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VAT Alert

19 September 2014

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New ECJ decision: Internal charges between a branch and the head-office are subject to VAT if a VAT group is in place

The European Court of Justice (ECJ) decided on 17 September 2014 in the case Skandia America Corp. (C-7/13) regarding the supplies of services from a main establishment in a third country to its branch in a EU Member State, where the branch is part of a VAT group – page 2

New ECJ decision: Internal charges between a branch and the head-office are subject to VAT if a VAT group is in place

The European Court of Justice (ECJ) decided on 17 September 2014 in the case Skandia America Corp. (C-7/13) regarding the supplies of services from a main establishment in a third country to its branch in a EU Member State, where the branch is part of a VAT group.

Background

Skandia America Corp. was the global purchasing company for IT services in the Skandia group. Its activities were carried out in Sweden through its local branch, which was part of a VAT group treated as a single taxable person in Sweden.

The Swedish tax authorities considered the internal charges between the main establishment and the Swedish branch as taxable in Sweden.

Decision

ECJ decided that the charges from the main establishment are subject to VAT in Sweden. The reason is that the VAT group (including the branch) is a taxable person independent of the US entity.

Implications

The decision has implications for all Romanian branches of companies which are members of VAT groups in their EU countries of establishment. The internal charges will be subject to VAT and this will have impact on the invoicing and VAT reporting obligations.

Additional VAT costs will arise for the businesses not having full VAT deduction right.

The entities part of this business set-up should determine the potential financial impact of this decision.

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Tax & Legal Weekly Alert

1 – 5 September 2014

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Legal Updates

Amendments to Unfair Competition Law and Competition Law

On September 5, 2014 the last amendments brought through Government Ordinance no. 12/2014 to regulations in the competition field entered into force.

Among the most important amendments we mention:

- Although there are identified as practices of unfair competition only the acts of denigration of a competitor or its products/services as well as undermining the client base, the “unfair competition" practices are defined extensively;
- It was given the opportunity to Competition Council not to act when it considers that the effects of unfair practices are minor and to prioritize investigations of anticompetitive practices based on certain criteria;
- It is introduced the rule of appealing against the order related to access the confidential part of investigation file only at the end of the investigation – page 2

Amendments to Unfair Competition Law and Competition Law

On July 31, 2014, the Romanian Government enacted the Government Ordinance no. 12/2014 amending and supplementing the Law no. 11/1991 on unfair competition and other regulations in the competition field. By entering into force of these amendments, it is envisaged the modernization of a regulation which was applied with difficulties in practice in the last years due to the evolution of the economic and social environment.

I. Amendments brought to the Law no. 11/1991 on unfair competition (Unfair Competition Law)

We present below the main amendments brought to the Unfair Competition Law:

a) The sphere of "business practices" considered "unfair competition"

- **There are removed from the scope of the Unfair Competition Law those practices that are covered by specific legislation** such as protection against misleading and comparative advertising for traders, protection of consumers' economic interests, protection of collective interests of the public in the field of audiovisual media services or protection of industrial property rights related to trademarks and geographical indications;

- **There are maintained as practices of unfair competition only the acts of denigration of a competitor or its products/services as well as undermining the client base**, if several specific conditions are met;

- **"Unfair competition"** practices are defined extensively by including any commercial practices that are contrary to the principles of fair dealing and good faith, which cause or may cause damage to any market participants.

b) Provisions with impact on the procedural aspects of Unfair Competition Law

- **It was given the opportunity to Competition Council, the competent authority to ensure the protection of undertakings against unfair competition practices, not to act when it considers that the effects of unfair practices are minor** (relative to the seriousness of the deed, the circumstances in which it was committed and the importance of the economic sector concerned);

- **The competition inspectors who solve unfair competition complaints may use the same investigation powers as those used when investigating anticompetitive practices** such as the possibility to conduct down raids or apply a fine in case the undertaking under investigation does not supply the information required by the competition authority;

- **It has been established an Interministerial Council** for fighting unfair competition practices without the law clearly defining its responsibilities and powers. The Council includes the Ministry of Finance, the National Council for Audio-visual, the National Authority for Consumer Protection, the State Office for Inventions and Trademarks and the regulatory authority for copyright protection. The Secretary of the Council will be the Competition Council.

II. Amendments brought to the Competition Law no. 21/1996 (Competition Law)

Amendments brought to the Competition Law mainly cover investigations carried out by the Competition Council, as follows:

a) The Competition Council's possibility to prioritize cases based on certain criteria

The Competition Council can prioritize cases based on the potential impact on effective competition, the general interest of consumers or the strategic importance of the economic sector concerned, in order to use reasonable the resources during investigations.

b) Appeal against the order related to access the investigation file may only be submitted at the end of the investigation

To avoid a long period of postponement of the hearing and issuance of the final decision, it was provided that the Order of the president of the Competition Council on the availability of some confidential documents obtained during investigation (allowing or denying access to the file) may be appealed only by appealing against the decision to terminate the investigation. Under the previous legislation, the order could have been appealed separately within 15 days of the decision being communicated and the investigation was suspended until the finalization of the respective challenge.

c) The obligation of the Competition Council to inform the undertakings regarding the closure of investigations

In the event that, after opening an investigation ex officio, finds out that it has not led to the discovery of evidence of the violation of law by the undertaking investigated, the President of the Council will be required to close the investigation and inform the parties immediately.

The Ordinance of the Government no. 12/2014 has been published in the Official Gazette of Romania on August 6, 2014. Some amendments have already entered into force on August 9, 2014 and procedural amendments to the Law no. 11/1991 on unfair competition entered into force on September 5, 2014.

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Tax Updates

Update to the additional strengthening of the restrictive measures against Russia

The reinforced measures mainly focus on strengthening the controls with respect to 1) the export of dual use goods, products and services, 2) the transfer of sensitive technologies and goods that can be used in the energy sector and 3) further restricting access to the EU capital markets for an increased list of Russian financial institutions.

The new restrictive measures laid down in Regulation no. 960/2014 entered into force on September 12, 2014.

1) *Export of dual use goods and technology*
The new measures specifically prohibit the export of dual use goods and technology and related services, such as technical assistance, brokering or providing financing or financial assistance for these goods to the following Russian entities:
- JSC Sirius (optoelectronics for civil and military purposes);
- OJSC Stankoinstrument (mechanical engineering for civil and military purposes);
- OAO JSC Chemcomposite (materials for civil and military purposes);
- JSC Kalashnikov (small arms);
- JSC Tula Arms Plant (weapons systems);
- NPK Technologii Maschinostrojenija (ammunition);
- OAO Wysokototschnye Kompleksi (anti-aircraft and anti-tank systems);
- OAO Almaz Antey (state-owned enterprise; arms, ammunition, research);
- OAO NPO Bazalt (state-owned enterprise, production of machinery for the production of arms and ammunition).

Please note that these prohibitions are not applicable for the execution of contracts or agreements concluded before September 12, 2014, and to the provision of assistance necessary to the maintenance and safety of existing capabilities within the EU. In addition, these prohibitions do not apply to the sale, supply, transfer or export of dual use goods and technology for the aeronautics and space industry, or related provision of technical and financial assistance intended for non-military use and for a non-military end user.

2) *Services related to the energy sector*
In addition to the new restrictions on export of dual use goods and technology, are prohibited the provision of services related to targets deep water oil exploration and production, arctic oil exploration and production, or shale oil projects in Russia, namely:
- drilling;
- well testing;
- logging and completion services;
- supply of specialised floating vessels.

Please note that these prohibitions are also applicable for the execution of an obligation arising from a contract or a framework agreement concluded before 12 September 2014 or ancillary contracts necessary for the execution of such contracts.

3) *Access to the EU capital markets*
The new measures, also prohibit the directly or indirectly purchases, sells, provide investment services for or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments with a maturity exceeding 30 days, issued after 12 September 2014 by the following legal person, entities or bodies established in Russia:
- Opk Oboronprom;
- United Aircraft Corporation;
- Uralvagonzavod;
- Rosneft;
- Transneft;
- Gazprom Neft.

What does it mean for you?
Although the previous restrictive measures initiated with Regulation 833/2014 did not restrict the exports of dual-use goods and technology for non-military use and/or for non-military end-users, the new measures now also targets companies that have both a military- and a civilian division. In addition, the reinforced measures will severely restrict energy (and affiliated) companies in their ongoing business regarding certain energy related projects in Russia, possibly preventing them to proceed with the activities altogether.

In order to enforce the new prohibitions, the competent authorities have to step up their monitoring activities with respect to all exports to Russia. It can be foreseen that the increased monitoring by the customs authorities of goods and technology in combination with the increased screening of the intended 'end-use' and 'end-users', will further slowdown customs formalities (e.g. the issuance of export authorizations) and customs processing of 'normal' shipments intended for Russia.

What to do?
It is likely that the reinforced restrictive measures will only increase when the situation in the Eastern Ukraine does not deescalate. Therefore, companies should actively monitor their export control programs, especially the end user with every contemplated sale or shipment to Russia in order to avoid exposure. It is increasingly important to assess whether or not the respective goods are dual use, which party will be the end-user and what the intended end-use will be. Additionally, companies should expect potential delays with respect to future shipments to Russia.

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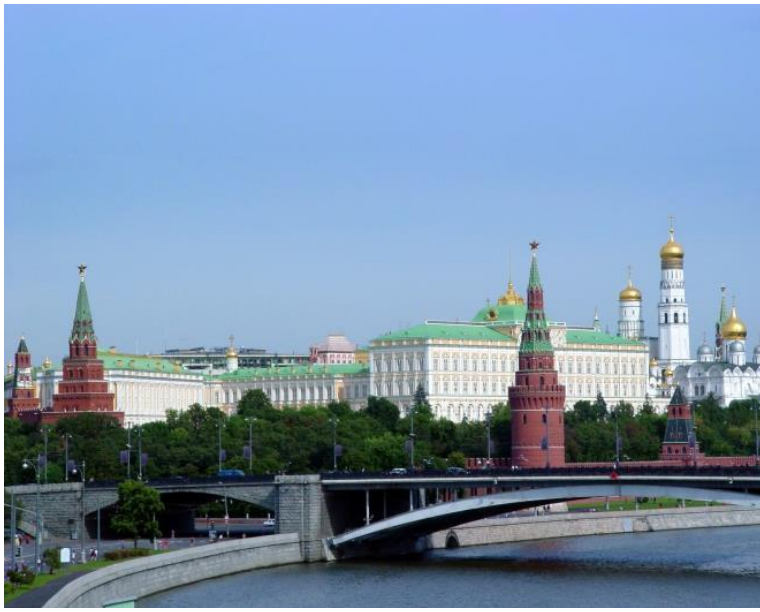

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Transfer Pricing Alert

The Organisation for Economic Co-operation and Development releases guidance on intangibles

The Organisation for Economic Co-operation and Development (OECD)'s revised guidance in Chapter VI of the Transfer Pricing Guidelines defines intangibles as assets other than physical or financial assets that are capable of being owned or controlled by a single enterprise. Under this definition, location-specific characteristics and workforce in place are not considered intangibles, because they are not capable of being owned or controlled; rather, they should be considered comparability factors to be taken into account in a transfer pricing analysis. The revisions to Chapter I issued September 16 as part of the release of Base Erosion and Profit Shifting (BEPS) deliverables provide important guidance on location-specific characteristics, workforce-in-place, and synergy benefits as comparability factors.

Location Savings

The new guidelines indicate that if reliable local market comparables are available and can be used to determine arm's length prices, specific comparability adjustments for location savings should not be required. However, when reliable local market comparable companies are not present, the guidance suggests that comparability adjustments for location savings should be driven by a full analysis of the underlying facts and circumstances, including the functions performed, risks assumed, and assets deployed by the relevant associated enterprises. Mere differences in salary costs should not be the sole basis for determining the existence or allocation of location savings.

Impact of government licenses on location-specific advantages

A government-issued license is an intangible. If the license restricts the number of entrants into the market, it may affect how location-specific characteristics are shared. In such a case, it is necessary to determine each affiliated party's contribution to obtaining the license to determine the allocation of the profit attributable to the license intangible.

Group Synergies

The new guidance provides additional clarification regarding the concept of group synergies and provides important examples that apply the principles in the context of intragroup loans and centralized purchasing groups.

The revised guidelines state that benefits arising from deliberate concerted group actions should be shared in proportion to the members' contribution to the benefit.

Assembled Workforce

The additions to Chapter I provide guidance on the potential impact of an assembled workforce in a transfer pricing analysis. The guidance indicates that a uniquely qualified or experienced workforce may be a comparability factor that may impact transfer prices.

Importantly, the guidance does not suggest that an assembled workforce is an intangible, presumably because it cannot be owned or controlled by a single enterprise.

Effective dates

The OECD has not recommended a specific effective date for the changes to Chapter I. The effective date of the changes will depend on the domestic law of the adopting states.

Conclusion

The additional guidance added to Chapter I regarding location-specific advantages, group synergies, and workforce-in-place provides important new guidance for tax administrators and companies. Companies that have taken positions on these issues should consider this new guidance when analyzing their transfer pricing positions.

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