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Global | Indirect Tax | January 2015 | Issue 5

FSI Indirect Tax News

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Global Indirect Tax Newsletter.

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Kind regards,

Gary Campbell

Global Indirect Tax FSI Leader

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Area in focus—Impact of Skandia America Corporation USA case (C-7/13)

The case of Skandia America Corporation USA (C-7/13) ("SAC") was a Swedish reference to the Court of Justice of the European Union ("CJEU") concerning VAT on supplies of services from an overseas head office ("HO") to a branch in a VAT group in a Member State.

Background

SAC is a US entity and, in 2007 and 2008, was the global purchasing company for IT services for the Skandia group. SAC carried out its activities in Sweden through its Swedish branch, which took the role of processing the externally-sourced IT services that had been supplied to it by SAC's HO and then supplying these to various entities in the wider Skandia corporate group. Supplies from the SAC HO to the Swedish branch, and from the branch to other entities within the Skandia group, were made at a mark-up of 5%, with costs allocated between the SAC HO and the Swedish branch through the issue of internal invoices. The Swedish branch of SAC was also a member of a VAT group in Sweden.

The Swedish Tax Authorities ("STA") took the view that transactions from the SAC HO to the Swedish branch constituted taxable supplies and the STA sought to levy VAT on these supplies. This decision was challenged by Skandia, with the Swedish court referring the following questions to the CJEU which heard the case on 12 March 2014:

(1) Do supplies of externally purchased services from a head office in a third country to its branch in a Member State constitute taxable transactions if the branch belongs to a VAT group?; and

(2) If the answer is yes, does that render the head office in the third country a taxable person not established in the Member state so that the purchaser is taxed for the transactions?

Decision

The CJEU followed the AG Opinion confirming that, where a branch of an overseas entity is part of a VAT group, any supplies of services made by an overseas head office in a non-EU country to that branch are considered to be made to the VAT group as a whole and hence subject to VAT. It is then the responsibility of the VAT group to account for VAT on these supplies under the reverse charge. This decision was made on the basis that the Swedish branch is dependent on SAC HO and is therefore not a

taxable person for the purposes of Article 9 of Directive 2006/112. Further, the CJEU confirmed that the “single taxable person” concept of VAT grouping precludes individual members from identification as separate taxable persons.

Sweden

As the STA consider that Swedish VAT law is in line with the *Skandia* decision it is not expected that they will issue any updated guidance following the decision. However, there has been some debate in Sweden about what type of transactions should be deemed to be taxable following the decision and specifically whether it only applies to supplies of externally purchased services received from a head office in a third country.

Another case on the VAT treatment of internally produced services provided to a local branch that is a member of a Swedish VAT group is due to be heard by the Swedish Supreme Administrative Court in March 2015 and it is anticipated that the STA will release a statement following the decision. Deloitte Sweden is monitoring this case and any developments closely.

Wider Implications

The Skandia decision has potential application to all EU businesses with branches. Many financial service companies in the EU, such as banks and insurers, may be faced with substantially higher VAT bills as a result of the decision.

While its impact in Member States which do not have VAT grouping is more limited, it does highlight the importance of the territoriality principle in VAT. In a number of EU jurisdictions, when a branch or fixed establishment is part of a VAT group, this VAT group membership is considered to extend to the legal entity as a whole. The Skandia decision calls into question whether this is correct.

Consequently, there are also a number of issues that businesses need to consider including:

- Whether there will be changes in the VAT group legislation in Member States
- If so the impact of varying timelines across different countries
- Impact on current business plans and processes
- Fundamental change to information required for VAT calculations and reporting

The table below indicates the EU Member States currently operating VAT grouping provisions.

Country	Is there a VAT grouping regime?	Country	Is there a VAT grouping regime?
Austria	Yes	Ireland	Yes
Belgium	Yes	Italy	Yes
Bulgaria	No	Lithuania	No
Croatia	No	Luxembourg	No
Cyprus	Yes	The Netherlands	Yes
Czech Republic	Yes	Malta	No
Denmark	Yes	Poland	No
Estonia	Yes	Portugal	No
Finland	Yes	Romania	Yes
France	No	Slovakia	Yes
Germany	Yes	Slovenia	No
Greece	No	Spain	Yes
Hungary	Yes	Sweden	Yes
Ireland	Yes	UK	Yes

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Asia Pacific

Singapore—Proposed changes to the draft e-tax guide on fund management

Paragraphs 3.6 – 3.10 of the proposed draft e-Tax guide on Fund Management introduced a new establishment test for offshore funds which are wholly administered by a Singapore fund manager. The Inland Revenue Authority of Singapore ("IRAS") took the view that in the absence of an establishment in any other location, the fund would be treated as having a either a business or fixed establishment in Singapore.

As a result, the fund manager would be required to charge GST on its service fees. However, following further consultation the IRAS advised that, fund managers can choose to continue applying zero-rating and they would consider waiving penalties for any under-declaration of GST on a case by case basis. The IRAS is now proposing a formal concession to allow qualifying overseas funds or overseas fund managers to recover a percentage of the GST charged to them on fund management services. The recovery rate is to follow the existing concession process for qualifying funds, i.e. the current rate of 90%. Please note that as the e-tax guide is still in draft it may yet be subject to further changes

Vietnam—New measures for businesses in financial difficulties and rules to simplify input tax deduction

The Vietnamese Government has issued a Decree to implement a number of tax measures to help businesses suffering financial difficulties with a view to supporting development of business activities in Vietnam. Those specific to VAT are as follows:

Supplies that can be treated as not subject to VAT

- In situations where a borrower is required to sell collateral in order to raise capital to make loan repayments the supply will no longer be treated as subject to VAT, providing the sale of the collateral has been authorized by the loan provider.

Proof of non-cash payment

In normal circumstances, an input VAT credit is only allowable on a purchase of VND 20 million or over (inclusive of VAT) that has a separate invoice, and provided proof of non-cash payment is presented (e.g. electronic payments). The following changes have been made:

- The regulation which prohibited an input VAT credit upon lack of non-cash payment vouchers at the contract payment date for instalment payment of invoices from VND20 million, or annually on 31 December where the payment date was due before 31 December, has been removed.
- The requirement for non-cash payment vouchers for a single purchase of goods/services from a vendor valued below VND20 million, but when the total purchase amount within a day from the vendor is VND20 million and above, has been removed.

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EMEA

Belgium—Corporate directors required to charge VAT on their fees from 2016

The Belgian Tax Authorities ("BTA") previously held the view that incorporated directors and liquidators could choose not to register for VAT. However, on 20 November and 12 December 2014, the BTA issued guidance stating that with effect from 1 January 2016 corporate directors will be required to charge VAT on their services, subject to the normal EU and Belgian VAT rules.

The above decision will impact businesses that do not have the right to full input tax deduction. We consider that this is likely to impact investment funds that do not qualify as special investment funds ("SIFs"), as the management of such funds will not qualify for the SIF VAT exemption. Businesses potentially impacted by the new rules should confirm their contractual position with corporate directors to determine if there could be an additional VAT cost.

Denmark—The ATP Pension Service case is still unresolved in the Danish courts

For many pension funds the Court of Justice of the European Union ("CJEU") decision in the ATP Pension Service case (Case C-464/12) is good news as it is expected that they will be entitled to a VAT refund from their suppliers. However, the ATP Pension Service case is still unresolved before the Danish courts and the Danish Tax Authorities ("DTA") are not expected to issue any guidance in respect of the CJEU's decision until Spring 2015.

Under Danish law, it is possible to submit a retrospective claim for any VAT charged erroneously for up to ten years. Therefore, following ATP Pension Service decision many pension funds and SIFs have been contacting their suppliers to request a repayment of any VAT charged erroneously during the last ten years.

SIFs or similar funds in Denmark which are still being charged VAT by their suppliers on management charges should consider whether there is scope for their suppliers to submit a protective claim for repayment of VAT.

Denmark—Cost sharing groups and Special Danish Payroll Tax

In Denmark, VAT exempt financial services are subject to the Special Danish Payroll Tax (“SDPT”) which is currently charged at a rate of 11.4% and will increase to 15.3% by 2021.

VAT exempt financial services provided by cost sharing groups (“CSG”) are also subject to SDPT. However, the rate of SDPT applied depends on the legal form of the business making the supply (rather than the nature of the supply) and is typically only 6.37% for a CSG.

To address this discrepancy, the SDPT legislation will be amended to ensure that going forward any services provided by CSGs operating in the financial sector will be subject to SDPT at the 11.4% rate (increasing to 15.3% as above).

Denmark—VAT ruling on investment management services

It is commonplace in Denmark for investment managers to be remunerated for their services by way of both commission income received from the fund and income from the discretionary investment management (“DIM”) fee charged to the customer. Some investment managers offer their customers the opportunity to reduce the DIM fee by the amount of commission income they are entitled to.

The Danish Tax Board (“DTB”) recently issued a binding ruling to an investment manager stating that it is required to account for VAT on actual amount of the DIM fee it charges to its customers, even if the DIM fee has been reduced pursuant to commissions received from the fund itself. This ruling is based on the specific facts of the case and is supported by the contractual position.

However, the above ruling contradicts a previous DTB ruling which stated that VAT should be accounted for on the gross amount of the DIM fee (i.e. before any discount was provided in respect of the investment manager’s commission income).

Consequently the latest ruling could potentially lead to both opportunities and risks from a VAT perspective and it is recommended that any businesses that may be impacted by the above should review their contractual position.

Finland—Ruling on the VAT treatment of bitcoins (Case 034/2014)

On 20 August 2014, the Finnish Central Board of Taxes ("FCBT") gave a ruling on the VAT treatment of commission fees charged by a business operating a bitcoin trading platform. The platform enables its users to buy and sell bitcoins and exchange them for standard currency. The company charges its customers a commission fee which is calculated as a percentage of the sale or purchase price of the bitcoin transaction.

The FCBT considered that bitcoins should be regarded as payment instruments and the services provided by the company are exempt from VAT under the Council Directive 2006/112, Article 135(1)(d): "transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection".

Finland—Ruling on the VAT treatment of IT services provided by a cost sharing group (Case 039/2014)

On 10 September 2014, the FCBT ruled that certain IT services supplied by X Oy, a limited liability company, to its shareholders are not subject to VAT.

X Oy is wholly owned by its customers, who are all concerned with the provision of VAT exempt insurance services. X Oy was set up so that its customers (i.e. its shareholders) could influence the development of IT services. The case concerned the VAT treatment applied to X Oy's provision of IT systems maintenance services which were essential to the provision of statutory employee pension insurance services. The relevant IT services were supplied at cost to the shareholders.

The IT services provided by X Oy to its shareholders were bespoke and could not have been purchased from other third party service providers. The case transcript notes that the customers would have purchased the services from X Oy regardless of whether VAT was due. Thus it was concluded that X Oy's supplies could not be deemed to distort competition.

The FCBT considered that X Oy qualified as a CSG for the purposes of the Finnish VAT Act and it was not liable to account for VAT on the above IT services supplied to its members. This ruling is particularly important because it is the first public decision concerning the Finnish legislation on CSGs which came into force on 1 January 2014. The Finnish Tax Authorities have not appealed the decision.

Germany—Ruling on the VAT treatment of distribution services (Case XI R 13/11)

On 14 May 2014 the German Federal Finance Court ("BFH") handed down its decision in case XIR 13/11 on the VAT treatment of distribution services provided in respect of financial and insurance products.

The appellant ("the Supplier") was concerned with the distribution of shares in funds to the German-speaking market. As the Supplier did not have the resource to carry out the services itself it engaged a number of third party distributors (the "Distribution Partners") to carry out the work.

The Distribution Partners were responsible for contacting and advising potential investors on the underlying investment products. The Supplier assisted the Distribution Partners in carrying out their duties by arranging training courses and providing advertising material. The Distribution Partners were responsible for preparing the purchase application forms and forwarding them to the Supplier. The Supplier would verify the content of the application forms before sending them to the investment management company who would effect the transaction.

In return for the above, the Supplier would receive acquisition, marketing and portfolio commissions. The Supplier would pay a portion of its commission income to the relevant Distribution Partners.

The BFH ruled that the Supplier's services could not be treated as VAT exempt financial intermediary services because its activities do not involve a distinct act of mediation. The BFH took the view that the Supplier's activities were limited to sales support and other management activities, which do not qualify as intermediary services. In contrast, the BFH considered that the activities carried out by the Distribution Partners could potentially be considered intermediary services.

The BFH based its judgment on the actual activities carried out by the Supplier and the Distribution Partners and it is unclear how much weight was given to the contractual position.

Italy—Guidance on the VAT treatment of management services provided in respect of insurance products

The Italian Tax Authorities (“ITA”) released guidance (Resolution n. 52/E) on 16 May 2014 on the VAT treatment of management services provided in respect of the following types of insurance contracts:

- Unit Linked;
- Index Linked;
- Life insurance; and
- Damages insurance.

The ITA view is that management services provided in respect of unit linked, index linked and life-insurance policies should be treated as VAT exempt. In contrast management services provided in respect of damages insurance products should be subject to VAT.

Italy—Guidance on the VAT treatment of management services related to investments

The ITA’s guidance (under Resolution n. 343/E dated 4 August 2008) outlined the ITA’s view that consultancy services provided in respect of investments could potentially fall within the Italian financial intermediary VAT exemption when there is a functional connection between the services provided and the execution of a transaction (for example, the sale or purchase of an underlying financial investment).

Following the CJEU’s decision in the GfBk case (C-275/11) there was some doubt about whether the VAT treatment outlined in the above Resolution still applied. In light of this, the ASSOSIM (Association of Brokerage Practitioners) asked the ITA to confirm the position. On 24 September 2014 the ITA confirmed that the Resolution n. 343/E 2008 is still valid in circumstances where the service has the “*effect of performing the specific and essential functions of management of a special investment fund*”.

Poland—CJEU decision suggests that Cypriot company did not have a Polish establishment

On 16 October 2014, the CJEU delivered its judgment in the Polish case of Welmory Sp. z o.o. (C-605/12) about the place of supply of the services Welmory Sp. z o.o supplied to Welmory Limited, a Cypriot company established in Nicosia. The Polish Tax Authorities decided that the services supplied to the Cypriot company were subject to Polish VAT on the basis that, through its relationship with Welmory Sp. z.o.o., the Cypriot company had a fixed establishment in Poland at which those services were received.

In this judgement the Court has reaffirmed its previous jurisprudence on the issue of when a fixed establishment exists and confirmed that this depends on whether there is *"... a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business ...*".

Although it left the final decision to the referring court, there is a strong directional suggestion in the decision that if, as Welmory Sp. z o.o asserted, *"... the human and technical resources for the business carried on by the Cypriot company, such as computer servers, software, servicing and the system for concluding contracts with consumers and receiving income from them, are situated outside Polish territory ... the referring court would then be led to conclude that the Cypriot company does not have a fixed establishment in Poland, since it does not have the necessary infrastructure to enable it to receive services supplied by the Polish company and to use them for its business.*"

Portugal—Banco Mais (C-183/13) CJEU decision

On 10 July 2014, the CJEU released its judgment in *Banco Mais* (C-183/13) that the Portuguese Tax Authorities (“PTA”) were entitled to apply a “use-based” partial exemption method to a bank’s leasing transactions.

Banco Mais (“BM”) provides asset finance, personal loans and insurance services. BM argued that it should be entitled to include the value of the assets sold, as well as the interest charged, in its partial exemption calculations. The PTA disagreed, determining that only the interest element should be included, as including the value of the assets would result in a breach of the principle of fiscal neutrality. Their view was that the inclusion of the asset values produced a level of input tax recovery that was distortive when reviewed in accordance with the actual use of input tax incurred by BM and that a use-based partial exemption method should be applied.

The CJEU commented that alternative partial exemption methods had to aim for "*a more precise determination of the deductible proportion*". In this case, it concluded that residual input tax for a bank "*is primarily a consequence of the financing and management of the contracts entered into by the lessor and its customers, not of the provision of the vehicles*". Therefore, it was more accurate to exclude the value of the assets, in this case cars, from the calculations than to include them.

Following the above decision, the Portuguese Supreme Court has handed down a decision on a similar case to *Banco Mais* and it has followed the CJEU's judgment.

Slovenia—Increase to the rate of financial services tax and insurance contract tax

Financial services that fall within the Slovenian VAT exemption are subject to a Slovenian financial services tax. The rate of the financial services tax in Slovenia was increased to 8.5% with effect from 1 January 2015 (from the previous rate of 6.5%).

The rate of insurance contract tax was also increased to 8.5% with effect from 1 January 2015 (from the previous rate of 6.5%).

Sweden—VAT ruling on payment processing services

The Swedish Supreme Administrative Court ("SSAC") recently ruled that the negotiation services received by a Swedish parent company in relation to its payment processing business from its foreign subsidiaries should be treated as VAT exempt financial intermediary services.

The parent company supplied payment processing services to third parties, which allowed them to accept payments from their customers via credit or debit cards. This service was undisputedly treated as a VAT exempt financial service concerning payments.

With a view to expanding its business, the parent company established a number of foreign subsidiaries which were responsible for attracting new foreign customers to the parent company's payment processing services. The subsidiaries facilitated the negotiation of agreements for payment services between the parent company and foreign customers.

The subsidiaries were responsible for making the initial contact with potential new customers and investigating whether they would benefit from the parent company's services. The subsidiaries' were also responsible for assisting any new customers with entering into the service agreement with the parent company. The subsidiaries were remunerated based on the number of new service agreements they facilitated. The

Swedish Tax Authority ("STA") took the view that the subsidiaries services were not connected to the parent company's underlying service (i.e. the payment processing service) and could not be deemed as intermediation services.

The SSAC ruled that the subsidiaries did all that is necessary for the parent company and its customers to enter into a contractual agreement, without having any interest of their own in the terms of the contract. Accordingly, the services supplied by the subsidiaries were deemed to be intermediary services. The SSAC went on to say that because the parent company's underlying services were VAT exempt it follows that the subsidiaries intermediary services should also be treated as VAT exempt.

The SSAC's ruling has provided some welcome clarification on the VAT treatment of financial intermediary services in Sweden because previous rulings in this area have been somewhat contradictory.

UK—VAT ruling on the VAT treatment of banking services

The First-tier Tribunal ("FTT") has released its decision in ING Intermediate Holdings Limited, with the FTT dismissing ING Direct (UK) NV's ("IDUK's") appeal.

IDUK carried on a retail banking trade in the UK from May 2003, until it was sold to Barclays with effect from 2 February 2013. IDUK took cash deposits from private individuals in the UK. It then used the money received to make investments, however the depositors were protected by the Dutch Deposit protection scheme. IDUK's business model comprised of two parts, namely (i) generation and retention of deposits; and (ii) investing all of the deposited money in long term investments (i.e. long term bonds and securities). IDUK incurred very little expenditure that was subject to VAT in the making of investments, however it did incur substantial amounts of VAT in attracting and retaining deposits.

IDUK's case was that the VAT incurred on services it purchased to support its deposit taking activity in the UK were business overheads and therefore recoverable under s. 26(2)(c), VATA 1994 as specified supplies. These activities included advertising to attract new depositors, construction of a head office and two call centres, IT services, employing staff at the call centre and supporting the internet banking platform.
The FTT decided that there was a VAT exempt supply of "banking services" by IDUK when it accepted deposits and paid interest on them. It rejected the bank's arguments that the telephone and internet facilities used by depositors to operate their accounts and the provision of cheque deposit facilities, account statements, etc., which were provided free by the bank, did not involve supplies made by the bank to its depositors for VAT purposes. The FTT concluded that they amounted to supplies for (non-monetary) consideration paid by the depositors.

It decided that "…*the value of the consideration (the deposits) was both what the bank was prepared to spend in interest and what it was prepared to spend in providing banking services, the value of the deposits less the value of the interest was equal to what the bank was prepared to spend on its banking services; so the value of the banking services is what the bank was prepared to spend on providing them*."

The FTT's conclusion was that the bank was making exempt supplies and the input tax in question was attributable to its exempt supplies of banking services in the UK and could not be attributed to IDUK's investment activities. Consequently, the FTT's decision meant that its claim for a refund of some of the VAT incurred on securing the deposits (just over £6 million) was unsuccessful.

Banks will need to consider the potential implications in terms of partial exemption and VAT recovery in particular in respect of investment activities as it may encourage HMRC to revisit these activities.

IDUK was granted permission to appeal the decision on 15 December 2014.

UK—Tax Authorities updated guidance on the VAT treatment of pension fund management

The UK Tax Authorities ("HMRC") issued two separate Briefs on 26 November 2014 addressing the liability of pension fund management provided to Defined Contribution pension schemes following the CJEU decision in *ATP Pension Services*, and a separate Brief regarding employer pension scheme arrangements following the CJEU decision in *Fiscale Eenheid PPG Holdings BV*.

In the ATP Pension Services Brief (Brief 44/14), there are some technical points which are of interest, but broadly, the Brief is consistent with expectations. UK legislation will be amended to implement the *ATP Pension Services* judgment, and in the meantime, taxpayers may rely directly on EU law to exempt pension fund management or administration services in accordance with the policy set out in the Brief. HMRC has said that businesses affected by the change in policy are able, but not obliged, to claim a refund of output tax over-accounted for on these supplies.

The PPG Brief (Brief 43/14), regarding employer/pension scheme arrangements includes some sections that are significantly different from those included in HMRC's earlier Brief from February (Brief 06/2014). The new policy means that employers may be able to claim input tax in relation to pension scheme costs where they were not previously able to do so. To claim VAT, the services in question must have been supplied to the employer and in particular, the employer must have been a party to the contract for the services and paid for them. In a departure from its previous position,

HMRC accepts that there are no grounds to differentiate between costs incurred in the administration of a pension scheme and in the management of its assets. This opens up the possibility of HMRC accepting VAT recovery by employers on investment management costs (although practical and regulatory considerations may make this difficult). HMRC views any recharges by an employer to the pension scheme as consideration for an onward taxable supply and so VAT should be charged accordingly. The PPG Brief announces a transitional period to 31 December 2015. HMRC has said that businesses affected by the change in policy are able, but not obliged, to claim a refund of input tax not previously claimed.

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