

Skandia Update
An EU perspective



Indirect Tax

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EU Survey on Skandia and Welmory

Due to the current uncertainty in the marketplace regarding the impact of the Skandia ruling, we conducted a survey among the EU Member States to ascertain the differences in implication and interpretation across the EU. Our findings are analyzed are below.

Introduction

In the Skandia case (Case C-7/13, Skandia America Corporation USA) of September 2014, the Court of Justice of the European Union (“CJEU”) ruled on the VAT qualification of supplies by a (non-EU) head office to its fixed establishment, which is part of a VAT group. A VAT group qualifies as a single taxable person for VAT purposes and by becoming part of a VAT group, the fixed establishment forms a different taxable person with the other members of the VAT group. According to the Court of Justice the supplies by a head office to its fixed establishment which is part of a (Swedish) VAT group is thus subject to VAT.

This CJEU judgment seemed to have caused a lot of uncertainty on how to deal with charges between a head office and its fixed establishment in the Member States of the European Union. In this document we will elaborate on publications on the impact of the Skandia case and how it is implemented within the European Union.

Furthermore we will give insight on the question whether Member States implemented VAT grouping in their VAT legislation, whether foreign entities can be included in a local VAT group, whether other CJEU case law (Case C-605/12, Welmory sp. z o.o.) on the definition of a fixed establishment complicated the impact of the Skandia case for the Member States and finally whether Member States published official guidance on how the Skandia case should be interpreted.

Publications on the implications of CJEU Skandia

In February of this year the VAT Committee published a working paper (VAT Committee, taxud.c.1(2015)747072 Working paper No 845) on the issues arising from the Skandia case. In the introduction the VAT Committee emphasized that for the sake of legal certainty it is desirable to reach a common and consistent position on the impact of the Skandia case. The VAT Committee also request delegations to express their view on the matter raised by the Skandia case. Based on this request the VAT Committee implicitly indicates that there are various questions outstanding on the impact of the Skandia case. For instance whether the Skandia case has an impact on the supplies other than from a head office to its fixed establishment.

The VAT Expert Group published a working paper (VAT Expert Group, taxud.c.1(2015)3986774 VEG No 047) on the Skandia case in September 2015. The VAT Expert Group firmly believes in a need for a limited interpretation of Skandia and prefers a broad application of FCE Bank principle (Case C-210/04, FCE Bank plc). Main arguments of the VAT Expert Group are the protection of the fiscal neutrality principle, the respect of the territoriality principle and discretion of Member States in applying the VAT grouping regime and avoidance of disproportionate administrative burdens for both businesses and tax authorities.

Official guidelines concerning the implications of CJEU Skandia

Whilst the majority of Member States have yet to issue formal guidance on how Skandia should be implemented, a few have offered some guidance on its interpretation. For example the Czech Republic has broadly accepted the Skandia case and has communicated this through an official guideline. In Hungary the tax authorities have stated that the interpretation concluded by the CJEU in the Skandia case is consistent with the Hungarian VAT Act, and therefore it should be applied as of 1st January 2008, when the current Hungarian VAT Act entered into force.

The Belgian government introduced a draft law, effective of 1st July 2015, which codifies the outcome of the Skandia ruling in the Belgian VAT legislation and simultaneously implemented the immediate withdrawal of the anti-avoidance legislation.

The tax authorities in the United Kingdom released their initial Brief on the Skandia judgement which stated that *“the implication of the Skandia judgement is that an overseas establishment of a UK-established entity is part of a separate taxable person if the overseas establishment is VAT-grouped in a Member State that operates similar ‘establishment only’ grouping provisions to Sweden”*. Further guidance has followed, confirming that the UK will apply Skandia from 1 January 2016 to supplies between a UK-established entity and an overseas establishment in a VAT group if the overseas Member State has with ‘establishment only’ VAT grouping and has implemented Skandia. However, the UK tax authorities have not issued a definitive list of which Member States they consider to meet these conditions, and have instead recommended that taxpayers should contact the tax authorities in the local Member State for further guidance.

Other countries, including the Netherlands, Italy, Ireland and Finland are expecting their respective authorities to issue an official position in due course. It is most likely that other Member States will await further guidance from the CJEU.

Complicating case law?

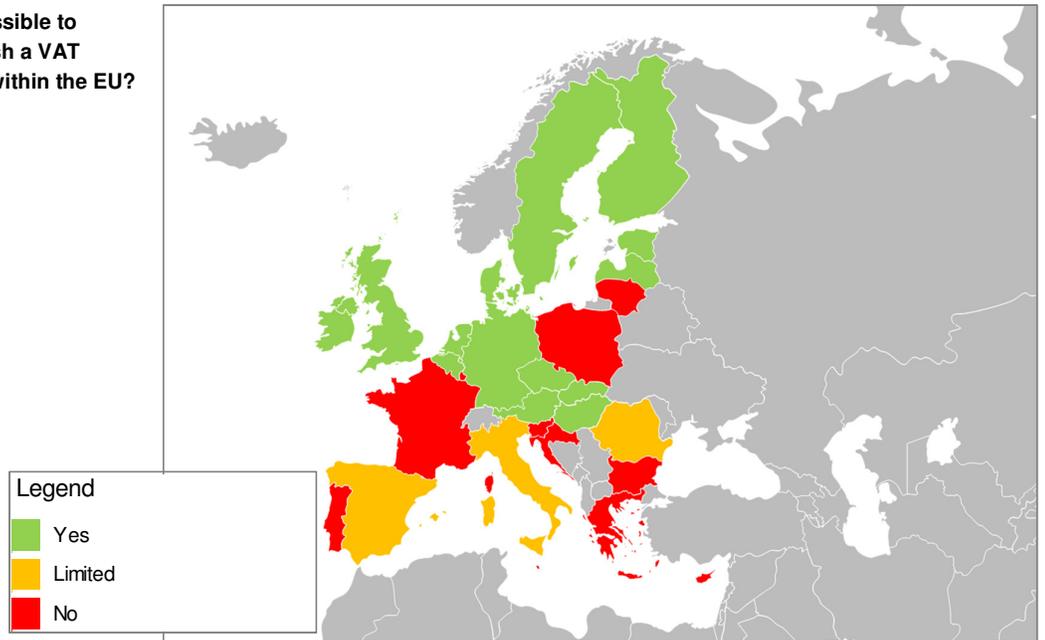
The Court of Justice of the European Union (CJEU) ruled in the Welmory case that a fixed establishment in a digital context requires a suitable structure, as regards human and technical resources, such as computer equipment, servers and adjusted software. The question arises whether the context of the fixed establishment changed due to the Welmory case.

While the majority of EU countries have seen no official changes regarding the requirements for a fixed establishment there are a few exceptions as stated below. Additionally, some local VAT experts do expect the case to play an important role in future tax disputes, such as in Lithuania and Latvia.

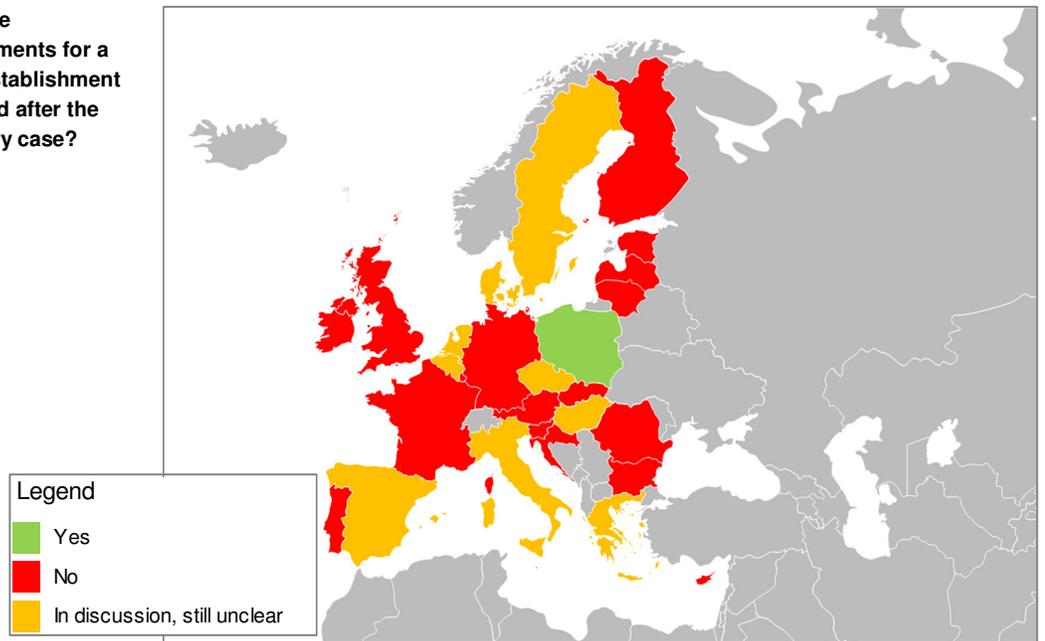
In Poland local VAT experts indicated that as a result of the Welmory case the administrative courts started to consider the existence of a fixed establishment in case a company has (a rented) technical infrastructure and human resources. Such an interpretation of the Welmory case could complicate the implications of the Skandia case within the European Union.

Results of survey

Is it possible to establish a VAT group within the EU?

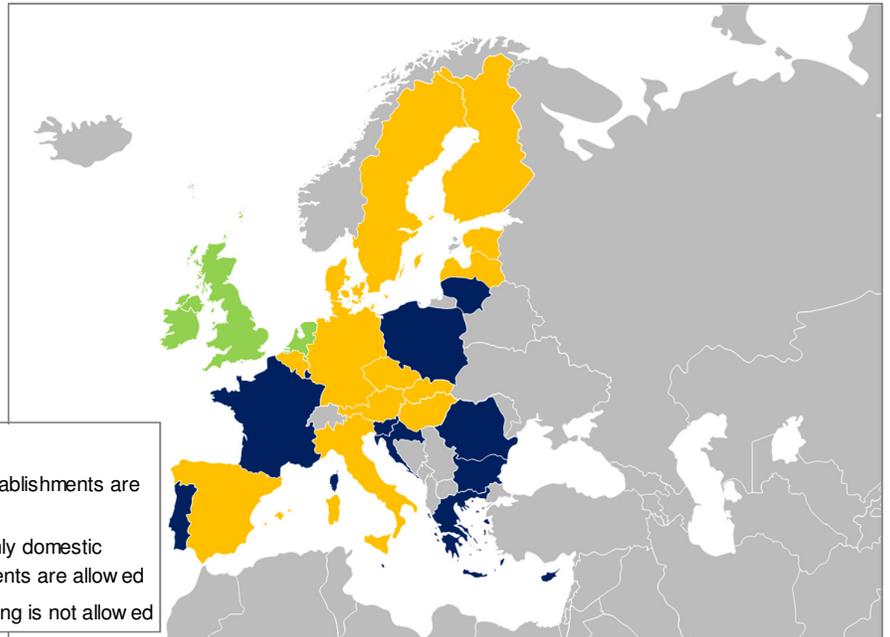


Have the requirements for a fixed establishment changed after the Welmory case?



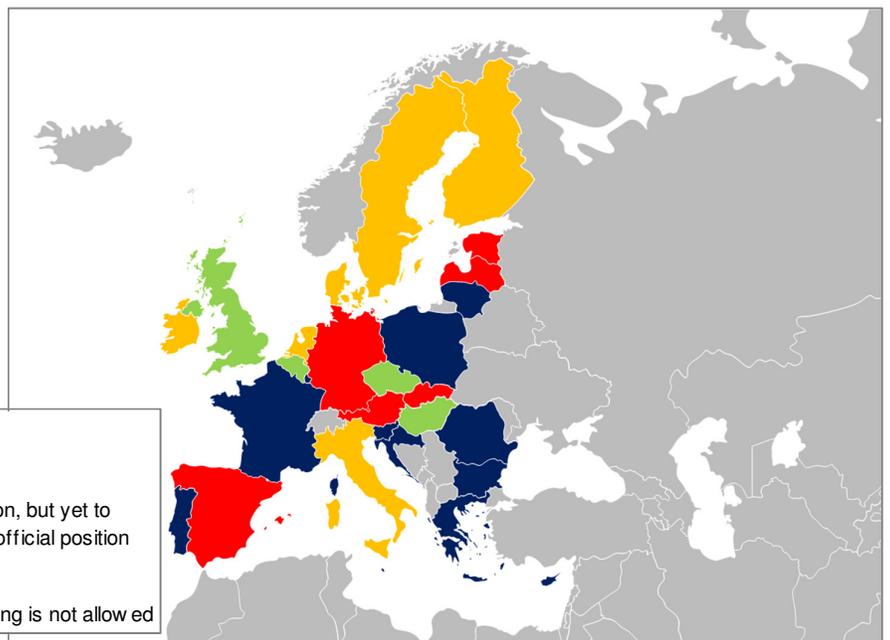
**Can a fixed establishment be included in a VAT Group in the EU?
If yes, may the foreign head office and/or fixed establishment also be included in said VAT group?**

- Legend**
- Yes, all establishments are allowed
 - Yes, but only domestic establishments are allowed
 - VAT grouping is not allowed



Has the government / tax authorities taken an official position on the Skandia case?

- Legend**
- Yes
 - In discussion, but yet to publish an official position
 - No
 - VAT grouping is not allowed



Conclusion

There is still a lot of uncertainty in the market regarding the interpretation and implications of the Skandia case. Several EU Member States claim that the Skandia judgement should be applied extensively whilst others have a more careful approach towards the interpretation of Skandia. In our opinion there is a need for the Skandia case to be interpreted consistently across the EU as the current differences in interpretation could threaten the principle of fiscal neutrality.

It is now the responsibility of the European Commission to give a clear vision on how the Skandia case should be interpreted throughout Europe. The current uncertainty is not only created by the question whether the Skandia case should only be applied in a similar situation, i.e. that a non-EU head office recharges IT costs to its fixed establishment which is part of a VAT group in the EU, but also by the changing definition of a fixed establishment for VAT and the non-uniform guidance published by the Member States.

In our view, following that of the VAT Expert group, VAT grouping is of great importance for the EU economy. A limited interpretation of the Skandia case would therefore be in line with the intention behind the VAT grouping facility in EU VAT legislation. The purpose being to lower the administrative burden of both taxable persons and the tax authorities, thereby enabling efficient VAT compliance and audit activities. Considering this and the option available to EU Member States in implementing anti-avoidance regulations to prevent a situation of non-taxation, the most desirable scenario would be if the European Commission announce that the Skandia case should only be limitedly interpreted. In this case only a factual situation similar to the Skandia case, i.e. that a non-EU head office recharges external costs to an EU fixed establishment included in a VAT group, should be influenced by the impact of the Skandia case. In other situations the FCE Bank principle should apply, via which a fixed establishment is legally unseparated from its head office.



Further information

Should you have any questions and/or comments on the impact of the Skandia case in the Member States and would like to discuss this any further with a local VAT expert please contact Karen Hough (Krough@Deloitte.nl or +3188 288 4941) or Sander van Löben Sels (SvanLobenSels@Deloitte.nl or +3188 288 8656). We will forward your questions and/or comments to the appropriate local VAT expert.

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