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Input VAT newsletter

Skandia reversed: the Danske Bank Case

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In the Danske Bank Case (C-812/19), the Court of Justice of the European Union (the "CJEU" or the "Court") has provided further clarity on the supply of services between a head office located in and belonging to a VAT group in one EU Member State, and a branch situated in another. In its decision, the Court confirmed that, for VAT purposes, where the head office belongs to a VAT group within its Member State of establishment, it needs to be regarded as a separate taxable person from its branch, situated in a different Member State, when supplying services to that branch. Thus, the services between head offices and branches falls within the scope of VAT and the VAT would be due on these services while in the financial and insurance sectors, the VAT is usually not or only partly deductible. This could thus lead to a final VAT cost.

Background

Established in Denmark, Danske Bank is part of a VAT group within that country (the "**Danish VAT Group**"). The bank also operates in Sweden through a separate branch (the "**Swedish Branch**").

For the purposes of carrying out its activities throughout Scandinavia, Danske Bank makes use of an IT platform which is used by all of its establishments across the Nordic countries, including the Swedish Branch. As a result, Danske Bank allocates part of the costs incurred for the use of said IT platform to the Swedish Branch.

The Swedish Branch asked the Revenue Law Commission of Sweden (the "**RLC**") to provide an advance ruling in order to determine whether the fact that Danske Bank is part of a VAT group in Denmark would mean that the VAT group should be regarded as a separate taxable person from the Swedish Branch for VAT purposes. They asked whether, as a consequence, the services supplied by the Danish VAT Group should be regarded as falling within the scope of Swedish VAT.

The RLC took the position that the Danish VAT Group (of which Danske Bank is a member) and the Swedish Branch should be regarded as two separate taxable persons and, as such, the services rendered by Danske Bank to the Swedish Branch must fall within the scope of VAT.

The Swedish Branch challenged this advance ruling before the Supreme Administrative Court of Sweden, taking the position that the Swedish Branch could not be separated from Danske Bank insofar as it does not carry out independent economic activity and is not part of any VAT group in Sweden. As such, they argued, it should be regarded as a single taxable person together with Danske Bank, with the consequence that the services rendered by Danske Bank to the Swedish Branch should not be regarded as falling within the scope of VAT.

The Supreme Administrative Court of Sweden issued a stay of proceedings and referred the case to the Court of Justice of the European Union (the "**CJEU**" or the "**Court**").

The referring court posed the question to the CJEU, asking whether the principal establishment of a company, situated in a Member State and forming part of a VAT group, and the branch of that company, established in another Member State, must be regarded as separate taxable persons for VAT purposes where that principal establishment provides that branch with services and imputes the costs thereof to the branch.

This topic has arisen from the different interpretations Member States have taken on an earlier decision made by the CJEU in *Skandia* C-7/13 (the "**Skandia Case**"). In the Skandia Case, the CJEU held that services provided by a US company to its Swedish branch, which was a member of a Swedish VAT group, were liable to reverse charge VAT in Sweden. This was on the basis that the services were considered as being supplied to the VAT group, a separate taxable person for VAT purposes, to that of the branch.

The Danske Bank Case is effectively the reverse fact pattern of Skandia. In their daily work, practitioners often refer to this case as being the "reverse Skandia".

Decision of the Court

In short, the CJEU's decision was largely based on the territorial and operational scope of the VAT grouping rules.

According to the Court, in case of a supply between a head office and its branch, in order to determine whether such a supply is taxable for VAT purposes it is fundamental to determine whether there is a legal relationship between the provider of the service and the recipient of such service, further to which there is reciprocal performance. In the specific case of a head office and its branch, which form a single taxable person, this legal relationship doesn't exist and therefore the reciprocal performance between the two constitutes a non-taxable internal flow of funds (as per CJEU's case *FCE Bank* C-210/04).

The Court ruled that, in order to establish whether the legal relationship exists, while it is fundamental to determine whether the branch performs an independent economic activity, it also must be taken into account whether the two establishments belong to a VAT group in their respective Member States of establishment.

Accordingly, where either the head office or its branch is in a VAT group, the legal relationship between them must be assessed by taking into account whether:

1. the group is placed on the same footing as a single taxable person. For example, members of the VAT group cease to submit VAT declarations separately and to continue to be identified, within and outside their group, as individual taxable persons; and,

2. the territorial limits of that group. For example, where a VAT group is created in a given Member State, persons established in a different Member State cannot be part of that VAT group.

The Court held that the principle set out in the Skandia Case according to which services supplied by a principal establishment in a non-Member State to its branch established in a Member State constitute taxable transactions when the branch is a member of a VAT group, is also applicable to the reversed case.

Upon review of the above, Danske Bank and the Swedish Branch cannot be regarded as uniting as a single taxable person and consequently, the services provided by Danske Bank to the Swedish Branch are subject to Swedish VAT.

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As such, the Court ruled that for "*VAT purposes, the principal establishment of a company, situated in a Member State and forming part of a VAT group formed on the basis of Article 11, and the branch of that company, established in another Member State, must be regarded as separate taxable persons where that principal establishment provides that branch with services and imputes the costs thereof to the branch.*"

What does this mean?

The judgment confirms the application of the Skandia Case principles in the reverse situation and highlights that supply of services between a head office and a branch located in different EU Member States where one of them is a member of a VAT group, falls within the scope of VAT. This is in line with the current approach by the Luxembourg VAT authorities (although not expressly formalized in official guidelines) and the "exposé des motifs" of the law of 6 August 2018 introducing the VAT group in Luxembourg.

Businesses should be:

- assessing where transactions take place within legal entities and whether any establishments of said legal entities are members of a VAT group;
- determining the territorial scope of such VAT groups (although less applicable for Luxembourg which confirmed the territorial scope of Luxembourg VAT groups); and
- obtaining information to identify supplies and determine the VAT liability, should this be necessary.

Businesses should then assess whether VAT needs to be reported in any Member State. We expect this to be the case, unless there is specific Member State law or guidance to the contrary. Businesses should also assess the impact on their VAT deduction right.

The Deloitte Luxembourg indirect tax team remains at your disposal to discuss the potential impacts of this topic on your organization.

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