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FSI Indirect Tax Newsletter

Financial Services and Insurance updates from around the world

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Welcome to the latest edition of Deloitte's Financial Services and Insurance ("FSI") Global Indirect Tax Newsletter.

We hope that you find the publication useful and we welcome feedback which could improve it. Should you have any comments or questions arising from the newsletter, please speak to your usual Deloitte contact or one of the national FSI leaders listed below.

Kind regards

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In this issue

Area in Focus 1: Investment Management and VAT – are we moving closer to clarity?

The investment management sector is one which has received considerable attention over recent years from a variety of sources such as politicians and the media, but also – and perhaps most significantly – from regulatory bodies. There has been a drive for greater openness in the market with the aim of ensuring that high street investors know exactly where their cash is going.

In the UK, regulators implemented the first phase of the Retail Distribution Review ("RDR") last year. This made significant changes to the investment advice market in order to clarify how much retail investors pay for financial advice and what exactly they pay for – for example, would investors be paying for advice or for an intermediary service of arranging (or attempting to arrange) transactions in securities? In reality, there may be a very fine line between the scenarios, but there is an important contrast in the VAT treatment of the respective services. The second phase of RDR is due to take effect from 6 April 2014 and will extend the adviser charging reform to retail investment platform providers.

When viewed from a wider perspective, there has not been a consistent approach from regulators globally, or even within the EU. Outside the UK, this is demonstrated by regulators in the Netherlands introducing similar reforms but on a scale that also extends to institutional investors. At the other end of the spectrum, Germany and France are yet to implement any changes to this effect.

This lack of global uniformity is reflective of the situation we currently face in the VAT and investment management sphere. As demonstrated below, in our round-robin of fund management updates, the VAT treatment of fund management services still varies between EU Member States and, to a large degree, is still evolving at a local level. Unless the EU Review of the VAT treatment of FSI is resumed and achieves its objective of harmonisation, the best source of clarity will continue to be judgments and guidance issued by the Court of Justice of the EU ("CJEU"), which will still of course be subject to local interpretation.

One of the principal areas of interest recently has concerned the VAT liability of pension fund management services. Following the *PPG* decision last year, there is now a more certain position in many Member States regarding an employer's right to recover the VAT on pension fund related investment management. The earlier *Wheels* case also set a precedent for treating investment management services provided to defined benefit schemes as taxable. We now await the *ATP* decision on 13 March 2014 to provide the CJEU's conclusions on how investment management services provided to defined contribution schemes should be treated. Unfortunately, it is possible that the *ATP* decision may still not comprehensively answer this question, due to the fact set of the case being specific to the Danish pension system which operates differently to many others around the EU.

So, in an industry which is moving towards greater transparency for investors, there are ongoing developments to effect this goal. Positively, we also appear to be edging closer to achieving clarity from a VAT perspective and, come 13 March, we will hopefully be closer still, but there is still a fair way to go.

Therefore, as things currently stand, we thought it would be helpful to provide a few snapshots of recent developments regarding the VAT treatment of fund management globally. We hope this is of interest.

Denmark

Until a few years ago, the VAT exemption for special investment management funds ("SIFs") attracted little interest in Denmark. Danish case law supported a broad VAT exemption for services provided to funds recognised as investment funds under the Law of Investment Funds in Denmark. In light of this, most services provided to an investment fund have been treated as VAT exempt historically.

In 2008 the National Tax Board in Denmark published a binding ruling, stating that all units in a fund that are taxed similarly to, or competing directly with, a UCITs fund are deemed to be SIFs and management services provided in respect of such funds should be treated as VAT exempt.

Following this ruling, a private equity / venture fund submitted a claim to the Danish Tax Authorities for the repayment of overcharged output VAT in respect of fund management services that it provided to a private equity fund. The claim was rejected by the Danish Tax Authorities; however the case was subsequently appealed to the National Tax Tribunal, who considered that the fund was a SIF and that the management service provided in respect of it should be treated as VAT exempt.

The Danish Tax Authorities did not appeal the above ruling. Consequently, many fund managers also submitted claims for the overpayment of output VAT. The total amount claimed is likely to have been substantial, not least because the Danish Tax Authorities have subsequently stopped making repayments to fund managers and are considering whether the Danish case law regarding SIFs complies with recent rulings from the CJEU. Furthermore, the Danish Tax Authorities are considering the content of the term "management" when it is subject to outsourcing. Despite recent decisions from the CJEU, which seem to broaden the scope of the term "management", the Danish Tax Authorities seem to be of the opinion that VAT exempt fund management is limited to investment management.

The Danish Tax Authorities have now decided to narrow the definition of a SIF with regard to VAT. The change takes effect on 1 April 2014.

In the future only UCITS funds, and non-UCITS funds with at least eight investors (or funds marketing themselves in order to bring up the number of investors) which are comparable with UCITS funds, are recognised as a SIF for VAT purposes, and thus far fewer units will be classified as SIFs.

We expect further clarification on this shortly, and consider that the changes in the legislation covering alternative investment funds and the management of those funds will have an impact on the scope of the Danish VAT exemption in the future.

CJEU cases: *Wheels, PPG* and *ATP*

Earlier this year the CJEU ruled that neither of the pension funds managed by Wheels or PPG could be considered SIFs and qualify for VAT exemption.

The Danish system for pensions is different to the majority of the other EU pension systems. Firstly, a pension fund covers all employees within a particular area of expertise rather than all employees from a particular business. Secondly, the value of the pension payments received by an individual after retirement is not typically guaranteed by the fund, but instead depends on the return of the investment from the capital paid in by each member.

On 12 December 2013, the Advocate General ("AG") released its decision in *ATP Pension Services A/S (C-464/12) ("ATP")*, with a decision expected from the CJEU on 13 March 2014. *ATP* concerns the VAT treatment of pension funds, but is different to the previous CJEU cases of *Wheels* and *PPG* which focused on defined benefit (final salary) pension schemes. Defined Contribution ("DC") schemes provide a return to the employee/pension customer depending on the investment performance of the assets purchased by the pension fund on the pension customer's behalf (the employer has no obligation to make any top-up payments into the fund).

The AG considered that occupational pension funds (i.e. DC Schemes) were capable of being SIFs where they demonstrated the following characteristics:

1) The fund allows for the pooling of assets among several beneficiaries which allow the spreading of risk over a range of securities;
2) Beneficiaries of the fund must bear the risk of the investment; and
3) The beneficiaries of the fund must have secure legal positions with respect to their individual assets.

The AG stated that it was irrelevant that contributions were made by an employer for an employee's benefit under a collective agreement between organisations representing employees and employers and that payments out of the fund were only made on retirement.

In short, the AG's opinion indicates that DC pension schemes do fall within the VAT exemption as SIFs, where such funds, pool the assets amongst several beneficiaries, allow the spreading of risk over a range of securities and where the beneficiaries bear the risk of the investment. The AG explicitly did not provide any guidance on whether the services provided by ATP constituted the management of such a fund, nor did the AG offer a view as to whether the services provided to the pension schemes consist of inter-account transfers, commenting that the CJEU had already provided extensive guidance on these issues.

We will now need to wait and see whether the CJEU follows the AG's analysis and whether the Court provides further guidance on the management services provided to such a fund or indeed whether the services can constitute transactions concerning payments.

Finland

In Finland, fund management services can be treated as VAT exempt financial services in certain circumstances. However, there is very little published legal practice or administrative guidance in Finland in relation to these services. In addition, the published guidance and decisions that do exist often appear to be somewhat contradictory.

Accordingly, the recent decisions by the CJEU in relation to fund management services should help to provide clarity over what should be treated as a taxable or exempt service. However, no additional guidance by the Finnish Tax Authorities or amendments to the VAT legislation have been issued as a result of the rulings to date.

France

The French Tax Authorities are expected to comment on the VAT treatment of fund management services in France following the decision in the *GfBk* case. This could result in changes to the VAT treatment of certain services which are similar to those provided by GfBk in the aforementioned case.

The French government implemented the Alternative Investment Fund (“AIF”) Directive on 25 July 2013. Following this, the French government also amended the French VAT provision implementing Art. 135.1.f of the VAT Directive in order to extend the VAT exemption to the management of particular types of AIFs outlined in the French legal provisions.

Deloitte in France do not consider that the decision in the *ATP* case will have a significant impact in France given that French pension schemes are substantially different to those in Denmark.

Germany

Under German VAT law, the management of German pension funds is treated as VAT exempt. The decisions in the *Wheels* and *ATP* cases are unlikely to have any impact regardless of the outcome. The German Tax Authorities issued guidance on 28 October 2013 in respect of the *GfBk* decision. The guidance confirms the position taken by the CJEU which ruled that advisory services of the kind supplied by GfBk can qualify for exemption.

Luxembourg

Under Luxembourg VAT Law, the VAT exemption applies to management services rendered to Luxembourg regulated funds, AIFs and securitisation vehicles. The VAT exemption for fund management services may also be applied to certain sub-delegated management services, following the CJEU’s decision in the *Abbey National* case.

In addition to portfolio management and investment advisory services, there are some other types of fund administration services that may also be able to benefit from the VAT exemption. However, these should be analysed on a case-by-case basis.

The Luxembourg Tax Authorities have not yet issued any guidance on the application of the fund management VAT exemption for services provided to pension funds following the CJEU decision in the *Wheels* case. In light of this, the fund management exemption is currently only applicable to certain regulated pension funds that are expressly outlined in the Luxembourg VAT law.

Malta

Under the Malta VAT Act the supply of management services to any investment scheme is treated as exempt from VAT, providing that such services are limited to activities that are specific to and essential to the core activity of the investment scheme.

For the purposes of the VAT exemption, an ‘investment scheme’ is defined in accordance with the concept of a ‘collective investment scheme’ as defined under the Investment Services Act, of the Laws of Malta. A pension fund or ‘retirement scheme’, on the other hand, is defined under the Special Funds (Regulation) Act, of the Laws of Malta.

In Malta, a ‘retirement scheme’ currently includes defined benefit retirement schemes. As such, following the recent CJEU decision in the *Wheels* case, the Maltese Tax Authorities may effect legislative changes to restrict the scope of the VAT exemption in respect of such schemes. Going forward, the impending CJEU decision in the *ATP* case may also impact on the current VAT treatment of fund management services in Malta.

The Netherlands

In the Netherlands, the VAT exemption for the management of collective investment undertakings (“CIU”) cannot be applied to the management of pension funds. The recent CJEU decisions in *Wheels* and *PPG* confirmed the current Dutch practice whereby VAT is due on management services provided in respect of a pension fund.

However, the judgment in *PPG* provides pension funds with the opportunity to allocate costs to the (taxable) employer. Deloitte in the Netherlands have noticed an increase in activity in pension funds seeking optimisation which can make it more difficult to allocate costs to an employer, for example through industry pension funds or outsourcing to insurers.

Slovenia

In Slovenia, the VAT treatment of fund management services is in line with the provisions outlined in the EU VAT Directive. Furthermore, the VAT legislation has been updated in line with the CJEU decision in case of *Abbey National*. Consequently, the CJEU decision in *GfBk*), did not have any legislative or practical impact on the VAT treatment of the fund management services in Slovenia.

Sweden

In Sweden, management services provided to certain funds (covered by Act 2004:46 and Act 2013:561) are treated as exempt from VAT. Following recent litigation, the interpretation of management services has been broadened to include additional services, such as risk and compliance services, which can now be treated as VAT exempt management services. Affected funds should analyse this opportunity in order to determine if services acquired could also fall within the VAT exemption, which could limit the burden of irrecoverable VAT for the fund.

Singapore

In Singapore, the supply of fund management services is generally taxable unless the fund manager acts as principal in the exempt financial transactions. For example, when a fund manager buys and sells units in its own name, it may be considered as making exempt supplies in respect of such financial transactions.

UK

The UK Tax Authorities released a Brief on 3 February 2014 following the CJEU's decision in *PPG* outlining their analysis of the impact of the decision and inviting claims for under-recovered input tax to be made by employers in certain circumstances.

In *PPG*, the CJEU decided that an employer was entitled to deduct input tax it paid on services relating to the administration of its employees' pension fund and the management of the assets of the pension fund. This applied in circumstances where there was a direct and immediate link between the services received and the employer's business activities.

To date, the UK Tax Authorities have allowed UK VAT registered employers to deduct input tax relating to the general management of an occupational pension fund (i.e. the setting up and day to day administration of the fund). However, VAT incurred on investment management services has not been treated as VAT which could be recoverable by the employer – it has been treated as VAT of the pension fund. In circumstances where there is a single invoice covering administration and investment management services, the UK Tax Authorities permitted employers to recover VAT on a 30/70 split in line with their Notice 700/17.

HMRC's Brief

Following the decision in *PPG*, the UK Tax Authorities are changing its policy on the recovery of input tax concerning the management of pension funds by removing the 30/70 split with immediate effect (albeit there is a six month transitional period for scenarios where the pension fund is currently invoiced for services). In summary the UK Tax Authorities consider:

- VAT incurred on investment management services will now be treated as input tax of the employer, provided they can demonstrate a direct and immediate link between the services received and the supplies it makes.
- However, they do not consider the VAT will be input tax of the employer where the supplies were not made to the employer or where the supply is limited to investment management services only (i.e. not a combined supply of investment management and administration services).
- In cases where the employer receives the supply but it is the pension fund that bears the ultimate cost, the UK Tax Authorities have stated that output tax will need to be accounted for by the employer (as they consider this will amount to a recharge to the pension fund).

Area in Focus 2: The impact of *Le Credit Lyonnais* across the EU

Background

The case of *Le Credit Lyonnais* (Case C-388/11) ("LCL") concerned the deductible portion of VAT applicable to it. LCL is a French bank with branches across the world. LCL made loans to its branches, some of which were located outside the EU. Interest income invoiced by LCL's head office in France to its branches could not be included in its pro rata recovery method because it and its branches are all part of the same legal entity. As such, in calculating its deductible proportion of VAT, LCL included the interest income of its worldwide branches on the basis that its principal establishment along with its branches constituted one and the same entity. LCL argued that the income from branches ought to be factored into any partial exemption calculation.

The French Tax Authorities disagreed and LCL appealed. The French Court referred a number of questions to the Court of Justice concerning the interpretation of the Sixth VAT Directive. Essentially, the main question at issue was whether a company whose principal establishment is situated in a Member State and which has branches abroad must take into account or not the income of its branches when calculating the deductible proportion of VAT.

The CJEU has followed the AG's opinion and held:

- The right to deduct is quantified according to a proportion fixed in accordance with the Directive (Article 19). In so far as the calculation of the deductible proportion constitutes an element of the deduction system, the manner in which that calculation must be carried out falls within the scope of the national VAT legislation to which an activity or transaction must be linked for tax purposes (territoriality principle).
- In determining the deductible proportion of VAT applicable to it, a company, the principal establishment of which is situated in a Member State, cannot take into account the turnover of its branches established in other Member States or third States;
- Taking into account LCL's turnover on a worldwide basis would have had the effect of increasing the proportion of VAT which LCL's principal establishment could deduct in its Member State (i.e. France) even though some of the activities undertaken by its branches do not reflect the use of inputs by the principal establishment. Thus, the amount of the deductible proportion would be distorted; and
- The Directive does not permit a Member State to adopt a rule for the calculation of the deductible proportion per sector of business of a company subject to tax which authorises that company to take into account the turnover of a branch established in another Member State or in a third State.

Implications

Whilst this decision may be largely limited to its own facts, it does highlight a number of points, including the importance of the territoriality principle in VAT. As such we have outlined the impact of LCL in a number of EU jurisdictions, as of the current date.

Country	Impacted by decision in LEL? (Yes, No, Maybe)
Denmark	No
Finland	No
France	No
Germany	No
Italy	No
Luxembourg	Yes
Malta	No
The Netherlands	Yes
Portugal	Maybe
UK	Maybe
Sweden	No
Slovenia	No

Asia Pacific

Singapore

Monetary Authority of Singapore ("MAS") GST Remission Circular

The MAS has allowed a GST remission for non-GST registered qualifying funds in order to recover a certain percentage of its input VAT. MAS had released the percentage recovery rate for qualifying funds for 2014. The rate will increase from the current 87% to 90% with effect from 1 January 2014. The current remission programme is scheduled to end in March 2014, subject to any announcements that might be made in the 2014 budget. However, the general indication is that the scheme will be extended.

EMEA

Denmark

Clarification of the *Deutsche Bank* case

In December 2012, following the CJEU ruling in *Deutsche Bank*, the Danish Tax Authorities issued a notice stating that discretionary investment management ("DIM") services should be treated as subject to

VAT with effect from 1 July 2013. However the guidance did not answer all relevant questions and consequently some financial institutions subsequently asked the National Tax Board ("NTB") for binding rulings in relation to the VAT liability of their services.

The NTB considers that investment advisory services should be treated as VAT exempt intermediary services providing the investment manager only has a mandate to provide advice (i.e. it does not have a mandate to trade on behalf on the customer). If the customer acts on the advice provided by the investment manager and subsequently instructs the investment manager to execute a trade, the fee for this service should also be treated as VAT exempt.

However, the NTB considers that in instances where an investment manager has two contracts with a particular customer and one of those contracts is for DIM services, then all investment advisory services should also be subject to VAT.

Ministry for Taxes to calculate the tax loss suffered from the VAT exemption

The EU VAT exemption for Financial Services ("FS") was originally introduced on the basis that charging VAT would make the cost of consumer credit unnecessarily expensive. Further to this, it is often difficult to determine what the taxable consideration should be in relation to a financial service.

In spite of the above, the Danish Government considers that the application of the VAT exemption in respect of FS leads to a tax loss for the Danish National Treasury. As such, the Danish Government introduced a 'Special Payroll Tax' ("SPT") which is levied on the salaries of employees of FS institutions. Currently the SPT is charged at a rate of 10.9 % on the salaries of FS employees and will increase to 15.3 % in 2021.

The FS sector considers that any tax loss that arises from the VAT exemption is already funded by FS institutions. Consequently, any increase in the SPT rate is an additional burden for FS employers. The Ministry for Taxes recently invited FS sector representatives to discuss how the "tax loss" is actually calculated in order to clarify the contradictory opinions outlined above.

It is likely to be very difficult, perhaps impossible, to calculate the tax loss. Nevertheless, we eagerly await any conclusions that are reached following the discussions.

Finland

VAT treatment of factoring services in Finland

The Supreme Administrative Court ("SAC") recently ruled that factoring services should in this case be treated as subject to VAT. The taxpayer's activities consisted of purchasing receivables from its customers and carrying the risk of bad debts. The taxpayer's fees consisted of an annual fee, a fixed invoice-specific management fee and a percentage invoiced based on the amount of the receivable. The SAC ruled that the taxpayer was liable to account for VAT on all of these fees.

Unlike many Member States, in Finland factoring was previously considered a VAT exempt financial service. Due to the significant impact of the decision, the Finnish tax administration is expected to issue guidance on the matter. However, at present no further information is available and it is not known when the services will be considered taxable and what types of factoring products will be affected.

VAT treatment of services in relation to card payments

The Central Board of Taxes ("CBT") ruled (KVL:035/2013) that an entity providing services that enable card payments was deemed to be a VAT exempt financial service. The services provided included the handling of payment transfers and necessary verifications, as well as certain additional services, e.g. customer service, manufacturing of the payment cards and reclaim handling. The CBT considered that these services related to payment transfers and as such should be treated as exempt from VAT.

The ruling does not significantly amend the current interpretation of VAT exempt financial services in Finland, but it provides assurance for companies carrying out similar activities and treating them as VAT exempt.

France

Holding company input tax recovery on acquisition costs

The *L'Air Liquide* case was decided in favour of the taxpayer by allowing VAT deduction on acquisition costs incurred by the French holding company,

The case concerned a French holding company that had incurred costs for the purpose of acquiring part or all of the affiliates of another company. The holding company had substance and regularly invoiced management fees to its worldwide affiliates. Some of the targets were not acquired despite early research and due diligence exercises. However, some of the targets were acquired by a sub-holding company of *L'air Liquide* (a purely passive holding company).

The Tax Authorities challenged the VAT deduction on the grounds that the top holding company had no business purpose to incur those costs as it did not make the acquisition itself. However, the Supreme Court confirmed that, given the organisation of the group, the top holding company was the only member capable of delivering management services to all its subsidiaries and sub-subsidiaries. This meant that expenses incurred in the course of the acquisition attempts represented general expenses (overhead expenses) incurred for the continuation and extension of its own business purpose, despite the fact that the shares were acquired by a sub-holding company. Hence, the VAT incurred on the related expenses was held to be deductible.

L'Air Liquide confirms that M&A transactions should be documented in order to match the expenses (with input VAT) with transactions effectively performed with services effectively supplied (with output VAT). As most of the holding companies have undergone audits on the subject, this gives opportunities for French corporate groups to revisit the issue in order to structure their transactions accurately.

Germany

VAT treatment of certain payments by car manufacturers to financing companies

The Federal Ministry of Finance ("MoF") has clarified the VAT treatment of certain compensation payments by manufacturers/dealers to automotive banks and other financing institutions. These compensation payments occur within the scope of leasing transactions and regular consumer credits to finance the purchase of motor vehicles and other upper-priced products. The interest and leasing rates offered to customers in this context are often far below market rates, and the manufacturers/dealers then make compensation payments in return.

The MoF distinguished between the financing granted by banks and third party financers. Typically, an automotive bank is a subsidiary of a car manufacturer, whose services are designed to promote the manufacturer's sales (rather than to maximise profit from credit agreements). Such below market rate financing is to be regarded as a service supplied by the automotive bank for the benefit of the associated manufacturer/dealer. Accordingly, compensation payments are to be treated as remuneration for taxable services (sales promotion).

In contrast, when an independent third party bank operates as a financing partner, its aim is to profit from these credit agreements. As such, the compensation payment to the bank is to be treated as additional third party consideration, obtained by the bank for the granting of credit to the respective customer. In this instance, there is no taxable service supplied by the bank to the manufacturer/dealer and the compensation payment does not affect the taxable base of the manufacturer's/dealer's supply to the customer.

In cases where independent leasing companies offer the dealer's/manufacturer's customer leasing rates below market rates (e.g. operating leasing), the compensation payments received from the dealer/manufacturer are to be attributed to the initial supply of the product by the manufacturer/dealer to the leasing company (the lessor). Said supply's taxable base is reduced.

These principles will apply to all pending cases. However, independent banks and leasing companies are concerned compensation payments received before 1 January 2014 will be treated as consideration for the supply of taxable sales promotion services.

Luxembourg

Cost sharing groups: Infringement case against Luxembourg

The European Commission has announced that it is referring Luxembourg to the CJEU over its implementation of the VAT exemption for "cost sharing" groups. Following the delivery of a "reasoned opinion" to Luxembourg, the VAT law there was changed in 2012 to restrict the scope of the exemption for "cost sharing groups" but the Commission considers that the changes do not go far enough and is referring the issue to the CJEU. The outcome of the case could have implications in each EU Member State on the VAT treatment of supplies between a "cost sharing group" and its members.

The Netherlands

Dutch Supreme Court rules that management of credit is subject to VAT

In case 11/03761 (in which the taxpayer is anonymous), the taxpayer developed a data processing system specially designed to process data necessary for issuing mortgages. The system is provided to financial institutions and is used for assessing credit applications and for issuing quotations for mortgages and loans. The taxpayer is compensated for this service by way of a transaction charge. Under a spate contract, the taxpayer also provides additional services including calculating the debtor's monthly payment amounts, making payment requests and the provision of the annual reports on the mutations and the state of interest bearing loans.

The Dutch Supreme Court did not question the fact that supply of the processing system and the additional services are two separate supplies for VAT purposes.

The earlier Higher Court decision considered that the provision of the data processing system should be regarded as an administrative and technical service which is subject to VAT. The Supreme Court confirmed this decision and said that the system enables the credit provider to make a considered decision as to whether it should grant a loan. The Supreme Court highlighted that this is different from the VAT exempt activity of granting and negotiation of credit.

The Higher Court ruled that the additional services do qualify for VAT exemption. The Higher Court considered that that the taxpayer could rely on 'Bankenresolutie' (guidance from the Dutch MoF) which stated that the collection of payments, excluding bad debts, can be treated as VAT exempt. The Supreme Court disagreed with the Higher Court on this point and considered that the additional services have the characteristics of credit management. Under EU law, the management of credit by a third party is subject to VAT. Only a taxable person granting the credit can treat credit management services as VAT exempt.

Dutch pension fund administration update

On 18 December 2013, the Dutch government and the opposition party reached an agreement on a number of proposed measures regarding Dutch pensions, which may have a significant impact on the VAT treatment of pension administration services provided to Dutch pension funds.

Currently, a large number of Dutch service providers apply the cost sharing exemption ("CSE") on pension fund administration services. The CSE has been implemented in the Dutch VAT Act and some additional rules were put in place by way of an implementation Decree on the Dutch VAT Act. According to this Decree certain services are excluded from the CSE including the provision of IT services, supply of staff, payroll services and finance administration.

The legislative bill that has been proposed to Parliament excludes the provision of pension administration services from the CSE from 1 January 2015. If these measures are put in place it will result in an additional VAT burden for Dutch pension funds, which are typically partly exempt. Currently the parties are looking into possibilities challenging the exclusion of pension fund administration services from the CSE on the basis of EU legislation and are exploring alternatives to mitigate the potential additional VAT burden.

Poland

Application of transfer pricing rules in the TCG with respect to VAT

Under Polish Corporate Income Tax ("CIT") Law a Tax Capital Group ("TCG") appoints one CIT taxpayer who is entitled to determine the value of charges made between group members in line with transfer pricing rules. However, for VAT purposes, the TCG entities must calculate any VAT due on the open market value ("OMV") of the supply if any of the TCG entities do not have the full right to input VAT deduction. This position stems from a decision by the Supreme Administrative Court ("SAC") issued on 8 October 2013 (signature I FSK 1536/12). In this case, the taxpayer (a bank) applied for a tax ruling to confirm that, for VAT purposes that it could treat transactions made between members of a TCG as below the OMV.

Initially, the Polish Tax Authorities gave a ruling that such transactions should be assessed on the OMV. However, the Provincial Administrative Court ("PAC") overruled the tax ruling and held that the transactions could be treated as below the OMV. This decision was subsequently appealed by the Polish Tax Authorities to the SAC.

The SAC decided to follow the Tax Authorities' approach in this respect and ruled that companies in a TCG are only obliged to charge VAT on the OMV of a supply made to another TGC member if that recipient does not have the right to full input VAT deduction. This is in line with Article 80 of the Directive 2006/112 that gives each Member State the right to prevent tax evasion or avoidance by deeming the taxable amount to between related companies to be charged at OMV.

Sweden

Swedish Tax ruling on the whether transactions between a head office and a branch should be treated as a supply for VAT purposes

The Swedish Board of Advance Tax Rulings has published a ruling on the subject of whether transactions between a head office and a branch should be considered to be a supply for VAT purposes when one of the establishments is part of a VAT group. The ruling stated that services received by a branch from its foreign head office are to be considered as a supply and that the Swedish VAT group, of which the branch was part of, is liable to account for VAT on these services.

Facts and Ruling

X is a foreign company who has a branch in Sweden and the branch is part of a Swedish VAT group. The foreign head office supplies services such as IT, HR and legal advice to the Swedish branch. All the acquired services are used exclusively by the branch and are not allocated to other companies within the VAT group.

The Board stated that the branch, by becoming a member of a VAT group, has become part of a new taxable person (the VAT group) and thus for VAT purposes has been dissolved from its head office. As a result the Board was of the opinion that there was a supply for VAT purposes. The VAT group was considered liable to pay Swedish VAT under the reverse charge scheme for the services that the head office had provided.

This ruling is of interest to many FSI companies and carries both opportunities and risks from a VAT perspective. We recommend that clients should analyse the impact carefully if they have transactions between head office and a branch (where either the head office or the branch is established in Sweden and at least one is a member of a VAT group).

The ruling has been appealed and will therefore be addressed by the Supreme Administrative Court in Sweden. This question is also under review by the Administrative Court in Stockholm and, as we reported in a previous issue of this publication, it has referred questions to the CJEU (C-7/13).

MoF propose to abolish Swedish VAT groups

The Swedish MoF held a press conference on 20 February 2014 to announce some proposed financial measures intended to take effect during the period 2015 to 2018. As part of this, the MoF proposes to abolish the Swedish VAT grouping rules. The financial measures will be officially announced in the Spring fiscal policy.

Additional details about the proposal have not yet been released. As such, there is a degree of uncertainty about how and when the changes are likely to take effect. However, the press conference statement indicated that the MoF would like the changes to take effect by 1 January 2015.

If the proposal is enacted it will have a substantial impact for all companies and branches that are part of a Swedish VAT group, particularly those in the FSI industry.

Switzerland

As of 1 January 2014, all forms of gold intended for trading are zero-rated from Swiss VAT (with input VAT credit).

Transactions involving banks' precious metals in the form of bars, tags or granules intended to be invested were treated as zero-rated. As things stand, the Swiss VAT Legislation refers to the Precious Metal Control Legislation, which only mentions casted gold bars and not stamped tags. In order to avoid misinterpretation and to ensure that all forms of investment gold will be subject to the same VAT treatment in the future, the Legislation has been amended to clearly state that transactions concerning gold bars or stamped gold tags should be treated as zero-rated.

Jewelry, including chains and rings made of gold, is not considered to be investment gold. Consequently, the trade of such articles in precious metals is treated as subject to VAT.

United Kingdom

Tribunal decision regarding the VAT exemption for payment processing

Way Ahead Group (“WAG”) acts as agent for event promoters. It takes bookings on behalf of the promoters and charges a booking fee and a transaction fee as principal. The transaction fee covers postage and packaging, and has always been treated as standard-rated. The issue in the appeal was the VAT liability of the booking fee. WAG argued that it was exempt, while HMRC considered it was standard-rated.

The main issues examined by the Tribunal were as follows:

- What is the supply or the supplies in question?
- Who is/are the supplier(s)?
- What is the supplier supplying to whom?
- Who is the recipient?
- How should this be characterised for VAT purposes?

The Tribunal has concluded that:

a) There were three supplies: the tickets, the delivery of the tickets, and the handling of payment. There was not one overall supply of ticketing services. After the supply of the tickets (by the Promoter), and the delivery of the tickets (by WAG), the third thing is what was left. This was essentially collecting payment and sending it to the right people. The fact that there was a profit element does not change what the payment was for.

b) The tickets were supplied by the promoter through the agency of WAG. The delivery of the tickets and the payment processing service were supplied by WAG as principal.

c) WAG supplied payment processing services as principal; the consideration for this was the booking fee.

d) The promoter receives the agency services from WAG (as agreed in the contract between the Promoter and WAG). The customer receives the payment processing services.

Following *Bookit* the Tribunal found that the service provided by WAG to customers was a payment processing service. Moreover, the Tribunal distinguishes *AXA*, holding that these services did not constitute debt collection as this was a supply to the customer of payment processing services, not a supply of debt collection to the promoter. Therefore, the booking fee was consideration for an exempt supply.

UK Tax Authorities have updated its guidance on the Cost Sharing Exemption

The UK Tax Authorities have released a VAT manual regarding the cost sharing exemption. The exemption applies when two or more organisations form a cost sharing group ("CSG") to supply themselves with certain services exempt from VAT.

For the most part, the text in the updated guidance remains the same as the previous version. To highlight a few of the main provisions, HMRC are still of the view that:

- the CSG must be an entity separate from its members;
- although there is no explicit statement that the exemption does not apply to CSG's, or members of CSG's, established outside the EU (which the early version did), this position remains implicit in the text which remains;
- the eligibility threshold for becoming a member of a cost sharing group remains the same, i.e. that organisations must be at least 5% exempt;
- members are still required to have a legal interest in the CSG, e.g. a shareholding; and
- The UK Tax Authorities continue with their rules to determine whether a service is directly necessary for an exempt or non-business activity: they have retained the 85% threshold despite the possibility of infraction proceedings against Luxembourg, and they interpret, for these purposes, 'directly necessary' to have the same meaning as used 'exclusively'.

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