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Reference for a preliminary ruling from First-tier Tribunal (Tax Chamber) (United Kingdom) made on 1 February 2019 — Kaplan International colleges UK Ltd v The Commissioners for Her Majesty's Revenue and Customs

(Case C-77/19)

(2019/C 131/31)

Language of the case: English

Referring court

First-tier Tribunal (Tax Chamber)

Parties to the main proceedings

Applicant: Kaplan International colleges UK Ltd

Defendant: The Commissioners for Her Majesty's Revenue and Customs

Questions referred

1.

What is the territorial scope of the exemption contained in Article 132(1)(f) of Council Directive 2006/112/EC (1)? In particular (i) does it extend to a Costs Sharing Group (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 member's 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?

(1) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ 2006, L 347, p. 1