



VAT & FSI tax alert

Belgium

VAT cases in CJEU: Cost Sharing Groups red carded in banking and insurance sector

The financial services industry held its breath on 21 September 2017, when the Court of Justice of the European Union (CJEU) rendered its judgments in the VAT cases involving DNB Banka (C-326/15), Aviva (C-605/15), and EC vs. Germany (C-616/15). The Court ruled that the VAT exemption for cost sharing groups cannot apply in the banking and insurance sector. With this judgment, the Court goes against accepted practice in many Member States, including Belgium. Importantly, the Court clearly prohibits Member States from applying the judgment retrospectively.

Introduction

The VAT exemption for independent groups of persons (also called cost sharing groups – “CSGs”) is found in article 132(1)(f) of the VAT Directive, which is transposed into article 44, §2bis of the Belgian VAT Code. More flexible conditions for the Belgian exemption were introduced from 1 July 2016, allowing CSG’s to render services to non-members and to members that are not VAT exempt. The Belgian VAT legislation does not limit the exemption for CSG’s to certain sectors.

In the cases regarding DNB Banka (financial sector) and Aviva (insurance sector), both taxpayers claimed the exemption for CSG’s on certain inbound services. In the Commission vs. Germany case, the European Commission challenged the German legislation that limits the exemption to the supply of

services by CSG's whose members undertake activities or professions in the health sector (doctors, paramedical professionals or activities in the hospital and medical care sector).

Key questions for the CJEU

The most interesting questions before the CJEU were the following:

- Whether the cost sharing exemption only operates as an extension to the public interest exemptions in the VAT Directive, and could not be extended to financial services businesses
- Whether the exemption can apply to CSGs that span different jurisdictions including outside the EU, or should be limited to a purely national scope
- Whether the exemption can be applied if national tax legislation obliges the CSG to apply a mark-up on the services supplied by the Independent Group (transfer pricing adjustments).

The Court's decision

In the DNB Banka and Aviva cases, the Court finds that the exemption can only apply to services from CSG's whose members undertake an activity in the public interest, as referred to in Article 132 of the VAT Directive. Services supplied by a CSG whose members undertake an economic activity in the area of financial services (DNB Banka) or insurance (Aviva) are not entitled to that exemption.

Unfortunately, the CJEU stops short of answering the other questions, particularly with regard to cross-border Independent Groups and transfer-pricing adjustments, etc., which had the potential of providing guidance for organisations confronted with such issues in recent years.

In the Commission vs Germany case, the Court decided that the exemption's scope cannot be restricted to healthcare professions; the exemption must also extend to other exempt transactions in the public interest (e.g. welfare and social security, education, sport and culture).

The court seems to have exercised a restrictive consideration for past transactions. The DNB Banka and Aviva decisions contain Member State guidance which largely prohibits a retrospective application, based on the principles of legal certainty and non-retroactivity.

Going forward

The CJEU's findings in these cases were expected to clarify the way in which the EU law exemption for supplies by CSGs could be applied in the financial services industry, amongst others. Unfortunately, the decision goes as far as eliminating the use of this arrangement in the industry altogether.

As in other Member States, Belgian VAT legislation currently allows a broader application. It is therefore not unlikely that the restriction to CSG's whose members undertake an activity

in the public interest will at some point lead to a change in Belgian VAT legislation.

Deloitte webinar coverage

On 25 September 2017 at 1:00 pm CET, there will be an EMEA Tax Dbrief, in which Deloitte experts from around Europe will discuss these CJEU judgments and their implications.

More information and registration for this webcast can be accessed [here](#).

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