



VAT alert Belgium

Advocate-General renders opinion on presence of branches in a VAT unity



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The advocate-general of the Court of Justice of the European Union (CJEU) delivered his opinion in a case involving Skandia America Corporation USA and concerning the inclusion of a US company's Swedish branch in a Danish VAT group. He concluded that a branch of a foreign company cannot be part of a VAT group without taking the head office into account in some form.

Facts

Skandia America Corporation USA is a US insurance company, headquartered in the US with a Swedish branch. That branch was admitted as part of a VAT group in Sweden, together with other Skandia affiliates.

The US headquarter purchased IT services, which were recharged to the Swedish branch. The Swedish branch produced the final IT product and recharged it to different group companies, some of which were members of the VAT group.

The disputed point was whether the recharge of the costs from the US head office to the Swedish branch is subject to VAT. The Swedish tax authorities defended that this is the case, since the branch was part of a VAT group and therefore a separate taxable person for VAT purposes. By contrast, Skandia relied on the FCE Bank principles (CJEU, C-210/04 FCE Bank) stating that a head office and its branch are part of the same legal entity and thus no VAT can be due on the recharge.

Opinion of the advocate-general

The Advocate-General concluded that a branch cannot be considered as a VAT group member independent from its head office, as the branch is not a taxable person which can be treated separately from the head office. The branch's inclusion would therefore mean that the entire legal entity to which it belongs becomes part of the VAT group.

The exact consequences of this viewpoint are not fully clear according to the AG, as allowing a foreign (non-EU) entity to enter a VAT group in its entirety opens the door to the channelling of services towards VAT group members without any VAT charge. The AG sums up different practical approaches that could be taken towards such situation, ranging from a prohibition for branches to entering a VAT group to different forms of anti-abuse measures which lead to a taxation of services entering a VAT group through a foreign entity.

Impact

In Belgium today, tax authorities take the view that only a Belgian branch can enter into a Belgian VAT group, while foreign branches of Belgian companies and non-Belgian establishments of foreign companies are excluded. While this viewpoint would be challenged in case the CJEU confirms the opinion, the real practical consequences would depend on the precise judgment. In effect, Belgian VAT legislation already foresees taxation of services received by Belgian branches or establishments from those from the same legal entity abroad, in case of VAT grouping (article 19bis BE VAT Code).

On a more global level, Member States may be pushed to implement anti-channelling measures when the opinion is confirmed by the court. It may also speed up a change in legislation to adopt the VAT guidelines for multiple location entities, as set out by the OECD, which prefer taxation on cross border services within the same legal entity altogether.

The key question therefore is if, and if so in which direction, the CJEU will follow the AG's school of thought when it will issue its verdict which is expected in Autumn 2014.

Contacts

Any questions concerning the items in this publication? Please contact your usual tax consultant at our Deloitte office in Belgium or:

- Johan Van der Paal, jvanderpaal@deloitte.com, + 32 2 600 66 39
- Ivan Massin, imassin@deloitte.com, +32 2 600 66 52
- Laurence Boulanger, laboulanger@deloitte.com, + 32 2 600 69 77
- Bert Derez, bderez@deloitte.com +32 9 393 75 30

For general inquiries contact:

bedeloittetax@deloitte.com, + 32 2 600 60 00

Be sure to visit us at our website: <http://www.deloitte.com/be/tax>



Deloitte Belgium

Berkenlaan 8A, 8B, 8C
1831 Diegem
Belgium

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