchaser taking supplies which were objectively unrelated as a single package – such as the grant of a lease together with complimentary theater tickets as an inducement to the tenant to enter into the lease. This again suggests that it is the objective features of the actual transaction which are critical, albeit that they have to be viewed in the light of commercial reality.

But, although in both *Purple Parking* and *Field Fisher* the Court of Justice was specifically asked by the national court to explain *Tellmer*, in neither case did the Court give any further guidance as to what Tellmer meant.

It is only now that the Court of Justice has finally attempted to explain Tellmer in its decision of April 16, 2015 in Case C-42/14 *Wojskowa*, which concerned letting of property together with utility supplies and refuse disposal. Here, the Court explained that, where a landlord gives a tenant the choice of supplier of utility services, this points to the utility services being a separate supply to the letting. What the Court now appears to be saying is that, although it is not relevant that the tenant could have obtained a different deal from another landlord, it is relevant whether the particular landlord was prepared to give the tenant a choice between a package of both a lease and utility supplies or alternatively a lease on its own, leaving the tenant to arrange its own utility supplies.

To the extent that the lease agreement gives the tenant an *ongoing* right to choose a separate supplier of utilities during the term of the lease, the *Wojskowa* decision conforms to the established approach in *Purple Parking* and *Field Fisher* that it is necessary to look at the actual contractual terms in the light of commercial reality.

But, unfortunately, what *Wojskowa* does not make clear is if it is relevant whether the landlord gave the tenant a choice of utility supplier *before* entering into the lease. If so, does that involve a swing back to the suggestion, later rejected in *Purple Parking*, that it is relevant what the tenant could have chosen

and not what it did choose? One possible answer is that the Court of Justice in *Wojskowa* was focusing, not on the specific consumer in question, but on the viewpoint of the "typical consumer". If some consumers take up the option of obtaining utility supplies separately, whilst others agree to take them as part of a package with the lease, it might be said that a "typical consumer" does not regard the two supplies as being economically indivisible. Those who hoped that *Wojskowa* would give a conclusive answer to what the Court meant in *Tellmer* will have to wait for the Court's next attempt at wrestling with single and multiple supplies.

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