

VAT and Business Models for Charging Electric Vehicles

Electric vehicles will play an important role in the future of mobility. In this article, the author addresses the VAT consequences of business models that offer recharging services by multiple providers through a single subscription. According to the author, the current VAT consequences undermine these business models and a deeming provision creating a chain transaction should be implemented.

1. Introduction

It is clear that our climate is changing and that action is needed, for which purpose the European Union has introduced its so-called Green Deal.¹ One of the causes of climate change is carbon emission from vehicles using fossil fuels.² Electrified vehicles, or electric or e-vehicles, will therefore play a major role in the future of mobility.³ Entrepreneurs have been looking for business models that can cope with both the high initial cost of electric vehicles and the public's perceived limitations such as vehicle range and long recharging times.⁴ Some of those business models make use of vehicle sharing⁵ and are closely linked

to the sharing economy or the platform economy.⁶ Other models offer solutions for vehicle charging, the limited range of the vehicles and the charging time of the vehicle batteries. Some models try to find a solution for different charging station providers and complications that arise with regard to the conclusion of agreements and/or subscriptions with these providers and billing issues.⁷ The latter model for recharging electric vehicles with multiple providers through one single subscription will be the focus of this article, which seeks to address VAT issues in this business model and look for solutions. With electric vehicles being an important part of the reduction of carbon emissions, it is important that taxes, such as VAT, do not hinder the business models that contribute to this reduction.

In this article, the author describes the business models for charging electric vehicles in section 2. In section 3., the relevant VAT legislation and case law is put forward. In section 4., the VAT consequences of vehicle charging business models are analysed. Section 5. seeks to provide solutions for the problems addressed in section 4. In section 6., the author provides a summarizing conclusion and recommendations.

2. The Charging of Electric Vehicles

Business models in electric vehicle charging through charging points deal with high costs for public charging stations and heterogeneous billing and identification systems. In this business model, a mobile charging interface with an integrated electricity contract is set up. The mobile charging interface contractually acts as a purchaser and seller of charging services.⁸

Recharging of electric vehicles typically includes two types of suppliers. A charge point operator (CPO), which either owns charging stations or has contracts with charging station owners (CSO)⁹ and an e-mobility service provider (eMSP), which offers goods and services to the driver on

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1. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – the European Green Deal, COM(2019) 640 final [hereinafter European Green Deal].
2. In the European Green Deal, *supra* n. 1, at p. 10, it is stated that transport accounts for a quarter of the European Union's greenhouse gas emissions, and is still growing.
3. In the European Green Deal, *supra* n. 1, at p. 11, it is stated that by 2025, about 1 million public recharging and refueling stations will be needed for the 13 million zero and low-emission vehicles expected on European roads. See also N. Kuehl, J. Walk, C. Stryja & G. Satzger, *Towards a service-oriented business model framework for e-mobility*, p. 7 Conference Paper, European Battery, Hybrid and Fuel Cell Electric Vehicle Congress (Brussels 2015).
4. K. Noyen, M. Baumann & F. Michahelles, *Electric Mobility Roaming for Extending Range Limitations*, p. 3 (International Conference on Mobile Business 2013) state: "Batteries, however, are far more expensive than a fuel tank and make the purchase of an EV considerably more expensive than a comparable ICE vehicle. Running costs of an EV, on the other hand, are way beneath those of an ICE vehicle. As prices for gasoline are on the rise, the cost for a full charge of an EV battery is almost negligible. Hence, the main challenge to make EVs attractive to consumers is to neutralize range anxiety and to turn the unique price structure of EVs into new business models providing financial incentives for consumers."
5. In this respect, it can be noted that changing from fossil fuel car driving to green car driving without doing anything about the size of the car fleet leads to the production of cars and to the depletion of the raw materials available for them. E.G. Borghols et al., *Hoofdzaken milieueffingen [Main issues of environmental taxes]*, p. 32 (Wolters Kluwer 2019). Car sharing limits the number of vehicles.

6. The platform economy is addressed by the European Commission in EC TAXUD, VAT Expert Group, VEG No. 090, VAT treatment of the platform economy (16 Apr. 2020), taxud.c.1. (2020)2365654, without the platform economy actually being defined. However, from the paper it becomes clear that what is meant is electronic interfaces connecting two sides of a market and, in particular, including the sharing or collaborative economy and the platforms operating in the field of e-commerce, see p. 2 of the paper.
7. K. Laurischkat, A. Viertelhausen & D. Jandt, *Business Models for Electric Mobility*, 47 *Procedia CIRP*, pp. 483–488 (2016).
8. S.A. Shaheen & N.D. Chan, *Evolution of E-Mobility in Carsharing Business Models*, in *Electric Vehicle Business Models (Lecture Notes in Mobility)* (D. Beeton & G. Meyer eds., Springer 2015), available at https://doi.org/10.1007/978-3-319-12244-1_10.
9. This article will focus on charge points owned by the CPO. The position of a CSO will not be discussed further.

the basis of its subscription arrangements.¹⁰ The CPO has a contract with the eMSP, while the eMSP has a contract with the driver. According to a document accompanying a question laid before the EU VAT Committee by Italy, typical services provided by the CPO to the eMSP include:

- Making charge points available.
- Allowing the eMSP to provide the following services:
 - displaying available charging stations;
 - start of the recharging session;
 - monitoring of the recharging process and its interruption; and
 - reservation service for the availability of a charge point.
- IT-services relating to the communication in real time of the following information:
 - address and geolocation of recharging infrastructures;
 - availability status of recharging infrastructures;
 - type of recharging infrastructure;
 - power of recharging infrastructure;
 - type of sockets available; and
 - all information relating to the recharging sessions.
- Providing the eMSP with a direct help desk service aimed at ensuring the timely resolution of problems such as inability to start and/or end a recharging session, and for non-urgent problems a dedicated electronic mail box or other tool/method.
- Monitoring the efficiency of recharging infrastructures on a daily basis.
- Providing the eMSP with an adequate level of service on their infrastructures.
- Guaranteeing, as far as possible, the use of electricity produced from renewable energy sources.
- Sending the eMSP a notification that the charging is complete.¹¹

According to the same document, the eMSP:

- Concludes a contract with the CPO and procures the necessary preparatory technological authorizations to provide the recharging service to the driver, manages the contract during its entire duration and is responsible for paying the agreed sum.
- Defines and manages the commercial portfolio of the recharging services to be offered to drivers, such as identifying the minimum set of services to be guaranteed to the end customer, enhancing them, and quantifying a price for the sale of these services.
- Defines and manages the contract with the driver for the provision of recharging services.

10. European Commission, Working Paper 969, VAT rules applicable to transactions related to the recharging of electric vehicles (13 May 2019), p. 2, taxud.c.1(2019)3532296.
 11. European Commission, Working Paper 1012, VAT rules applicable to transactions related to the recharging of electric vehicles – follow-up (17 Mar. 2021), annex, pp. 14-15, taxud.c.1(2021)2099876.

- Defines and manages the methods of access to services, such as reservation, start of a recharging session, etc.
- Designs and carries out commercial communication to the public and has relationships with drivers, facilitating the resolution of management and technical problems.
- Processes personal data, holds the data of drivers as regards personal details and recharging service history.
- Manages the invoicing of services, credit and litigation.¹²

The contract between the eMSP and the driver according to the same document typically includes:

- The search for charging stations and their availability, the possibility to book charging stations, recharging and support services.
- Apps and web portals to subscribe to a recharging service offer.
- App and radio-frequency identification (RFID) card to manage all recharging services on public and private infrastructures, including a map display with location of recharging infrastructures, socket reservation services and payment management.
- App and web portals for monitoring and final assessment of recharging services to B2B customers, and call centers on a 24/7 basis for commercial management of drivers and directing them to the reference CPO in the event of purely technical problems.¹³

In most cases drivers get access to the charging process using a network RFID card, a key fob or an app, some of which need to be preloaded with funds.¹⁴ The eMSP invoices the driver for all the activities and the electricity. It is possible to ad hoc charge the vehicle directly from the CPO. In that case, the driver will not acquire any additional services from the eMSP.¹⁵

Interoperability agreements, or e-roaming agreements, are important. Without them, the driver would have to hold several subscriptions, one for each charging operator in each region or country. Roaming refers to a driver's possibility of charging in different charging stations belonging to various operators in different cities or countries.¹⁶ To this end, bilateral roaming agreements can be concluded between CPOs and eMSPs. However, bilateral contracts do not seem practical, mainly because of

12. Id., at annex, p. 16.
 13. Id., at annex, p. 17.
 14. J.C. Ferreira, C. Ferreira da Silva & J. P. Martins, *Roaming Service for Electric Vehicle Charging Using Blockchain-Based Digital Identity*, 14 *Energies* 1686, p. 1 (2021), available at <https://www.mdpi.com/1996-1073/14/6/1686> (accessed 1 Nov. 2021).
 15. Working Paper 1012, *supra* n. 11, at p. 7.
 16. Ferreira et al., *supra* n. 14, at p. 1.

the contractual¹⁷ and administrative expenditure.¹⁸ A central party may, therefore, provide for a more practical situation. Physical infrastructure owned by various local service providers (including local service providers established in one country) are bundled and provided to the customer using one single interface.¹⁹ It is the platform that deals with the service providers involved. The customer only deals with the platform and pays one bill. All clearing is done by the platform in the background.²⁰ This clearing can be done on a nett basis, meaning that only the balance of transaction is cleared between charging operators. Hubject (Germany), Gireve (France) and e-clearing.net (Germany and supported by the German Ministry of Economy and Energy and the Dutch Ministry of Economic Affairs) are examples of e-mobility platforms, though it seems that none of them currently provides for the opportunity that the driver deals only with the platform. It seems the driver still deals with its eMSP, but the eMSP is connected to a platform that easily establishes a connection with several CPOs. It should also be noted that the set-up of these platforms may be different. While Hubject provides for a network of CPOs and eMSPs who use the interchange label²¹ and use the Hubject platform for performing their services, Gireve provides for an online platform where roaming agreements by CPOs can be signed using a legal template provided by Gireve.²² On the platform operated by Hubject, eMSPs and CPOs are connected and have access to each other's services, while individual eMSPs and CPOs still need to sign bilateral e-roaming contracts in the case of Gireve, but this is facilitated by the Gireve platform. E-clearing.net also allows CPOs and eMSPs to choose their partners freely and set up business agreements with those parties.²³ E-clearing.net also applies a standard e-roaming contract but, different from Gireve, the use is completely optional.²⁴

Invoices for charging electric vehicles are issued by the CPO in the name of the eMSP in the case of Hubject.²⁵

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17. Concluding multiple bilateral contracts with multiple e-mobility service providers.
 18. A. Pfeiffer & M. Bach, *An E-Clearinghouse for Energy and Infrastructure Services in E-Mobility*, in *Operations Research Proceedings 2012*, Operations Research Proceedings, DOI: 10.1007/978-3-319-00795-3_44, pp. 307-308 (S. Helber et al. eds., Springer 2014).
 19. Noyen et al., *supra* n. 4, at p. 2.
 20. *Id.*, at pp. 6 and 8.
 21. Hubject, Interchange labelling guide, available at https://assets.website-files.com/602cf2b08109ccbc93d7f9ed/60534f29d8fb7c64645c2a7c_interchange-labeling-guide-EN.pdf (accessed 4 July 2021).
 22. *See*, in particular, Gireve, Open! Services description, art. 1.2.1-1.2.4 and 1.3.1, available at <https://www.gireve.com/wp-content/uploads/2020/08/GIREVE-OPEN-Services-description-%E2%80%93-2.0.2-May-2020.pdf> and Gireve, Boost! Services description, art. 1.2.1-1.2.3 and 1.3.1, available at <https://www.gireve.com/wp-content/uploads/2021/08/GIREVE-%E2%80%93-BOOST-Services-description-%E2%80%93-2.0.3-July-2021.pdf> (both accessed 4 July 2021). The Gireve roaming template can be found at <https://www.gireve.com/wp-content/uploads/2020/12/Roaming-Agreement-Template-V2.9.pdf> (accessed 4 July 2021).
 23. *See*, in particular: <https://e-clearing.net/e-clearing-net/about-us> and <https://e-clearing.net/e-clearing-net/how-does-it-work> (both accessed 4 July 2021).
 24. E-clearing.net, Standard Roaming Contract, available at <https://e-clearing.net/e-clearing-net/Standard-Roaming-Contract> (accessed 4 July 2021).
 25. Hubject, e-Roaming Agreement, art. 5.5, https://assets.website-files.com/602cf2b08109ccbc93d7f9ed/60534f25a4298320909900be_130614_Appendix-eRoaming-Agreement.pdf (accessed 3 July 2021).

Details of the charging session are also provided by the CPO to the eMSP.²⁶ In the case of Gireve, the CPO invoices the eMSP for the charging sessions (though it seems the platform will be used for this in the future),²⁷ while details of the charging sessions are provided on the platform.²⁸ Gireve also offers to act as billing agent for CPOs, in which case it prepares and sends the invoices on the CPO's behalf to the eMSPs.²⁹ E-clearing.net, likewise, is not a party in the e-roaming contract, and under the standard contract it is the CPO billing the eMSP for the charging.³⁰

3. Relevant VAT Legislation

3.1. Special VAT rules for the supply of electricity

Since the business models of the CPO and eMSP include the supply of electricity, it is important to discuss the VAT consequences of such a supply. The supply of electricity is subject to special arrangements within the EU VAT system, both as regards the definition of the taxable event and the place of supply. Under article 14(1) of the VAT Directive³¹ the supply of goods for the purpose of EU VAT is defined as: the transfer of the right to dispose of tangible property as owner. Article 15 of the VAT Directive states that electricity, gas, heat or cooling energy and the like shall be treated as tangible property. Articles 38 and 39 of the VAT Directive determine the place of supply of electricity, and distinguish between supplies to taxable dealers and supplies to other persons. A supply to a taxable dealer is subject to VAT where that taxable dealer has established its business or has a fixed establishment for which the goods are supplied or, in the absence of such a place of business or fixed establishment, the place where the taxable dealer has its permanent address or usually resides. A mandatory reverse charge rule applies under article 195 of the VAT Directive. EU Member States must adopt a reverse charge rule that determines that VAT is due by the taxable dealer as a customer if the supplier is not established in the EU Member State of the taxable dealer. Since a taxable dealer is defined by article 38(2) of the VAT Directive as “a taxable person whose principal activity in respect of purchases of gas, electricity, heat or cooling energy is reselling those products and whose own consumption of those products is negligible”, a taxable dealer is able to deduct this VAT in the same VAT return. Under article 39 of the VAT Directive, all supplies of electricity to other persons than taxable dealers are subject to VAT in the place where the customer effectively uses and

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26. Hubject, Contract Terms for EMP User Agreements, art. 7.1, available at https://assets.website-files.com/602cf2b08109ccbc93d7f9ed/60534f7682662c337f14420a_180131_Contract-Terms-EMP-User-Agreements.pdf (accessed 3 July 2021).
 27. *See*, in particular, Gireve, Boost! Services description, *supra* n. 22, at art. 3.5.1, and Gireve, Boost! License content, art. 3.5.1, available at <https://www.gireve.com/wp-content/uploads/2021/01/GIREVE-%E2%80%93-BOOST-licence-content-%E2%80%93-2.0.3-January-2021.pdf> (accessed 4 July 2021).
 28. *See*, in particular, Gireve, Boost! Services description, *supra* n. 22, at art. 2.3.5, 2.3.6, 3.3.1-3.4.1.
 29. Gireve, Open! Services description, *supra* n. 22, at art. 3.5.2.
 30. *See*, in particular, e-clearing.net, Standard Roaming Contract, *supra* n. 24, at art. 5.
 31. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347 (2006), Primary Sources IBFD [hereinafter VAT Directive].

consumes those goods. In a situation where all or part of the electricity is not effectively consumed by the customer, the non-consumed goods shall be deemed to have been used and consumed at the place where the customer has established their business or has a fixed establishment for which the goods are supplied. Again, in the absence of a place of business or fixed establishment the customer is deemed to have used and consumed the goods at the place where they have their permanent address or usually reside. As pointed out by Advocate General Szpunar in his Opinion in the *XY* case, in the case of batteries (that are charged as part of electric vehicle charging), energy is stored in the form of chemical energy, i.e. the (potential) energy of an electrochemical reaction that occurs between the chemical compounds in the battery when current flows.³² In the author's view, recharging an electric vehicle, therefore, includes the full usage of the electricity provided. While a taxable dealer will always be a taxable person for VAT, these other persons may include other businesses and consumers.

3.2. ECJ case law on the supply of fossil fuels

A supply of goods takes place between the party that transfers the right to dispose of the goods as owner and the party to which that right is transferred. As regards the right to dispose of the goods as an owner, the *Auto Lease Holland*,³³ *Fast Bunkering Klaipėda*³⁴ and *Vega International Car Transport and Logistic*³⁵ cases are of importance. Even though these cases deal with traditional fossil fuels for vehicles, they may be relevant to electricity for vehicles as well.

The *Auto Lease Holland* case is the oldest of the three and deals with a leasing company with its registered office in the Netherlands, which makes motor vehicles available to its clients. In return for use of the vehicle, the lessee pays to Auto Lease the monthly instalments stipulated in the leasing contract. Auto Lease Holland also offers the lessee the option of entering into a fuel management agreement. The agreement permits the lessee to fill up their motor vehicle with fuel, and from time to time to purchase oil products, in the name and at the expense of Auto Lease Holland. For that purpose, the lessee receives a so-called ALH-Pass as well as a fuel credit card from the German credit card company DKV. That card names Auto Lease as the DKV customer. DKV regularly submits its account to Auto Lease and itemizes the various supplies per vehicle. The lessee pays to Auto Lease each month in advance one twelfth of the likely annual petrol costs. At the end of the year, the account is then settled according to actual consumption. There is a supplementary charge for fuel management. Auto Lease Holland applied for a

refund of German VAT on fuel supplied in Germany. This refund was refused by the German tax authorities stating that there was no supply of fuel from the oil companies to Auto Lease Holland. The ECJ followed this reasoning of the German tax authorities. According to the ECJ, the lessee is empowered to dispose of the fuel as if they were the owner of that property. The lessee obtains the fuel directly at filling stations and Auto Lease Holland does not at any time have the right to decide in what way the fuel must be used or to what end. The argument to the effect that the fuel is supplied to Auto Lease Holland, since the lessee purchases the fuel in the name and at the expense of that company, which advances the cost of that property, cannot be accepted according to the ECJ, because the supplies were effected at Auto Lease Holland's expense only ostensibly. The monthly payments made to Auto Lease Holland constitute only an advance. The actual consumption, established at the end of the year, is the financial responsibility of the lessee who, consequently, wholly bears the costs of the supply of fuel. The ECJ thus concluded that the fuel management agreement is not a contract for the supply of fuel, but rather a contract to finance its purchase. Auto Lease does not purchase the fuel in order to subsequently resell it to the lessee. Instead, the lessee purchases the fuel, having a free choice as to its quality and quantity, as well as the time of purchase. Auto Lease Holland acts, in fact, as a supplier of credit vis-à-vis the lessee. Later, in the *Loyalty Management and Baxi* cases,³⁶ the ECJ refers to the *Auto Lease Holland* case mentioning that consideration of economic realities is a fundamental criterion for the application of the common system of VAT. So, apparently, this was an important consideration in the *Auto Lease Holland* judgment.

The *Auto Lease Holland* judgment was confirmed by the ECJ in the more recent *Vega International Car Transport and Logistic* case, which dealt with one group company purchasing fuel on behalf of other group companies, the latter using fuel cards issued by the first group company. According to the ECJ, the group company, by means of fuel cards, provides the other group companies with a simple instrument enabling them to purchase fuel, thereby playing no more than an intermediary role in the purchase transaction concerning that product. In addition to its previous case law, the ECJ added that the service provided by Vega International Car Transport and Logistic qualified as an exempt granting of credit.

Similar to its reasoning in both the *Auto Lease Holland* and the *Vega International Car Transport and Logistic* cases, the ECJ ruled in the *Fast Bunkering Klaipėda* case that fuel is provided directly by the oil company to the owner of a seagoing vessel instead of to an intermediary, thus allowing the application of the exemption of article 148(a) of the VAT Directive. Under the ECJ's reasoning, from the moment the fuel is loaded into fuel tanks of a

32. DE: Opinion of Advocate General Szpunar, 12 May 2021, Case C-100/20, *XY v. Hauptzollamt B*, ECLI:EU:C:2021:387.

33. DE: ECJ, 6 Feb. 2003, Case C-185/01, *Auto Lease Holland B.V. v. Bundesamt für Finanzen*, ECLI:EU:C:2003:73, Case Law IBFD.

34. LT: ECJ, 3 Sept. 2015, Case C-526/13, *Fast Bunkering Klaipėda UAB v. Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos*, ECLI:EU:C:2015:536, Case Law IBFD.

35. PL: ECJ, 15 May 2019, Case C-235/18, *Vega International Car Transport and Logistic – Trading GmbH*, ECLI:EU:C:2019:412, Case Law IBFD.

36. UK: ECJ, 7 Oct. 2010, Case C-53/09, *Commissioners for Her Majesty's Revenue and Customs v. Loyalty Management UK Limited*, Case Law IBFD and UK: ECJ, 7 Oct. 2010, Case C-55/09, *Commissioners for Her Majesty's Revenue and Customs v. Baxi Group Limited*, ECLI:EU:C:2009:144, para. 39, Case Law IBFD.

vessel, its operator is generally entitled to actually dispose of it as if it were the owner. Although, according to the procedures laid down by the applicable national law, the ownership of the fuel was formally transferred to the intermediaries and those intermediaries are deemed to have acted in their own name, those intermediaries have at no time been in a position to dispose of the quantities supplied, since the power to dispose of the fuel belonged to the operators of the vessels as soon as Fast Bunkering Klaipeda had loaded it.

By contrast, in the *Wojskowa Agencja* case,³⁷ the ECJ ruled that when a property owner that lets immovable property and provides utilities, including electricity, heating, water and refuse disposal, it is the landlord who purchases the services in question for the immovable property which it lets. Different from the *Auto Lease Holland* case, where it is the lessee that purchases the fuel from filling stations and has a free choice as to its quality and quantity, as well as when to purchase, the tenant does not purchase the utilities from specialist third-party suppliers. It follows from the purchase by the landlord of supplies comprising the provision of those goods and services that it is the landlord who must be regarded as providing those supplies to the tenant. According to Advocate General Kokott, a typical expression of ownership is the right to dispose of property as one sees fit, especially to exercise physical control over it and to sell it.³⁸ As stated by the ECJ in the order in the *Koela-N* case, the transfer of the power to dispose of tangible property as an owner, within the meaning of article 14(1) of the VAT Directive, does not require that the party to whom that tangible property is transferred physically possesses it, nor does it require that the tangible property be physically transported to it and/or physically received by it.³⁹

3.3. Composite supplies

Last but not least, the doctrine of composite supplies needs to be addressed, since the supplies provided by both CPO and eMSP consist of several elements. According to the ECJ's case law, where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine whether that operation gives rise, for the purposes of VAT, to two or more distinct supplies or to one single supply.⁴⁰ Every transaction must

normally be regarded as being distinct and independent, but a transaction which comprises a single supply from an economic point of view should not be artificially split. There is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.⁴¹ In this respect it is relevant whether the customer, being an average customer, has a single economic purpose by purchasing the service consisting of several elements.⁴² There is also a single supply where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a service must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied.^{43,44} Whether a single price is charged is not decisive. If the service provided to customers consists of several elements for a single price, the single price may, however, suggest that there is a single service, but if the customers intend to buy two distinct services, the single price will need to be split using the simplest possible method of calculation.⁴⁵ Whether the customer is allowed to purchase one of the supplies from another service provider is also important in order to determine whether there is a single supply or two distinct supplies.⁴⁶

4. VAT Treatment of Business Models for Recharging of Electric Vehicles

4.1. Deliberations in the VAT Committee

The VAT Committee has deliberated on two occasions about the VAT treatment of the activities of the CPO and eMSP.⁴⁷ At the first occasion, the VAT Committee adopted guidelines. Unfortunately, it only took position as regards the qualification of the supply by the CPO. By unanimity the VAT Committee is of the opinion that the main element of the transaction by the CPO is the recharging of the electric vehicle, which can be qualified as a supply of goods in accordance with articles 14(1) and 15(1) of the VAT Directive. The question as regards to whom the CPO provides this supply is left open.

37. PL: ECJ, 16 Apr. 2015, Case C-42/14, *Minister Finansów v. Wojskowa Agencja Mieszkaniowa w Warszawie*, ECLI:EU:C:2015:229, Case Law IBFD.
38. See AT: Opinion of Advocate General Kokott, 10 Nov. 2005, Case C-245/04, *EMAG Handel Eder OHG v. Finanzlandesdirektion für Kärnten (Berufungssenat II)*, para. 58, ECLI:EU:C:2005:675, Case Law IBFD.
39. BG: ECJ, 15 July 2015, Case C-159/14, *'Koela-N' EOOD v. Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*, para. 38, ECLI:EU:C:2015:513, Case Law IBFD.
40. DE: ECJ, 10 Mar. 2011, Case C-497/09, *Finanzamt Burgdorf v. Manfred Bog*, Case Law IBFD; DE: ECJ, 10 Mar. 2011, Case C-499/09, *Hans-Joachim Flebbe Filmtheater GmbH & Co. KG v. Finanzamt Hamburg-Barmbek-Uhlenhorst*, Case Law IBFD; DE: ECJ, 10 Mar. 2011, Case C-501/09, *Lothar Lohmeyer v. Finanzamt Minden*, Case Law IBFD; DE: ECJ, 10 Mar. 2011, Case C-502/09, *Fleischerei Nier GmbH & Co. KG v. Finanzamt Detmold*, paras. 52 and 21, EU:C:2011:135, Case Law IBFD;

CZ: ECJ, 21 Feb. 2013, Case C-18/12, *Město Žamberk v. Finanční reditelství v. Hradci Králové*, para. 27, EU:C:2013:95, Case Law IBFD.
41. *Bog and Others (C-497/09)*, *Flebbe Filmtheater (C-499/09)*, *Lohmeyer (C-501/09)*, *Fleischerei Nier (C-502/09)*, at para. 53; CZ: ECJ, 10 Nov. 2016, Case C-432/15, *Odvolační finanční reditelství v. Pavlína Baštová*, para. 70, EU:C:2016:855, Case Law IBFD. 2021).
42. NL: ECJ, 27 Oct. 2005, Case C-41/04, *Levob Verzekeringen B.V., OB Bank N.V. v. Staatssecretaris van Financiën*, para. 24, ECLI:EU:C:2005:649, Case Law IBFD.
43. UK: ECJ, 25 Feb. 1999, Case C-349/96, *Card Protection Plan Ltd v. Commissioners of Customs and Excise*, para. 30, ECLI:EU:C:1999:93, Case Law IBFD.
44. NL: ECJ, 18 Jan. 2018, Case C-463/16, *Stadion Amsterdam CV v. Staatssecretaris van Financiën*, para. 21-23, ECLI:EU:C:2018:22, Case Law IBFD.
45. *Stadion Amsterdam (C-463/16)*, at para. 31.
46. *Wojskowa Agencja (C-42/14)*, at para. 39.
47. On both occasions, the European Commission prepared a working paper, i.e. Working Paper 969, *supra* n. 10 and Working Paper 1012, *supra* n. 11.

Later, Italy informed the European Commission that it did not agree with this position. According to Italy, the electricity is consumed by the CPO, which does not supply electricity, but provides a recharging service that is subject to VAT under the main B2B rule for the place of supply of services of article 44 of the VAT Directive (i.e. the CPO provides a B2B service to the eMSP).⁴⁸ The European Commission does not agree with this position and still considers that the charging is the main element of the supply.⁴⁹ According to the European Commission, the CPO supplies electricity to the eMSP, who supplies electricity to the driver. The eMSP can be regarded as a taxable dealer, and the supply of electricity by the CPO will be subject to VAT at the place where the eMSP is established pursuant to article 38 of the VAT Directive. The place of supply for the electricity provided to the driver will be the place where the driver effectively uses and consumes the goods: the location of the charging terminal.⁵⁰

According to the European Commission, the situation is rather different from the one that was dealt with in *Auto Lease Holland*, because the CPO, acting in its own name, not only supplies electricity but also a set of other ancillary supplies making it possible for the eMSP to carry out its activity. The eMSP, acting in its own name, supplies the electricity and other ancillary services to the driver of the electric vehicle. In these circumstances the driver can access and dispose of the electricity only after acquiring the RFID card or mobile application from the eMSP. The European Commission also points out that according to the sector, ABC transactions typically take place. The VAT Committee has not yet taken a position on the issue put forward by Italy.

4.2. A single or distinct supply?

The author agrees with the position of the European Commission that there is one supply, of which the main element is the supply of electricity with the objective of recharging the vehicle. The driver seeks the opportunity to recharge its vehicle. All other services provided are a means to make this supply more attractive. The billing arrangements, including the charging of the fee by the eMSP or the pre-loading of funds, make it easier for the customer to pay for the electricity supplied, which they do not have to take care of on the spot with each charging session and each CPO separately. The map with charging points, including information about their availability, will make it easier for the driver to find an available charging location instead of driving around looking for one, which – compared to refueling with fossil fuels – is even more burdensome because of recharging times and therefore possibly fewer charging points available (one cannot simply wait five minutes for the previous customer to complete their purchase). Reservation services likewise contribute to the availability of charging points. Using the RFID card or mobile application for identification of the driver at the charging point is in the author’s view just a *modus ope-*

48. Working Paper 1012, *supra* n. 11, at p. 4.
 49. *Id.*, at p. 7.
 50. *Id.*, at p. 9.

randi and cannot be regarded as a distinct supply, comparable to the fuel cards issued by Auto Lease Holland and Vega International Car Transport and Logistics.

4.3. Who is the customer of the supply of electricity?

In the author’s view, once it is established that there is a single supply consisting of the supply of electricity, it should – following the ECJ case law discussed in section 3.2. – be established to whom the right to dispose of this electricity is transferred. Electricity is deemed to be tangible property by article 15(1) of the VAT Directive. A taxable supply of goods (tangible property) only takes place when the requirements of article 14(1) of the VAT Directive have been met, requiring the supplier to transfer the right to dispose of the goods as owner to the customer. The question that needs to be answered is whether the right to dispose of the electricity is transferred from the CPO to the eMSP, who subsequently transfers the ownership to the driver or directly by the CPO to the driver. In this respect, it should be noted that electricity compared to other goods – like fossil fuel – is of a different nature. Due to its specific nature, the physical flows of electricity do not coincide with the contractual relationship between seller and buyers. Because it is almost impossible, considering this characteristic, to trace the physical flow of electricity, this has led to the adoption of new place-of-supply rules in 2005 introduced by Directive 2003/92/EC.⁵¹ Following the *Koela-N* judgment, in order to establish that someone has obtained the right to dispose of goods as owner it is not necessary to have physical possession of the goods. However, in the author’s view, the person in question should have decision-making power, meaning that it can decide that the goods purchased are to be delivered to its customer. The question that, therefore, needs to be answered is whether the contract concluded between the CPO and the eMSP prior to the actual purchase of electricity (the recharging session) provides this decision-making power to the eMSP. The *Auto Lease Holland* and *Vega* judgments, however, show that this is not the case. Similarly to the contracts concluded by these parties, it is the driver who decides to purchase the electricity, the quantity, the quality (including the origin of the electricity, i.e. electricity generated by natural sources or in fossil fuel power plants) and location. The driver obtains the electricity directly and the eMSP does not decide in what way the electricity is used. It is also the driver who bears the costs of the recharge. The RFID card or mobile application is comparable to the fuel cards issued by Auto Lease Holland and Vega. The eMSP also has no control over the electricity flow.

Although the ECJ demonstrated, in the *Wojskowa Agencja* case, that two successive supplies can take place in the case of electricity, the situation is in the author’s view different. First of all, because electricity supplied by a landlord to its tenants is a continuous supply, whereas in the situation of recharging a vehicle there is a supply each time

51. Council Directive 2003/92/EC of 7 October 2003 amending Directive 77/388/EEC as regards the rules on the place of supply of gas and electricity, pp. 8-9, OJ L260 (2003).

the vehicle is charged. Secondly, the cables, sockets and other equipment needed to acquire and supply electricity to the tenants are owned by Wojskowa Agencja as the landlord. Thirdly, it is Wojskowa Agencja that has signed the energy contract and has a legal relationship with the person supplying the electricity that Wojskowa Agencja can use for its own needs (e.g. in generally used spaces of the building such as a hall or elevator, or in the apartments when they are empty) or supply to its tenants. Looking at the ECJ's reasoning in *Auto Lease Holland*, a legal relationship is considered to exist between the lessee and the pump station, because the court took the position that the lessee does not purchase fuel in the name and at the expense of Auto Lease Holland and Auto Lease Holland is in fact a supplier of credit. Similar to that reasoning, the driver should be considered to conclude a contract with the CPO, because they choose to recharge their vehicle at a charge point of that CPO and opted to do so by using the eMSP's RFID card or mobile app instead of ad hoc charging. The electricity is also not purchased for the account of the eMSP, since it is the driver paying for it.

The author therefore does not agree with the European Commission that there is an ABC transaction in this situation. In the author's view, ancillary supplies that are just a means of making the main supply attractive cannot be taken into account when determining the VAT treatment of the main supply and changing that VAT treatment. This would run counter to the case law regarding composite supplies.⁵²

4.4. Commission agent?

Article 14(2)(c) of the VAT Directive also allows for two successive supplies in the case of a transfer of goods pursuant to a contract under which commission is payable on the purchase or sale. This provision creates a legal fiction of two identical supplies of services provided consecutively. The commission agent is considered to have received the supplies in question from the principal, before providing those supplies to the client himself.⁵³ This provision applies if two conditions are met: (i) there is a mandate under which the commission agent acts on behalf of the principal; and (ii) the goods or services supplied by the commission agent are identical to those sold or transferred to the principal.⁵⁴ According to the author, those two conditions are not met in the situation of the CPO and eMSP. As regards the first condition, it is not the eMSP acting based on a mandate of the driver. It is the driver that interacts with the CPO when using the CPO's charging point. For the first condition to be met, it should first be assumed that the driver, when connecting their

vehicle to the charge point, acts in the name of the eMSP, who subsequently acts under mandate of the driver.⁵⁵ This by no means reflects the economic reality of the situation. As regards the second condition, it is the eMSP that does not provide an identical supply, but adds its own elements to that supply.

4.5. VAT treatment of ancillary supplies

Thus, in the author's view, the CPO supplies electricity directly to the driver. That leaves us with ancillary services provided by the CPO and the eMSP. In the author's view, the ancillary services provided by the CPO will have to be considered as being integrated in the supply of electricity, which is provided by the CPO directly to the driver, and share the tax treatment of the principal service.⁵⁶ As regards the supply by the eMSP, it should be noted that ECJ case law in the author's view provides for the possibility to regard supplies by two different taxable person as a single supply.⁵⁷ That would make both the payment of the driver to the eMSP and the payment of the eMSP to the CPO subject to VAT at the place where the charge point is located under article 39 of the VAT Directive. However, this case law also demonstrates that the fact that two distinct suppliers are involved is a factor to be considered and indicates two distinct supplies.⁵⁸ However, based on this case law, it cannot be ruled out that two suppliers provide a single supply.

If the services provided by the eMSP are to be regarded as a distinct supply, the author is of the opinion that this service is to be regarded as a single service that is beyond the scope of an exempt financial service. The average consumer, in her view, seeks to obtain a package of services allowing them to easily charge their vehicle.⁵⁹ Both the billing by the eMSP, including the charging of the fee or the pre-loading of funds and the information about

52. Cf. *Stadion Amsterdam* (C-463/16).

53. BE: ECJ, 14 July 2011, Case C-464/10, *Belgian State v. Maître Pierre Henfling, Maître Raphaël Davin, Maître Koenraad Tanghe (acting as trustees in bankruptcy of Tiercé Franco-Belge SA)*, paras. 35 and 36, ECLI:EU:C:2011:489, Case Law IBFD.

54. RO: ECJ, 12 Nov. 2020, Case C-734/19, *ITH Comercial Timișoara SRL v. Agenția Națională de Administrare Fiscală - Direcția Generală Regională a Finanțelor Publice București - Agenția Națională de Administrare Fiscală - Direcția Generală Regională a Finanțelor Publice București - Administrația Sector 1 a Finanțelor Publice*, para. 51, ECLI:EU:C:2020:919, Case Law IBFD.

55. The author also refers to the judgment of the Dutch Supreme Court in NL: HR, 19 Sept. 2014, 12/05005, ECLI:NL:HR:2014:2678, where the court has stated (freely translated): "A purchase or sale on commission within the meaning of Article 14(2)(c) VAT Directive 2006, in accordance with which Article 3(6) of the Dutch VAT act should be interpreted, is not consistent with the fact that the principal of the commission agent himself acts on behalf of the commission agent without having previously given the commission agent an order to buy or sell. The Court of Appeal has established, as considered above in 3.2 and not disputed in cassation, that the customer himself made the choice in the shop to proceed with the purchase and that he immediately followed that choice, which implies that he had not previously given the interested party an order to buy." This also applies in this situation. The driver purchases electricity from a certain CPO depending on what charging point is chosen. The driver chooses to make this purchase without previously having provided the eMSP to buy electricity at this charging point.

56. CCP (C-349/96).

57. In particular in IT: ECJ, 21 Feb. 2008, Case C-425/06, *Part Service, Ministero dell'Economia e delle Finanze, formerly Ministero delle Finanze v. Part Service Srl, company in liquidation, formerly Italservice Srl*, para. 54, ECLI:EU:C:2008:108, Case Law IBFD and UK: ECJ, 26 May 2016, Case C-607/14, *Bookit Ltd v. Commissioners for Her Majesty's Revenue and Customs*, para. 28, ECLI:EU:C:2016:355, Case Law IBFD.

58. See, in particular, FR: ECJ, 16 July 2015, Case C-584/13, *Directeur général des finances publiques v. Mapfre Asistencia compania internacional de seguros y reaseguros, and Mapfre Warranty SpA v. Directeur général des finances publiques*, paras. 56 and 57, ECLI:EU:C:2015:488, Case Law IBFD. More about this in M.M.W.D. Merckx & J. Gruson, *Twee zielen, één prestatie [Two souls, one supply]*, MBB 10-35 (2018).

59. Cf. *Baštová* (C-432/15), at paras. 72-75.

the availability of charge points provided in the app are equally important in that respect. The RFID or mobile phone app is, in the author’s opinion, again to be regarded as a *modus operandi* and not as a distinct supply of services. In the case of B2B services, the supply by the eMSP will be within the scope of the main place-of-supply rule of article 44 VAT Directive, making the supply subject to VAT in the Member State of the customer. In the case of B2C services, the supply might be regarded as an electronically provided service if information about available charging points is available via the Internet, and billing takes place automatically and requires minimal human intervention. Electronically supplied services are subject to VAT in the country of the recipient under article 58 of the VAT Directive. If the supply cannot be regarded as an electronically provided service, it will be within the scope of the main place-of-supply rule for B2C services of article 45 of the VAT Directive, which means that the service is subject to VAT in the country of the eMSP.

4.6. Charging of electric company cars

In a similar manner, VAT issues arise when an electric vehicle driver that has a company car seeks to have a charging point at their house. Their energy supplier and the supplier providing electricity at the charge point can be different parties, following article 4(12) of the DAFI Directive,⁶⁰ which makes clear that Member States must ensure that the legal framework permits the electricity supply for a recharging point to be the subject of a contract with a supplier other than the entity supplying electricity to the household or premises where such a recharging point is located. In that situation, the driver receives a credit note from the charge point provider (because the charge point is connected to the household electricity network and it is the driver’s household electricity provider that supplies the electricity needed to recharge the vehicle), who subsequently invoices the company. In the author’s view, following the *Wojskowa Agencja* judgment, it is indeed the driver supplying electricity to the charge point electricity provider (which will make the driver a taxable person for VAT following the *Fuchs* case⁶¹) and the charge point electricity provider subsequently supplies the electricity to the company following the *Auto Lease Holland* and *Vega* cases. If it concerns leased cars, the leasing company is not the recipient of the electricity.

5. Possible Solutions to Avoid Disruptions on the E-Services Roaming Market

5.1. Introduction

Based on the author’s position that it is the CPO supplying electricity directly to the driver, it is the CPO that needs to invoice the driver for the supply of electricity, or – alternatively - the eMSP should do this on the CPOs

60. Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure Text with EEA relevance, pp. 1-20, OJ L07 (2014).
 61. AT: ECJ, 20 June 2013, Case C-219/12, *Finanzamt Freistadt Rohrbach Urfahr v. Unabhängiger Fianzsenat Außenstelle Linz*, ECLI:EU:C:2013:413, Case Law IBFD.

behalf. This, however, undermines the eMSP’s business model, because if the driver uses charging points owned by multiple CPOs, the eMSP will not be able to issue one invoice. In the future, e-roaming platforms as described in section 2. will also face difficulties as they cannot issue one single invoice to the driver either because they need to issue invoices on behalf of all the CPOs whose charge points have been used by the driver. This may, in fact, limit the business models and thus the availability of charging points for electric vehicle drivers, which runs counter to the objectives set by the European Green Deal as discussed in section 1.

The author sees four possible solutions that may provide for a smoother functioning of these business models:

- for B2C-supplies: treat the costs for electric vehicle charging as repayment of expenditure incurred in the name and on behalf of the customer and entered into the eMSP’s books in a suspense account (see section 5.2.);
- treat electricity provided by charging points for electric vehicles as a service (see section 5.3.);
- regard the transactions as chain transactions (German and Austrian model, see section 5.4.); and
- allow the eMSP to treat the costs as its own costs (Dutch model, see section 5.5.).⁶²

5.2. For B2C-supplies: Expenditure in the name and on behalf of the customer and entered into the eMSP’s books in a suspense account

Costs that are made on a suspense account are not part of the taxable amount for VAT purposes. This can already be explained by the fact that those costs are not received in return for a supply of the taxable person in question and are therefore not part of the taxable amount under article 73 of the VAT Directive.⁶³ To avoid any doubt, article 79(c) of the VAT Directive states that amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of that customer, and entered into its books in a suspense account, are not part of the taxable amount. In order to meet the conditions of this provision, costs must be incurred and paid on behalf of the customer and in its name. The condition is not met if the amount is paid in the taxable person’s own name and on its own behalf.⁶⁴

In the author’s view, the costs payable to the CPO are made in the name and on behalf of the driver. Costs are also incurred on behalf of the driver, following the *Auto Lease Holland* and *Vega* cases, because it is the driver paying for the charging session. As discussed in section 4.3., the

62. Both latter solutions have also been addressed by the VAT Expert Group in a document presented to the VAT Committee, *Selected CJEU cases with impacts on businesses operating in the EU Single Market – issues evoked by the VAT Expert Group – right of deduction and supply chains* (2 Mar. 2021), Working Paper 1008, taxud.c.1(2021)1759933.
 63. Cf. A. van Doesum, H.W.M. van Kesteren & G.J. van Norden, *Fundamentals of EU VAT Law* p. 276 (2nd ed., Kluwer Law International 2020).
 64. PT: ECJ, 11 June 2015, Case C-256/14, *Lisboagás GDL, Sociedade Distribuidora de Gás Natural de Lisboa SA v. Autoridade Tributária e Aduaneira*, para. 35, ECLI:EU:C:2015:387, Case Law IBFD and PT: ECJ, 5 Dec. 2013, Case C-618/11, *TVI Televisão Independente, SA v. Fazenda Pública*, para. 47, Case Law IBFD.

legal relationship exists between the driver and the CPO, which also underpins the costs incurred in the name of the driver. Costs could therefore be put on the eMSP's invoice as costs that are made on a suspense account. The VAT on those costs is due by the CPO in the country where the charge point is located under article 39 of the VAT Directive. The VAT due on the eMSP's own service is to be determined in accordance with the place-of-supply rules for services, which have already been addressed in section 4.5. In the case of B2C supplies, it is not mandatory to issue an invoice. The CPO, therefore, does not have to issue an invoice to the driver. The CPO will, however, for administrative purposes and billing purposes for the eMSP, need to provide an overview of the charging sessions per driver and the costs including VAT. The CPO should also make sure not to mention those costs on an invoice to the eMSP, since they are not costs of the eMSP. For B2C supplies by the CPO to the driver, the issue can thus be solved. Member States may, however, under article 221(1) of the VAT Directive implement an obligation to issue invoices for B2C-supplies. In the author's view, this should be discouraged in the situation of the charging of electric vehicles. This could be done through soft law or by making changes to article 221(1) of the VAT Directive. In the Netherlands, costs incurred for the supply of energy for land vehicles by the station operator (for example a CPO) which are paid for by the issuer of a fuel card (for example an eMSP) in the name and on behalf of the fuel card holder (for example the driver or, in the case of a company car, the company) are considered costs on a suspense account. These costs must in that case be individualized, for example on the basis of card numbers and registrations.⁶⁵

If the driver is a taxable person with a right to deduct VAT, they are the only one that can deduct the VAT on the recharging costs. In order to do so, they should have an invoice in the name of the CPO (issued either by the CPO itself or on the CPO's behalf by the eMSP). Therefore, the solution discussed in this section only provides a solution for B2C-supplies. Other solutions will be looked upon in the next sections.

5.3. Treat as service

Under this option, article 15(1) of the VAT Directive will be amended and electricity for the recharging of electric vehicles at charging points will be excluded from the scope of that provision. If this electricity is not to be regarded as tangible property, its supply is automatically a supply of services under article 24 of the VAT Directive. For supplies of services, the person that has the legal relationship with the supplier is the customer of the supply.⁶⁶ However, as discussed in section 4.3., the author is of the opinion that a contract is concluded each time the vehicle is connected to the charging point and a recharge session is initiated.

65. NL: Decree of 29 June 2018, nr. 2018/84956, Stcrt. 2018, 37763, sec. 4.1.
66. UK: ECJ, 3 May 2012, Case C-520/10, *Lebara Ltd v. The Commissioners for Her Majesty's Revenue & Customs*, para. 33, ECLI:EU:C:2012:264, Case Law IBFD and UK: ECJ, 20 June 2013, Case C-653/11, *Her Majesty's Commissioners of Revenue and Customs v. Paul Newey t/a Ocean Finance*, para. 43, ECLI:EU:C:2013:409, Case Law IBFD.

Even though one could contractually state that the driver, when charging, acts on behalf of the eMSP, the ECJ case law also makes clear that the economic reality needs to be considered. It remains, in fact, the driver who decides where, when and how long to charge, having arranged the settlement in advance by making arrangements with the eMSP. Therefore, in the view of the author, this cannot be regarded as a feasible solution.

5.4. Regard as chain transaction

There are several provisions in the VAT Directive that create two successive supplies based on a fiction, for example article 14(2)(c) (discussed in section 4.4.) and article 14a. For the situation of electric vehicle charging, such a provision could be implemented as well. In that case, a supply can take place from the CPO to the eMSP and subsequently by the eMSP to the driver, allowing the eMSP to bill the driver in its own name. This provision could create a chain of transactions without the transfer of the right to dispose of goods as owner being required. In that situation, the supply of electricity by the CPO to the eMSP will be subject to VAT in the country where the eMSP is established based on article 38 of the VAT Directive, and the reverse charge rule will be applied if the CPO is not established in that country, pursuant to article 195 of the VAT Directive. The supply by the eMSP to the driver will be subject to VAT in the country where the electricity is effectively used and consumed, which will be the place where the charging point is located. This may require a VAT registration of the eMSP in the country of the charge point. Depending on the Member State's implementation of article 194 of the VAT Directive, the VAT may be reverse charged to the customer. An extension of the One-Stop Shop⁶⁷ or a mandatory reverse charge could lighten the burden in this respect. It should be noted that Germany and Austria currently allow for a chain transaction treatment between a pump station and lessor and subsequently between the lessor and the lessee in the case of fossil fuels. In Germany, this applies when certain conditions are met.⁶⁸ In Austria, it is stated in an interpretation of the VAT Act that chain transac-

67. The One-Stop Shop or OSS allows the taxable person to report and pay VAT due in several EU Member States in a single EU Member State and currently applies to B2C services, B2C distance sales and certain local supplies to non-taxable persons by electronic interfaces, see Title XII ch. 6 VAT Directive.

68. See decree of the Federal Ministry of Finance, DE: BMF v. 15.06.2004 - IV B 7 - S 7100 - 125/04 BStBl 2004 I 605. These conditions are: (i) the lessor and the lessee do not enter into a separate agreement on the management of fuel or do not regulate other contractual relationships on the granting of credit for the purchase of petroleum products; (ii) the lessee refuels the vehicle in the name and for the account of the lessor in a manner recognizable to the petrol station operator involved. This requirement can be fulfilled by the use of an appropriately printed fuel credit card; (iii) the lessor has not made use of its right to prohibit refueling in its name and for its account, e.g. by blocking the fuel credit card; (iv) the charge for the fuel shall be agreed separately at each delivery stage between the parties involved. Each supplier bears the risk of non-payment at its delivery stage; and (v) in the event of performance failures (e.g. in the form of engine damage caused by the fuel tanked), any claims for damages by the lessee against the lessor and claims by the lessor against the petroleum company shall be asserted. It should be noted that this decree was drafted following the ECJ judgment in *Auto Lease Holland* and therefore deals with the supply of fossil fuels.

tions can take place, but it is not explained under what circumstances.⁶⁹ In Germany, this chain transaction can be created by the parties involved by drafting the contracts in such a way that those conditions are met. However, in the author's view, this does not reflect economic reality since it is always the lessee (driver) that has a legal relationship with the pump station owner (or CPO). As was discussed in section 4.4., it cannot be assumed that the lessee purchases fuel in the name of the lessor.

5.5. Regard as own costs

In the Netherlands, the taxable person may treat costs on suspense account (*see* section 5.2.) as its own costs meaning it can deduct the VAT on the invoice from the other business and will subsequently pay the VAT on the costs on suspense account to the tax authorities. This can be applied under the following conditions:

- the taxable person passes the costs on to its customer for the same amount and under the same VAT regime and pays the VAT due on these costs;
- the taxable person states the costs separately on the invoice to the customer;⁷⁰ and
- the taxpayer does not include the amount of those costs in its determination of the right of deduction on its general expenses.⁷¹

In an earlier version of the applicable decree, it was explicitly mentioned that if the customer (driver or, in the case of company cars, the company) has a right to deduct VAT, they can deduct the VAT that the taxable person has charged to them.⁷² Although this is not mentioned explicitly in the current decree, in the author's view there was no intention to change this, so it can still be assumed that VAT can be deducted by the customer. This model would thus provide for a solution for B2B-transactions. Again, however, the eMSP will need to be VAT registered in the country where the charge point is located, unless the reverse charge rule applies. Different from the chain transaction model discussed in section 5.4., under this model the CPO will apply article 39 of the VAT Directive on its supply, meaning it will charge VAT of the EU Member State where the charge point is located. An extension of the One-Stop Shop to cover the payment of VAT or a mandatory reverse charge will in that case, therefore, not lighten the burden in all respects under this model, because the eMSP will need to recover the foreign VAT through a refund request for foreign VAT, either under

Directive 2008/9/EC,⁷³ or under the Thirteenth Directive.⁷⁴

6. Conclusion and Recommendations

In this article the author addressed business models for the recharging of electric vehicles. In the author's view, the supply of electricity constitutes the main element of the supply and is provided directly by the CPO to the driver. The supply by the eMSP, if regarded as a distinct supply, constitutes more than an exempt financial service, in the author's opinion.

These VAT consequences could undermine the eMSP's business model because the eMSP will not be able to issue a single invoice to the driver. For B2C transactions where Member States are discouraged to implement invoicing obligations for B2C supplies for these transactions, costs can be charged by the eMSP to the driver as costs on suspense account. This does not work for B2B transactions where the driver should be able to deduct VAT. There are two solutions for B2B transactions. The first is to create a chain transaction by implementing a deeming provision in the VAT Directive. The second is that the eMSP treats the costs as its own costs following the Dutch model. Both solutions have a similar result, but will still require the eMSP to register for VAT in the Member State where the charge points are located when the reverse charge rule cannot be applied.

The chain transaction model, in the author's view, provides two advantages compared to the Dutch model:

- (1) the eMSP does not have to ask for a refund of foreign VAT in the Member State where the charge point is located; and
- (2) the reverse charge rule can be applied on the first transaction if the eMSP is located in a different EU Member State than the CPO or a in third country, under article 195 of the VAT Directive, which provides a financing advantage.

An extension of the One-Stop Shop can be considered to avoid the VAT registration of the eMSP in the EU Member State of the charging point, which is an issue in both models.

Last but not least, a deeming provision is more in line with provisions already included in the VAT Directive and the way businesses in the sector operate (*see* section 4.1.). Therefore, this option would be preferable to the author.

69. AT: Addendum to the Guidelines of the Ministry of Finances regarding the interpretation of the national VAT Act (USt-RL 2000, Rz 345) (2019). It should be noted that this addendum, too, deals with fossil fuels.
 70. It is not a condition to mention the VAT separately on the invoice according to the decree (*infra* n. 71), but the VAT will need to be mentioned to determine the full amount including VAT to be paid and to allow the customer to deduct the VAT.
 71. NL: Decree of 29 June 2018, no. 2018/84956, Stcrt. 2018, 37763, sec. 4.1.
 72. NL: Decree of 21 November 2012, no. BLKB 2012/1962M, sec. 3.2.

73. Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State, pp. 23-28, OJ L44 (2008), Primary Sources IBFD.
 74. Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory, pp. 40-41, OJ L326 (1986), Primary Sources IBFD.