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## FSI Indirect Tax News Financial Services and Insurance updates from around the world

Issue 9

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Welcome to the latest edition of Deloitte's Financial Services and Insurance (FSI) Global Indirect Tax Newsletter.

We hope that you find the publication useful and we welcome your feedback. Should you have any comments or questions arising from the newsletter, please speak to your usual Deloitte contact or one of the regional FSI leaders listed below.

Kind regards

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In this newsletter  
we cover:

#### Area in focus

- The effect of the CJEU judgment in *Fiscale Eenheid X* (C-595/13) on the management of special investment funds

#### Asia Pacific

- **China** – Reform of the FSI VAT system
- **Malaysia** – Accounting for the reverse charge
- **Malaysia** – Penalty for late payment of taxes
- **Malaysia** – Update to the financial services guides

#### EMEA

- **Denmark** – VAT recovery for UCITS investment funds with non-EU customers
- **Denmark** – Sectorized pro rata VAT recovery for VAT groups
- **Denmark** – Scope of payment processing exemption may be reduced
- **Finland** – Cases on the VAT treatment of special investment funds
- **Finland** – Ruling on VAT treatment of services of settlement and payment processing

- **Finland** – Ruling on VAT treatment of services in relation to business restructuring
- **Germany** – New guidelines on the sale and purchase of non-performing loans
- **Netherlands** – VAT treatment of fees charged by stock exchanges and brokers to (high frequency) traders
- **Netherlands** – VAT treatment of fees charged by asset manager for clients that invest via a Dutch vehicle (*Beleggersgiro*)
- **Poland** – Exemption from VAT for services provided by an independent group of persons
- **Poland** – Court of Justice of the European Union confirms insurance outsourcing not exempt
- **Sweden** – Guidance on the VAT treatment of factoring services
- **UK** – Draft legislation on ‘use and enjoyment’ of insurance repairs
- **UK** – Supreme Court to hear hire purchase pro rata case

## Area in focus – The effect of the CJEU judgment in *Fiscale Eenheid X* on the management of special investment funds

On 9 December 2015, the Court of Justice of the European Union judgment was delivered in the Dutch case *Fiscale Eenheid X* (C-595/13).

### Background

*Fiscale Eenheid X* concerned the VAT treatment of services supplied to three Dutch companies investing in real estate. These companies had issued ‘holdings’ owned by third-party investors, which included portfolio management, property management, financial administration services, directorship services and the management of investor relations.

The case was referred to the CJEU in 2013. The CJEU, in its judgment, largely followed the Opinion of the Advocate General (AG), who recommended that collective investment vehicles investing in real estate could be treated as ‘special investment funds’ for the purposes of the fund management exemption in Article 135 (g) of the EU

VAT Directive.

The conclusion of the CJEU was as follows:

1. The exemption for the 'management of special investment funds as defined by Member States' is not limited to the management of funds investing in securities.

It can potentially extend to the management of any entity:

- a) which meets the '*ATP tests*' (e.g. containing the pooled capital of several investors who bear the investment risk); and
  - b) where the Member State concerned has made that entity "*subject to specific State supervision*".
2. For the purposes of the exemption, the scope of 'management' does not include the property management of real estate investments.

Investment companies could be counted as 'special investment funds' if:

- They contain the pooled capital of several investors;
- The capital is invested with a view to purchasing, owning, managing and selling immovable property in order to derive a profit;
- The profit would be distributed to the investors in the form of a dividend and the investors would also benefit from an increase in the value of the assets (and hence, where the investors bore the risk connected with the management of those assets); and
- They were subject to State supervision.

The ruling would seem to imply that the VAT exemption for fund management services will widen. However, the CJEU judged that for the purposes of the VAT exemption, the scope of 'management' does not cover the actual management of real estate investments (property management).

Below, we look at how the case has had an impact on several EU countries.

## Denmark

The latest rulings from the CJEU: *ATP Pension Services* (C-464/12) and *Fiscale Eenheid X* (C-595/13), have had an impact on the Danish definition of a special investment fund. The Danish Tax Authorities (DTA) have published draft guidelines on the definition going forward, though none of these drafts have yet been finalized.

In the meantime, the old definition of a special investment fund, which is used for income tax purposes, remains relevant. This means that a fund has to have at least eight investors in order to meet the criteria of 'capital pooled by several investors'. However, the DTA have become slightly more lenient on this criteria in one of their latest drafts, accepting a fund as a collective investment fund if the fund is efficiently marketed to the public or if the fund tries to raise the number of investors to eight or more. Deloitte Denmark expect that the criteria will be relaxed even more in the next draft versions of the guidelines due to *Fiscale Eenheid X*.

Currently, Danish pension funds are reclaiming VAT previously paid back from the DTA on all purchases which are likely to be considered as the management of investment funds, while the DTA are very reluctant to provide a further definition. The DTA claim that the concept of 'management' is unchanged, and that CJEU cases like *ATP Pension Services* have simply pinpointed which services are deemed 'management' when the services are supplied to investment funds.

## **Finland**

The Finnish tax authorities are currently drafting guidelines concerning the VAT treatment of investment funds. The term 'special investment fund' has not been specifically defined in Finland for VAT purposes. The guidelines were released for comments when the CJEU delivered the *Fiscale Eenheid X* judgment but they have not yet been published. The judgment could therefore be taken into account in the authorities' new guidelines concerning the VAT treatment of investment funds. However, significant changes to the Finnish guidance as a result of the CJEU decision are not expected.

With respect to the current Finnish situation, the exemption for 'management of special investment funds' is not limited to investment funds investing in securities, but also includes investment funds investing in real property. In general, investment funds are deemed to be special investment funds in accordance with the VAT Directive if they qualify as collective investment funds within the meaning of the Undertakings for Collective Investment in Transferable Securities Directive ("UCITS Directive") or if they have similar characteristics. Furthermore, the conditions set out in the *ATP* judgment (e.g. containing the pooled capital of several investors who bear the investment risk and investing the funds by using a risk-spreading principle) have been referred to in several judgments of the Finnish Supreme Administrative Court (SAC) and rulings of the Finnish Central Board of Taxes (CBT). Investment funds fulfilling the conditions set out in the *ATP* judgment are, in principle, deemed to be special investment funds in accordance with the VAT Directive.

According to case law of the SAC and the CBT, State supervision of an investment fund is not currently a precondition for the VAT exemption for special investment funds to apply. It is, however, rather likely that whether an investment fund is subject to specific State supervision will have more importance in the decision-making of the SAC and the CBT in the future.

In Finland, property management services are not deemed to be in the scope of VAT exempt management services of a special investment fund. Thus, the CJEU's *Fiscale Eenheid X* judgment should not change the current legal state in this respect.

## **France**

The French tax authorities have not yet commented on the CJEU decision in *Fiscale Eenheid X*.

The French VAT provisions referring to the fund management VAT exemption provide for a list of the funds eligible for the VAT exemption. Under the current VAT provisions, real estate funds are not listed as 'VAT exempt funds'. Therefore, the management of real estate funds is subject to VAT.

The scope of the VAT exemption is still to be defined. However, the management company may elect for the payment of VAT (the option to tax being available in France

for financial services), which would allow the management company to carry out an activity entitling it to VAT recovery.

## Germany

The German Tax Authorities (GTA) have not issued any response to this judgment.

From a German perspective the exemption for 'management of special investment funds as defined by Member States' is not limited to the management of funds investing in securities, i.e. the fund can invest in property. However, the GTA do not accept an exemption for the management of closed-ended funds (although there is 'specific State supervision' with regard to closed-ended funds). For closed-ended funds, it is argued that the 'redemption requirement' is not met (the investor is not able to redeem the share at least once a year). Nevertheless, closed-ended funds have recently been put under 'specific State supervision'. Against this background one could try to argue that the German administrative practice is not totally consistent with the CJEU case law.

## Italy

The Italian Tax Authorities (ITA) have not released any comment about the possible implications of the CJEU judgment in *Fiscale Eenheid X*.

The ITA have already indicated that the exemption for the 'management of special investment funds as defined by Member States' also applies to the management of immovable property investment funds. They do not explicitly refer to the *ATP* tests and to the State supervision condition, even if, in any case analyzed by the ITA, such conditions seem to be met. However, the provision in Italian law does not refer to the State supervision of investment funds and consequently there could be changes to the law in the future.

Currently, some management companies consider the property management of real estate investments, supplied together with other services, as an exempt supply. Some changes could be expected in the future in order to clarify that the exemption does not apply where the management cannot be recognized as ancillary to an exempt supply.

## Luxembourg

The Luxembourg Tax Authorities (LTA) have always accepted that the management of investment funds focusing on real estate investments could be seen as special investment funds for the exemption from VAT under the Luxembourg VAT law. The CJEU judgment in *Fiscale Eenheid X* has now specifically endorsed this position.

Regarding the limitation of the scope of the term 'management' to exclude property management for assets of a real estate special investment fund, Deloitte Luxembourg would not expect this to have a significant impact in Luxembourg for two reasons:

1. Whilst the position under the Luxembourg law was not explicit on this point, in Deloitte's Luxembourg's experience, general practice has been to assume that such property management services could not qualify as exempt management; and
2. In any event, it is very rare for this question to arise given that such services would be seen as being 'closely connected with immovable property', thus supplied where the property is located, and in almost all cases where there is a

Luxembourg-established real estate special investment fund, the investment properties are outside Luxembourg. Accordingly, the treatment of property management services under the Luxembourg VAT law generally does not arise.

The LTA have not, however, released any official statement in respect of the ruling in this case and Deloitte Luxembourg are not aware of them having any intention to do so.

## **Netherlands**

*Fiscale Eenheid X* is a Dutch case and the judgment of the CJEU is in line with the current Dutch VAT practice. However, besides property management, often fund and asset management services are also supplied with respect to real estate funds. For these services, rulings are normally obtained and a variety of VAT treatments (taxable and exempt) exist based on these rulings. The CJEU seems to imply that asset management may be covered by the VAT exemption. Given that the Dutch Supreme Court has to rule on the referred case from the CJEU, the actual Dutch impact is not yet clear. However, given the fact that multiple rulings exist, the case will undoubtedly have an effect on the Dutch market.

The criterion set by the CJEU that funds need to be under State supervision is new and will impact the Dutch fund market. Currently the VAT exemption can apply as long as the pooled investments meet the criteria set by other CJEU rulings (*Abbey National*, *JP Morgan Claverhouse* and *ATP Pension Services*) that investments must be pooled by multiple parties and risks are spread. It remains to be seen how the Dutch Supreme Court and the Dutch Tax Authorities (DTA) will interpret the criterion of State supervision, but discussions are currently taking place with the DTA with a view to obtaining more clarity on this point.

## **Portugal**

There has not been any guidance issued by the Portuguese Tax Authorities (PTA) as a consequence of the CJEU's judgment in *Fiscale Eenheid X* and it is unlikely that the PTA will issue any guidance in this regard.

In Portugal, the concept of 'special investment fund' has always been broadly interpreted. The concept of 'special investment funds', according to the PTA, applies to all types of funds, namely, pension funds, funds investing in securities and funds investing in real estate. This means that the management of all these funds is considered as exempt, independent of the specific characteristics of each fund.

Considering the above, it is not expected that the decision will have a significant impact in Portugal, at least in the short term.

Where the CJEU's decision may have an impact in Portugal is when property management services are considered by some fund managers as being part of the management of the funds and, as such, included in the scope of the VAT exemption. In contrast, if the property management services are being supplied by a third party other than the fund manager, such services are treated as taxable. As such, it will be important to understand what kind of services are being performed by the fund managers and if such services fall within the VAT exemption. The contracts could specifically provide for the separate services of management of the funds and management of the assets.

## **Sweden**

The outcome in the *Fiscale Eenheid X* case was unexpected in Sweden; the Swedish Government had submitted an opinion to the court stating that the relevant entities should not be deemed as special investment funds. The Swedish Government's main argument was that investment in real property is not an investment in transferable securities, as required for undertakings governed by the UCITS Directive. Furthermore, the Swedish Government was of the opinion that the relevant entities were not comparable to undertakings governed by the UCITS Directive as the investment in real property did not bring about the required spreading of risk.

Although the court's judgment is contrary to the Swedish Government's stated opinion, the case has not yet attracted any attention from the Swedish tax authorities or from the market. The likely reason for this is that collective investment in real estate is fairly uncommon in Sweden and the majority of Swedish real estate funds do not invest directly in real property. Rather, real estate property is held via a SPV. The definition of a special investment fund is thus uncertain, as no guidance has been released in relation to *Fiscale Eenheid X*.

## UK

The CJEU judgment in *Fiscale Eenheid X* will have an impact in the UK as currently the VAT exemption for the management of special investment funds does not extend to real estate investment funds. The UK tax authorities (HMRC) have indicated there may be some guidance issued in the next few months, however the greater likelihood is that HMRC will go straight to producing draft legislation and explanatory notes.

HMRC are still in a consultation process about the relevant definitions that arose from the case, in particular how the definition of specific State supervision should be applied in this case.

The widening of the exemption is likely to have an impact on the UK investment industry. The UK impact is likely to fall heavily on special investment funds and other equivalent collectives in the UK, particularly with respect to real estate and other assets that generally appreciate in value.

VAT which was previously irrecoverable in this respect may now be recoverable as a result of this ruling. Claims should be considered by funds against suppliers for the irrecoverable VAT and similarly those who may face a claim should consider making a protective claim in anticipation of this.

Funds which do represent 'management' (investment management services concerning the selection and disposal of real estate assets, together with fund-specific administration and accounting services) may not be exempt from VAT and a possible implication is less VAT leakage in the case of funds investing in exempt real estate.

## Asia Pacific

### China – VAT reform for the FSI Sector

On 24 March 2016, the Chinese Ministry of Finance (MOF) and the State Administration of Taxation (SAT) jointly issued Caishui [2016] No. 36 (Circular 36) which provides the detailed implementation guidance on the further rollout of the VAT reform to sectors including financial services. Circular 36 takes effect from 1 May 2016.

Pursuant to Circular 36, the applicable VAT rate for the FS sector is 6% (3% for small-scale taxpayers). Financial services have been defined to include finance and insurance businesses, i.e. loan services (lending and borrowing), fee-based banking and financial services, insurance and the transfer of financial products.

In order to avoid an increase in the tax burden to the FS sector as a result of the VAT reform and to ensure a smooth transition to the VAT regime, Circular 36 inherited most exemptions under the original Business Tax (BT) regime. Therefore, most BT-exempt items will continue to be exempt from VAT (such as interest from inter-bank cash transactions, certain loans to farmers generated before 31 December 2016, government bonds, life insurance products with a term of more than one year, etc.).

Circular 36 states that the following items are outside the scope of VAT:

- Interest from deposits; and
- Insurance compensation received by the insured.

There are still certain areas however which have not been clarified and are pending further clarification by the government authorities. For example, it is still not entirely clear on how to differentiate between the transfer of financial products and the transfer of equity interests, the latter of which is generally not subject to VAT. Circular 36 also did not explain how the purchase price of the different types of financial products should be calculated, how to determine the VAT exclusive sales for a transfer of financial products, how inter-bank deposits should be categorized, etc.

## **Malaysia – Accounting for the reverse charge**

A reverse charge mechanism applies where the Malaysian service recipient is required to account for and report GST on the services imported by it into Malaysia. This only applies to supplies that would have been taxable supplies if made in Malaysia. Service recipients are eligible to claim input tax credit of the GST paid under the reverse charge mechanism where the services would normally be attributable to the making of taxable supplies.

Previously the time of supply for reporting reverse charges was based on the date when payment was made to the overseas vendor for the imported services. However with effect from 1 January 2016, the time of supply for reverse charges has been amended to occur on the earlier of the issue of the invoice from the overseas vendor or the payment to the overseas vendor. The time for claiming input tax credit has been amended to be consistent with this as well.

However most businesses are facing practical difficulties in accounting for the reverse charge on the issue of invoices from overseas vendors, as this may, and often does, occur at a different time from the date on which the invoice may be received and processed. As a result, many find it preferable to continue to follow the payment date as the basis for reporting the reverse charge. It remains to be seen if the Malaysian tax authorities (RMCD) are willing to offer any concessions in this respect.

## **Malaysia – Penalty for late payment of taxes**

A late payment penalty has been introduced in the GST Act with effect from 1 January 2016. This is a time based penalty starting from a base penalty of 5% of the tax due and

going as high as 25% of the tax due based on the number of days of delay in the payment of GST. Once the applicable penalty reaches the 25% threshold, the matter may then be referred for prosecution.

The RMCD have indicated in the public domain that the above penalties will be applied across the board and no concessions will be offered.

## **Malaysia – Update to the financial services guides**

The RMCD recently revised their guides on financial services, i.e. commercial banking, investment banking, Islamic banking and development financial institutions. Most of these revision points were already common knowledge at industry level. However this is the first time that the RMCD has published them officially.

Services supplied within Designated Areas (DA) are treated as ‘disregarded supplies’, i.e. no GST is required to be charged on these services. A new section on DA has been inserted in all the guides. This states that a non-DA based Malaysian bank that operates a branch in a DA is required to charge GST on their services to DA clients. This is on the basis that the branch is simply an extension of the main operation on the mainland. However services supplied by banks incorporated in DA, to customers in DA, continue to be disregarded supplies for GST purposes. This view has been shared by the RMCD in discussions with industry.

[Back to top](#)

## **EMEA**

### **Denmark – VAT recovery for UCITS investment funds with non-EU customers**

The Danish Tax Authorities (DTA) have published draft guidelines for partial VAT recovery if UCITS investment funds have ‘customers’ from countries outside the EU. ‘UCITS’ are ‘undertakings for the collective investment in transferable securities’ and are monitored on an EU wide level.

The DTA have previously indicated that the customer, for the purposes of calculating a pro rata according to article 169 of the VAT Directive, is any ‘counterpart’ in the transaction. According to the draft guidelines, the UCITS investment fund has to calculate a pro rata based on gross turnover, where the yearly gross result of the investment is considered the ‘turnover’. If a UCITS investment fund obtains interest from bonds issued by an American company, for example, this interest must be included in the numerator. Also, if the UCITS investment fund sell shares in a Danish company through a broker in, e.g. Norway, the money received is ‘turnover’ which should be included in the numerator.

The costs are, however, quite often held by the fund manager and not the fund itself. The manager is not entitled to deduction based on the fund’s turnover from outside the EU. This means that UCITS investment funds should have a new look at their pro rata calculations and cost structure.

## **Denmark – Sectorized pro rata VAT recovery for VAT groups**

The Danish High Court has ruled that a VAT group may consist of several sectors with separate VAT pro rata recovery rates.

As a starting point, the Danish VAT rules imply that a VAT group has one pro rata VAT recovery calculated on the basis of its turnover from third parties. This often implies that, for example, a VAT group including both a bank and a leasing company has quite a high pro rata recovery.

In a recent ruling from the High Court, it has now become clear that the DTA may decide that the VAT group consists in reality of several sectors, each with separate pro rata VAT recovery rates for costs attributable to that sector.

In this specific case, it was not discussed as to whether the costs were actually attributable to the sectors, so this may be the next item on the DTA's agenda. This could also imply that the ruling will have little effect in this specific case; however, it is very relevant for a number of financial institutions benefitting from a high pro rata VAT recovery due to leasing activity.

## **Denmark – Scope of payment processing exemption may be reduced**

The Danish High Court has ruled that certain services provided by a UK parent company to a Danish subsidiary cannot be exempt as 'payment transactions'. Until now, the assumption was that the VAT exemption for payment transactions was to be applied quite broadly in Denmark following the CJEU ruling in *Sparekassernes Datacentre* (C-2/95) (SDC). This assumption is no longer valid, since the High Court recently decided that data processing services relating to loan payments did not fall under the scope for the exemption, as the service was merely 'bookkeeping and administration' rather than a payment transaction.

According to Deloitte Denmark's understanding, the exact same services are considered exempt when the UK parent company provides them to subsidiary companies in other EU countries. It will be interesting to see whether the joint CJEU cases of *NEC* (C-130/15) and *Bookit* (C-607/14) will have an impact on this latest Danish case. The DTA may revisit the SDC settlements, but it is unlikely that this will happen until further guidance from the CJEU is available.

## **Finland – Cases on the VAT treatment of special investment funds**

### **Case X Oy**

The Finnish Central Board of Taxes (CBT) has ruled in a case regarding a joint-stock company, on the VAT treatment of investment fund X Oy.

The investment fund had five shareholders who had invested in the share capital and

non-tied equity of the investment fund. X Oy had three different share types of which only one entitled the shareholder to a dividend. X Oy was not regarded as a collective investment fund within the meaning of the UCITS Directive nor an alternative investment fund within the meaning of the Alternative Investment Fund Managers Directive. Further, X Oy did not have the same characteristics as a collective investment fund within the meaning of the UCITS Directive.

Therefore, the management services that X Oy purchased were not deemed to be exempt management services of a special investment fund. The ruling has been appealed to the Finnish Supreme Administrative Court.

### **Case X Ky**

In this case, the CBT considered the VAT treatment of a private equity fund, X Ky, which had the form of a limited partnership. The only active partner of X Ky was the management company of the fund, GP Oy. As GP Oy had no employees, it had outsourced the management of the fund to A Oy, which was registered as manager of alternative investment funds. Further, A Oy had outsourced a part of the management services to a German company, B GmbH, which sold part of the services to A Oy and part of the services directly to X Ky. The management services B GmbH provided included, amongst other things, the calculation of management fees, quarterly reports, the supervision of investment commitments of limited partners, the management of the payments related to profit distribution and analysis on the investments of the fund.

X Ky was regarded as an alternative investment fund within the meaning of the Alternative Investment Fund Managers Directive. X Ky had sufficiently similar characteristics to a collective investment fund within the meaning of the UCITS Directive. Therefore, X Ky was regarded as a special investment fund within the meaning of Article 135(1)(g) of the VAT Directive. Further, the CBT stated that the services that were purchased from A Oy and B GmbH formed a distinct service fulfilling the specific and essential functions of a special investment fund's exempt activities. Thus, the services B GmbH rendered were regarded as exempt management services of a special investment fund.

### **Company A**

The CBT considered the VAT treatment of the services provided by a private equity fund's management company A. The management company A supplied management services to another management company B. The private equity fund managed by management company B was regarded as a special investment fund in accordance with the VAT Directive. The CBT considered that the outsourced services formed a distinct service fulfilling the specific and essential functions of a special investment fund's exempt activities and, further, the outsourced services were considered exempt if they fulfilled the requirements for VAT exemption which applied to the own management company of the fund. Thus, the services supplied by the management company A were deemed to be exempt management services of a special investment fund.

## **Finland – Ruling on the VAT treatment of services of settlement and payment processing**

The CBT has recently considered the VAT treatment of settlement and payment processing transactions. In this case, a VAT group purchased settlement and payment processing services from a company established in France. The French supplier

undertook the approval of the payment transaction file, calculating the net position of a bank, sending the payment transaction file included in the funds' transfer request to the European Central Bank (ECB) and delivering the payment transaction file in relation to the transfer of funds to the banks. The transfers of funds took place on the ECB's system.

The CBT considered that the settlement of receivables did not constitute a payment transfer service. Furthermore, the supplier did not participate in the transfer of funds in order to manage the payment transaction but only delivered the payment transaction file concerning the transfer of funds. According to the CBT, the service could not be regarded a bank transfer. Therefore, the supplier did not perform exempt financial services within the meaning of the VAT Directive. The services were not considered to fulfil the specific and essential functions of a financial service but were regarded as technical services. Accordingly, the VAT group was required to account for VAT on the services under the reverse charge mechanism.

The ruling has been appealed to the Finnish Supreme Administrative Court.

## **Finland – Ruling on the VAT treatment of services in relation to business restructuring**

The CBT has provided a ruling on the VAT treatment of services in relation to business restructuring. The company in question had both engagements relating to the sale of shares or assets and to the purchase of shares or assets. If the engagements related to the sale of shares or assets, the company acted as a financial advisor and its services included, amongst other things, searching and contacting potential buyers, evaluation of offers, planning and coordinating of the due diligence process, assisting in the negotiations and preparing presentations and materials. In the engagements relating to the purchase of shares or assets, the company acted as a financial advisor with respect to planning and executing of the restructuring. The company represented the purchaser in the engagement and was also responsible for the effective execution of the possible restructuring together with the client.

The company received a success fee if the restructuring succeeded. Further, a monthly fee or a retainer fee was usually charged regardless of whether the restructuring succeeded or not. According to the CBT, the services in relation to business restructuring fulfilled the specific and essential functions of negotiation in securities. Both the services relating to the sale of shares and to the purchase of shares were regarded as exempt transactions in shares in accordance with the VAT Directive, if the restructuring was executed in the form of a share deal. If the retainer fee had been charged inclusive of VAT, the company was required to correct the VAT treatment if the restructuring was executed as a share deal, as the business transaction in question was deemed to be exempt negotiation in shares. Further, if the purpose of the agreement was solely a share deal that was not executed, the company's retainer fee was still considered negotiation in shares and, therefore, still a supply of an exempt financial service within the meaning of the Finnish VAT Act.

The ruling has been appealed to the Finnish Supreme Administrative Court.

## **Germany – New guidelines on the sale and purchase of non-performing loans**

Since the CJEU judgment in *GFKL Financial Services* (C-93/10), the German Supreme Court of Finance has accepted that a business which, at its own risk, purchases defaulted debts at a price below their face value does not supply a taxable debt collection service to the seller of the defaulted debt.

On 2 December 2015 the German Ministry of Finance published new guidelines in order to implement this new case law.

Prior to the new guidelines, the following VAT treatment had applied:

- 1) If the purchaser of the debt relieves the seller of the debt-recovery activities, the purchaser of the debt supplies a taxable service of debt collection to the seller of the debt. It is not relevant whether the debt is non-performing or non-defaulted.
- 2) In this scenario, the assignment of the debt from the seller to the purchaser is, from a German VAT perspective, disregarded. The assignment of the debt is only a means to enable the purchaser to provide the taxable debt collection services to the seller.
- 3) As the purchaser of the debt supplies taxable debt collection to the seller of the debt, the purchaser of the debt is entitled to recover German input VAT which is directly attributable to its debt recovery activities and to the purchase of the debt.
- 4) As far as the seller of the debt is concerned there is an entitlement to input VAT recovery if the debt sold is the result of an initial supply which was not exempt.

Further to the above, the new guidelines seek to distinguish between non-defaulted receivables and non-performing loans (NPLs):

- 5) For the purchase of NPLs, even if the purchaser collects the debt, the purchaser is not providing taxable debt collection services to the seller of the debt (in contrast to 1 above).
- 6) As a result, the purchaser of the NPL is not entitled to recover German input VAT which is attributable to the purchase of the NPL and to corresponding debt recovery activities (in contrast to 3 above).
- 7) The assignment of the NPL from the seller to the purchaser is to be regarded as a supply within the scope of VAT (in contrast to 2 above). However, this supply is exempt from German VAT.
- 8) Where a portfolio of debts purchased consists both of NPLs and non-defaulted debts, the portfolio has to be split for the purposes of determining the purchaser's German input VAT position (see 3 and 6 above). To the extent the portfolio contains non-defaulted debts and the seller does not collect the non-defaulted debts itself, the purchaser continues to supply taxable debt collection services to the seller (see 1 above).

## **Netherlands – VAT treatment of fees charged by stock exchanges and brokers to (high frequency) traders**

Currently, fees labelled as 'trading fees', 'broker fees', 'market access fees', 'gateway access' and 'membership fees' are considered to be exempt, whereas fees labelled as 'connectivity fees', 'rackspace fees', 'co-location fees', 'market data fees', 'shareprice information fees' and 'licence fees' are currently considered to be taxable.

However, there is an argument that the fees which are currently considered taxable should be seen as one composite supply (together with the exempt elements) and that this composite supply falls under the scope of the exemption for intermediary services related to shares. It could also be argued that rackspace fees (if a separate service) should be considered as a real estate related service which is taxable at the place where the real estate is located and therefore no Dutch reverse charge VAT should be due.

## **Netherlands – VAT treatment of fees charged by an asset manager for clients that invest via a Dutch vehicle (*Beleggersgiro*)**

In a case currently at the first (lower) Dutch court, the Dutch tax authorities have taken the position that the fees charged by an asset manager for clients to invest in a *Beleggersgiro* should be considered as taxable asset management (supplied to individuals) and not as exempt management of special investment funds.

Investors can choose to invest in certain 'profiles' either with a specific amount or with monthly deposits. The investor opens a bank account and all the amounts deposited by the combined investors are held in a central account in the name of the *Beleggersgiro*. The investor cannot deviate from the chosen profile. If based on the management of the profile the decision is made that purchases/sales will be made, this is done by the *Beleggersgiro* for all investors in the profile combined. All securities are held in the name of the *Beleggersgiro*, but for the account of the participating investors.

The argument for exemption is that although the asset manager has a separate contract with the individual investor for asset management services, the services should be considered to fall under the scope of the VAT exemption of special investment funds because of the way the investments are pooled and executed (by means of the *Beleggersgiro*). This is based on the conditions from CJEU case law (mainly *ATP* and *Fiscale Eenheid X*) – the services display identical characteristics to those of UCITS and therefore carry out the same transactions or, at least, display features that are sufficiently comparable for them to be in competition with such undertakings.

As a secondary point of view, it was argued that the management services performed by the asset manager could also fall within the scope of the VAT exemption for intermediary services relating to shares.

## **Poland – Exemption from VAT for services provided by an independent group of persons**

On 26 August 2015, the Polish Supreme Administrative Court referred a question for a preliminary ruling to the CJEU regarding the exemption from VAT for services provided by an independent group of persons. The case concerns a group providing insurance services in Europe.

The question concerned whether the Polish VAT exemption which applies to the activities carried out by an independent group of persons without providing any procedures linked with distortion of competition is in accordance with Article 132(1)(f) of the VAT Directive. Furthermore, the Polish Supreme Administrative Court asked which criteria should be applied to establish whether distortion of competition has occurred.

## **Poland – CJEU confirms insurance outsourcing not exempt**

On 17 March 2016, the CJEU released its decision in the case of *Aspiro* (C-40/15) (formerly: BRE Ubezpieczenia sp. z o.o.). The CJEU has followed the opinion of the Advocate General and concluded that the claims handling service provided by Aspiro does not fall within the insurance (and related services) exemption detailed in Art 135(1)(a) of the VAT Directive. The decision was widely anticipated given the CJEU's previous decisions in respect of insurance related services (in particular *Arthur Andersen*, C-472/03).

The CJEU approached its decision in a methodical fashion and, repeating the wording of the Directive, confirmed that in order to access the exemption the services provided by Aspiro needed to fall within the definition of either 'insurance transactions' or 'related services performed by brokers and agents'.

The CJEU confirmed that the services provided by Aspiro were not 'insurance transactions', as the taxpayer had no contractual relationship with the insured party and it did not itself cover any risk.

With regard to 'related services performed by brokers and agents', the decision appears to reconfirm the key point in *Arthur Andersen*; that this aspect of the exemption is available only to service providers that perform the activities of insurance agents or brokers, which are described in the decision as 'the finding of prospective clients and their introduction to the insurer'.

## **Sweden – Guidance on the VAT treatment of factoring services**

On 1 February 2016, the Swedish Tax Authority (STA) published guidance on the VAT treatment of different types of factoring services and invoice financing services.

Following domestic case law and guidance from the CJEU in *AXA UK* (C-175/09), *MKG-Kraftfahrzeuge-Factoring* (C-305/01) and *GFKL Financial Services* (C-93/10) there has been some uncertainty in Sweden on the correct VAT treatment of different kinds of factoring services and invoice financing services. As a result the STA has now published guidance on its interpretation of the correct treatment.

According to the guidance, the collection of another business' debts is a taxable service. If the debt collector purchased the debts from the client, the taxable base for the debt collecting service is the difference between the consideration paid and the debts' nominal value. It should be noted that the STA is of the opinion that VAT applies irrespective of whether the debt collection agency purchases the debt from the client on a recourse or non-recourse basis. Furthermore, the STA stated that invoice financing,

i.e. a line of credit against collateral in the client's invoices, should also be deemed as a taxable factoring service if the finance company is also responsible for collecting the debt. Invoice financing agreements where the client is still responsible for the debt collection should therefore be treated as an exempt supply of credit.

Finally, the STA states that the above does not apply in relation to bad debts purchased at market value. As a result, the difference between the market value and the debt's nominal value should not be treated as consideration for a taxable debt collection service. The transactions should instead be outside the scope of VAT. Unfortunately, the STA does not explain how to determine what constitutes a bad debt, i.e. how old it should be and how big a difference between the market price and the nominal value there needs to be. Further discussions on this subject are therefore expected going forward.

## **UK – Draft legislation on ‘use and enjoyment’ of insurance repairs**

In the Summer Budget 2015 the UK Government announced that it would introduce a use and enjoyment provision to counter avoidance where insurance repair services relating to insurance for UK customers are supplied to an offshore insurer, and are treated as outside the scope of VAT, whereas identical work for a UK insurer would be standard-rated (and would result in irrecoverable input VAT).

The draft legislation has been published, alongside the draft explanatory memorandum, for the implementation of the provision. There has been a consultation process with the aim of ensuring the legislation works as intended. The technical consultation closed on 29 February 2016 and further information is awaited.

## **UK – Supreme Court to hear hire purchase pro rata case**

The UK tax authorities (HMRC) have been granted permission to appeal the Upper Tribunal's decision in the *VW Financial Services (UK) Limited (VWFS)* case. This case considers the decision of a fair and reasonable pro rata method in relation to hire purchase transactions. As the transactions were sold on at cost, HMRC argued that input tax on overheads did not relate to the taxable supply and so no VAT could be reclaimed. VWFS argued that the hire purchase agreements could be counted separately as both taxable and exempt supplies in relation to the car and the supply of finance respectively. HMRC are appealing the rejection of their argument that no recovery of VAT could be made in relation to the hire purchase agreements.

[Back to top](#)

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