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SUMMARY

This study examines the legal concept of "taxable person" in the European system of value added tax, within the meaning of Article 4 of the Sixth VAT Directive. The study was prompted by evidence of disparity in the use of the concept between different Member States. The causes of this are explored and possible solutions put forward within the context of the theoretical and structural framework of the Sixth VAT Directive.

Chapter one addresses the concept of "taxable person" in the light of the purpose and structure of the European VAT system. The European VAT is a general tax on consumption. Its purpose and structure together with the principle of tax neutrality, require that it be applied generally. The concept of "taxable person" determines the scope of the whole system. On the one hand a broad application is called for; while on the other the system needs to be applied in a focused and flexible manner. This results in a certain tension within the concept of "taxable person".

Chapter two describes the objectives of the Sixth VAT Directive. The directive has two principal objectives. One is to pursue a further harmonization of the European VAT rules. The other is to achieve uniformity in the tax base.

Concepts used in the Sixth VAT Directive may be divided into three categories according to the degree of discretion they allow the Member States. "Community concepts" leave no domestic discretion. Their opposites, the "quasi-national concepts" leave a significant level of discretion. In between these two we find the "quasi-Community Concepts" which allow the Member States a certain, limited, freedom in their definition and application.

The concept of "taxable person" is such a "quasi-Community concept". It leaves the Member States a certain freedom of definition and application. This conflicts with the objectives of the Sixth VAT Directive. From the perspective of these objectives, "taxable person" should be interpreted as a "Community concept"

Chapter three examines the methods and sources used for interpretation by the European Court of Justice in its case law.
regarding VAT. In the CILFIT-case, the Court lays down various standards for the interpretation of concepts and provisions in European Community Law. Central to this is a textual analysis by way of comparison between the authentic languages. In addition, Community terminology, contexts (broad and narrow), objectives and evolution of the law need to be taken into account. Documents relating to the preparatory stages of the directive need to be used with some caution, but there may be a significant change in a provision between the Commission proposal and the final text. Other aids to interpretation, in the case of the Sixth VAT Directive, are terminology and case law of the Court of Justice regarding, in particular, the Second VAT Directive. However, in this case both context and objective of the law need to be taken into account. If, based upon the above, a conclusive meaning can not be found, Community usage of language prevails.

Chapter four focuses on the wording of Article 4(1). A "taxable person" is "any person who independently carries out, in any place, any economic activity, whatever the purpose or results of that activity". Regarding the definition of a taxable person, the Sixth VAT Directive applies a world-wide meaning to the concept of taxable person; this is designed to achieve tax neutrality. This starting point is in accordance with the destination principle and fits within the European VAT system. The requirement that the economic activity needs to be carried out independently is intended to exclude employees and other persons from the scope of VAT. Various meanings can be attributed to the concept of economic activity. In general, an economic activity is an activity ultimately aimed at the production of goods for consumption in households. Non-VAT related European community law shows that an economic activity is an activity carried out for reward. The Sixth VAT Directive contains an exhaustive definition of what is to be regarded as an economic activity for VAT purposes. In terms of the Sixth VAT Directive's first and second sentences of Article 4(2), the relevant economic activities encompass all activities of producers, traders and persons supplying services (first sentence), as well as the exploitation of tangible and intangible property for the purpose of obtaining income therefrom on a continuing basis. (second sentence). Complications arise from the above definitions
in particular the meaning of the second sentence and the relation between both sentences. In my opinion the second sentence is an elaboration of the first. By using the term "whatever the purpose or results" in Article 4(1), the burden of proving whether or not an economic activity is performed, is clarified. Through this addition to Article 4(1) the tax authorities must accept that the person has acted as a taxable person even if the outcome of the activity is, or is likely to be, nil. According to Article 2, to qualify as an economic activity, an activity has to be performed "as such". With regard to Article 4(2) of the Sixth VAT Directive a distinction regarding the "as such" criterion has to be be made between the two sentences. The first sentence of Article 4(2) of the Sixth VAT Directive uses the terms producer, trader or person supplying services. The second sentence mentions the purpose of obtaining income on a continuing basis. This suggests that the requirement to obtain income on a continuing basis is used instead of the criterion "as such". This means that one need not intend to be a taxable person, but if the above conditions are met, one is deemed to be one. It is often assumed that the economic activities to be performed by a producer, trader or person supplying services need regularity or continuity in the sense of acts performed otherwise than on an incidental basis, to result in a liability to tax. In my opinion the starting point is that where a person acts in the capacity of a producer, trader or person supplying services this automatically qualifies as a taxable person. In addition, the requirement of regularity cannot be determined clearly objectively. Lastly, the overall scope of the Sixth VAT Directive is important for the interpretation of the concept of "taxable person".

Chapter five deals with the development of the concept of taxable person in the case law of the European Court of Justice on financial services, specifically as regards the holding and selling of shares and securities. Regarding this case law, two questions may be posed. The first question is the definition of a financial service. An activity is a financial service in the following cases: when it involves the management of a subsidiary; when it is performed in the capacity of a provider of financial services; or when the activity in question forms a direct, permanent and necessary extension of an existing taxable activity. The second question
regards the right to deduct VAT which has been paid. How do financial services influence the right to deduct and how should this right be handled when there is no provision of financial services. The answer to this question has not yet materialized in the case law of the Court of Justice. In my opinion we should adhere to the system of the right to deduct. In chapter one, it was concluded that there needs to be a general concept of the taxable person and its boundaries should be clear. Regarding the development of the concept of "taxable person" in the case law of the European Court of Justice on financial services, one must conclude that the boundaries are not yet clear. The cause of this is the second sentence of Article 4(2) of the Sixth VAT Directive.

Chapter six addresses the liability to tax bodies governed by public law. These bodies are subject to VAT based upon the legal character of the European VAT system and the principle of neutrality. Bodies governed by public law are, however, solely qualified as taxable persons in the Sixth VAT Directive when engaged in economical activities not performed in their capacity as public authorities, for activities performed in such a capacity but giving rise to a significant distortion of competition, and for those activities listed in Appendix D of the Sixth VAT Directive. The "significant distortion of competition test" plays a significant role in determining the liability to tax bodies governed by public law. This concept grants a considerable level of freedom to the EC Member States, which will erode the objectives as set out by the Sixth VAT Directive. From the point of view of harmonization, it should be strongly considered abolishing the special regime for determining tax liability of bodies governed by public law. Should this not be feasible, then relevant activities of bodies governed by public law could be subject to the zero rate. Appendix D can also be extended or the activities performed as public authorities could be more closely defined.