

Global FSI Indirect Tax Newsletter Issue No 4



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

Gary Campbell

Partner, Indirect Taxes, Deloitte UK.

Area in Focus: VAT Treatment of Financial Trading Platform Services

Technology has had an immeasurable impact on the financial services industry over recent years. The evolution of the relationship between the two sectors has led to significant developments and opportunities for both the providers of financial services and their recipients. From mobile banking to online portfolio management or currency purchases to peer-to-peer lending, whatever the industry advancement, it can sometimes be a challenge for indirect tax legislation and guidance to keep up with the pace.

Some areas may be relatively straightforward from an indirect tax perspective, such as acting as an intermediary for the provision of finance or transferring cash between accounts (in many territories it is accepted that such services should be treated as exempt). However, one area which is still fairly

contentious in several territories is the indirect tax treatment of financial trading platform services.

A supply of financial intermediary services?

There is a considerable variety of platform services that are provided, both within the business to business (B2B) and business to consumer (B2C) markets. Within the B2B market, trading platforms will often be used by one user to submit bids for products such as FX, equities or other securities. The trading platform system will then match such bids with offers of other users before executing the transaction. Depending on the exact nature of the platform services, there may be scope for such services to fall under the exemption for financial intermediary services.

Due to a high proportion of B2B platform services being supplied cross-border, it will often be the responsibility of the recipient to determine whether or not the services being received are (a) single or multiple supplies, and (b) taxable or exempt. As many platform providers charge fees based on the volume of trades undertaken by the recipient, the values involved are often significant. This makes it important for partly exempt businesses to apply the correct treatment in order to prevent assessments and

penalties from local tax authorities and also to minimise costs where possible.

Although some of the contracts under which platform services are provided may include words such as “software” or “technology”, ultimately, the indirect tax treatment should be dependent on the economic reality of the supply be provided in practice. Therefore, it is important to consider the actual aim being sought by using such services and whether there is scope for exemption to apply.

For reference, we have undertaken a survey on the scope for exemption to apply to trading platform services around the world, the results of which we have provided below, together with some high level comments.

2015 EU place of supply changes

From 1 January 2015, the EU place of supply rules for B2C supplies of certain electronically supplied services (as well as broadcasting and telecommunications services) will change. Currently the place of supply for these services is determined by the location of the supplier but, from 2015, this will change to the location of the consumer. Where qualifying supplies take place, taxpayers will need to consider the correct VAT treatment in the Member State which the consumer belongs.

This could be significant to financial institutions that provide B2C platform-related services, should local tax

authorities consider such services to fall within the scope of the place of supply changes. Deloitte is currently in discussions with the UK Tax Authorities regarding the potential impact that the proposed changes could have on financial platform providers (and suppliers of other services that could fall within the scope of the changes). Please let us know if you have any questions or would like to receive further information on this matter.

Scope to treat trading platform services as exempt?	
Belgium	Potentially
Denmark	Yes
Finland	Potentially
France	Potentially
Germany	Potentially
Italy	Potentially
Luxembourg	Potentially
Malaysia	No
Malta	Yes
Netherlands	Potentially
Portugal	Potentially
Singapore	Potentially
Slovenia	Potentially
UK	Yes

Belgium

Although from a technical perspective there may be scope to treat trading platform services as exempt, in practice Deloitte Belgium has observed that the fees charged by trading platform providers to brokers for access to and the use of the platform are typically subject to VAT.

Denmark

The Danish Tax Board previously issued two binding decisions on this matter which both confirm that the hosting of an internet portal can be treated as a VAT exempt financial intermediary service in certain circumstances. The first decision involved the provision of a ‘crowd funding’ internet portal that allowed investors to invest in businesses in developing

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countries. The second and most recent decision involved the provision of an internet platform which allowed investors to invest in businesses funding app development. In both instances, the investor generated income by reference to a percentage of the revenue earned.

In both cases, the supplier was considered to be acting in an intermediary capacity by bringing two parties together with a view to them entering into a financial transaction (e.g. providing a loan). It should be noted that the supply of pure IT or software services is likely to be subject to VAT.

Finland

This matter has not been considered by the Finnish Tax Authorities and the guidance and legal practice in this area are often contradictory. Although there may be scope to treat certain services as VAT exempt, trading platform services that involve the supply of IT or software are not likely to fall within the financial intermediary exemption, especially if the IT element is supplied separately.

France

The French Tax Authorities have not issued guidance on the VAT treatment of trading platform services in France. Although from a technical perspective there may be scope to treat trading platform services as exempt, Deloitte France considers that the Tax Authorities are likely to take the view that such services do not fall within the VAT exemption for financial intermediary services. In terms of cross border supplies, the French Tax Authorities would typically expect the French-based broker to account for VAT under the reverse charge on the purchase of platform services from overseas providers.

Luxembourg

In certain circumstances, the supply of trading platforms can be treated as a VAT exempt financial intermediary service. However, a service consisting of administrative or IT services, such as the provision of the system, is unlikely to fall within the exemption. It is necessary to consider the nature of the underlying services on a case by case basis in order to determine the correct VAT treatment.

Malaysia

Deloitte Malaysia takes the view, based on the draft legislation and draft guidance available, that the supply of trading platform services will be subject to GST once introduced. The draft zero-rating order in Malaysia states that a supply directly connected with the trading of securities or unit trusts in Malaysia cannot be zero-rated, even if those services are supplied to a person belonging outside of Malaysia. This is different from the treatment applied in Singapore which is outlined below. Any business involved in this activity should consider whether its services are directly in connection with the trading of securities or unit trusts, as this will impact the VAT treatment.

Netherlands

Case on the VAT treatment of outsourcing a multilateral trading facility

The Dutch Court (first judicial entrance) recently ruled that the outsourcing of a multilateral trading facility ("MTF") does not fall within the scope of the VAT exemption for trading in securities or an intermediation exemption for these transactions. A Dutch trading exchange acquired licences, hardware and software from another international exchange. The Dutch exchange also outsourced the operation of the MTF to the same supplier. The services provided by the Dutch exchange to its customers which are

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VAT exempt were not questioned by the Dutch Tax Authorities.

The Court ruled that the outsourced services were limited to technical aspects, which are not specific and essential to the execution (or intermediation) of securities trades. The fact that the outsourced service provider did not have any contact with traders was a relevant factor taken into account by the Court in coming to its judgment. The parties involved are considering appealing the decision.

Although this decision is not binding, Deloitte Netherlands considers that it gives an insight into the view taken by the Dutch Tax Authorities on exemption. The Dutch Tax Authorities did not look at the functionality of the system itself and appear to have followed a stricter approach in applying the VAT exemption for outsourced activities.

Portugal

The Portuguese Tax Authorities have not provided any specific guidance on this matter. However, Deloitte Portugal has observed scenarios where the commission fee charged by the platform provider for executing trades has been treated as exempt. It has also advised on scenarios where the introductory fee charged by financial institutions, for referring clients to providers of trading platforms, has been treated as exempt. To apply this VAT treatment would require an analysis of the nature of the services being provided and the contractual position.

Singapore

In Singapore there is no exemption for financial intermediary services. However, if certain services are considered to be part of an exempt financial service, they may fall within the exemption of the principal supply. The supply of a trading platform is typically viewed as a separate taxable supply, albeit that the

supply could be zero-rated in certain circumstances.

Slovenia

There is no specific guidance in Slovenia on the VAT treatment of trading platform services. On this basis, businesses would need to seek guidance from the Slovenian Tax Authorities in respect of whether or not exemption could apply.

UK

In the UK, there is scope for financial trading platform services to fall under the exemption for financial intermediary services. This applies where the core service provided by the platform is one of bringing together a party that provides financial services and a party that seeks to receive financial services. Depending on the nature of the financial service being provided, it may also be necessary for the platform to perform work preparatory to the execution of the financial contract. As there are many variations to the exact nature of services received from platform providers, recipients that must decide whether or not to apply the reverse charge on such supplies may need to seek clearance on the correct treatment from the UK Tax Authorities, depending on the complexity of the relevant fact set.

EMEA UPDATE

Belgium

The Cost Sharing Exemption (“CSE”) – Taxable Activities of Members

Belgium has implemented the cost sharing provisions in Art.132(1)(f) of the Principal VAT Directive (“PVD”). The provisions allow independent groups of persons to provide VAT exempt services to the members of the cost

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sharing group (“CSG”) without VAT. Consequently, an opportunity exists for partly exempt or non-taxable organisations to share costs and remove certain irrecoverable VAT charges that they would otherwise incur. Previously, members of the CSG were allowed to engage in a limited amount of taxable activities provided that the income generated does not exceed 10% of that member’s annual turnover.

The Belgian Ruling Commission has now ruled that services supplied by a CSG to its members can remain eligible for the VAT exemption if one member breaches the 10% threshold. This decision addresses the different VAT treatment outlined in the Belgian administrative guidelines for CSGs comprising legal personalities compared to the guidelines for those comprising individuals without a legal personality (i.e. non-business). For the latter, the Belgian VAT Authorities’ guidance requires that a majority of the members are either non-taxable persons, VAT exempt or mixed taxpayers. To avoid any discrimination, the Belgian Ruling Commission confirmed that a CSG a legal personality can also have one member whose taxable activities generate more than 10% of its income, without impacting the VAT exemption for the services rendered by the CSG to its members.

Denmark

The Cost Sharing Exemption – Distortions of Competition

Since the CSE was implemented in the Danish VAT Act, Deloitte Denmark has observed a change in the way that the Danish Tax Board judges whether or not a proposed CSG results in a distortion in competition. The Danish Tax Authorities’ guidance states that, for each CSG proposed, an analysis must be carried out to determine whether it could result in a distortion of competition. The arrangement must be refused if there is a risk that the exemption may, immediately or in the future,

result in a distortion of competition. The Danish Tax Authorities’ guidance on this matter is based on the CJEU case Taksatorringen (C-8/01) which established a number of tests to determine whether or not a CSG causes a distortion of competition.

The Danish Tax Board has issued six binding rulings on this matter to date. The initial three rulings allowed the CSE to be applied to a broad range of services including administration of child and youth institutions, IT services provided to unemployment funds, services related to the management of investment funds, fund administration and marketing services. The Danish Tax Board considered that external suppliers providing such services would remain competitive regardless of whether there was a CSG and therefore there was no distortion of competition.

More recently the Danish Tax Board appears to be taking the view that there is a distortion of competition when the services provided by the CSG could be supplied by other third party providers. The three most recent rulings said that there would be a distortion of competition if the proposed CSGs provided database development, legal assistance and cleaning and maintenance services, and therefore the CSGs were rejected.

Finland

VAT treatment of discretionary investment management services

The Finnish Central Board of Taxes (“CBT”) ruled in a recent case (KVL:052/2013) that commission (i.e. brokerage fees) and subscription income derived from discretionary investment management (“DIM”) is subject to VAT, regardless of who invoices for the services. This decision has a number of practical implications as it means that a business providing DIM may be liable to account for VAT on fees charged to the customer by other businesses, including third party providers.

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The CBT also ruled that, in respect of the facts of this case, the inducement payments received by the business could not be considered remuneration for a service and should not be included in its pro-rata calculation. Although this ruling is specific to the facts of the case, it may have wider ramifications in respect of the VAT treatment of inducement payments more generally.

The ruling has been appealed to the Supreme Administrative Court (“SAC”).

Ruling that an insurance portfolio cannot be a SIF

The case (KVL: 053/2013) concerned the VAT treatment of DIM services provided in respect of insurance portfolios. The portfolio’s assets were invested in stocks and other securities. The portfolios related to different insurance products and capital redemption policies provided by the insurance company to its clients. The insurance company retained title to the underlying portfolio assets.

The CBT ruled that insurance portfolios are not special investment funds (“SIFs”). Consequently DIM services provided in respect of them do not fall within the VAT exemption for the management of a SIF.

The ruling has been appealed to the SAC.

Ruling on the VAT treatment of services provided to a closed-end investment fund

The CBT in case (KVL: 003/2014) ruled on the VAT treatment of services provided to a closed-end investment fund. The fund was established as a limited partnership consisting of two partners. The silent partner X was the fund’s only investor and the active partner A Oy was responsible for the management of the fund. The fund did not have any employees and it acquired all the necessary fund management services from a business located outside of Finland.

The CBT considered that the only purpose of the fund was to invest X’s funds. The fund was a closed-end investment fund and, therefore, not a cooperative undertaking as intended in the UCITS directive. As the fund only invested X’s funds it did not directly compete with investment funds that collected funds from the general public. The CBT ruled that the fund was not a SIF and A Oy was liable to account for VAT under the reverse charge mechanism on the services purchased from the overseas supplier.

The implication of this ruling is that investment funds consisting solely of the funds of a single investor cannot be deemed as SIFs.

The ruling has been appealed to the SAC.

Ruling on the VAT treatment of services provided to a closed-end real estate fund

The CBT ruling in (KVL:012/2014) concerned the VAT treatment of services provided to a number of closed-end real estate investment funds that were established as limited partnerships. The case also concerned the VAT treatment of services supplied to the active partners of the funds. The services supplied to the partners related to the establishment and legal requirements of the funds. The other services supplied directly to the fund included the arrangement of the fund’s leasing activities, real estate management and reporting services.

The CBT ruled that the services in relation to the establishment and legal requirements of the funds were directly necessary for the management of these funds, and constituted a specific and essential part of the funds’ activities. The CBT ruled that these services constituted the management of a SIF and should be treated as VAT exempt. The other services were not considered to be specific and essential to the management of a fund and should be treated as taxable.

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Guidance on the VAT treatment of fund management services in Finland has been limited in the past. As such, this ruling provides some useful clarification on what services can be treated as the management of a SIF.

Germany

VAT grouping: clarification regarding organisational integration

Under German VAT law a legal entity that is integrated financially, economically and organizationally into the business of a controlling entity cannot be considered an independent taxable person and mandatory VAT-grouping applies. Transactions between VAT group members are treated as outside the scope of German VAT.

German regulatory law requires businesses operating in the FSI sector to have independent management teams. Until recently it was unclear whether these requirements impacted businesses operating in the FSI sector in respect of satisfying the above organizational integration criterion necessary to form a VAT group. However the German Tax Authorities published a circular on 5 May 2014 stating that the above regulatory restrictions should not impact FSI businesses from being members of a VAT group.

Italy

Ruling on the VAT treatment of fund supervision and control services

The Italian Tax Authorities challenged the exempt VAT treatment applied to supervision and control services provided by a bank. These services were supplied by a depository bank to a number of discretionary investment managers ("DIMs") as part of an overall exempt supply. Following the CJEU decision in the Abbey National case (C-169/04) the Italian

Tax Authorities said that the services provided by the bank should be treated as follows:

- i. Custody and administration services - subject to VAT;
- ii. Management of investment funds services - exempt from VAT; and
- iii. Control and supervision services are subject to VAT.

The ruling court said that, where a number of services carrying different VAT liabilities are provided under one contract, for a single fee, and it is not clear what part of the consideration relates to the exempt activities, an analysis needs to be carried out to determine the portion of the fee that relates to the taxable activity. From the analysis of the facts, the control and supervision activities represented 28.3% of the total consideration. The court said that the banks could charge the assessed VAT to its customers if the contractual position supports this treatment (i.e. if the contracts are VAT exclusive).

The Italian Tax Authorities also said that services which are necessary to determine the value of the underlying shares in a fund, which are sometimes outsourced by a DIM to a third party, could benefit from the VAT exemption as this activity would be a specific and essential function of the management of a mutual fund.

Poland

CJEU case on the point at which a fixed establishment can be created

The AG has released his opinion in the CJEU case of Welmory Sp z.o.o. (C-605/12)) regarding the point at which a fixed establishment can be created for VAT purposes.

The case concerns a Cypriot company, Welmory Limited, which was operating an internet auction site using infrastructure and personnel belonging to Welmory Sp. z.o.o and

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which was located in Poland. The Polish Tax Authorities submitted their view that the services supplied to the Cypriot company were subject to Polish VAT on the basis that it had a fixed establishment in Poland by virtue of its relationship with Welmory Poland.

The AG opined that it was for the national tax authority to determine whether a company has a fixed establishment in its territory. In doing so, it should consider: (i) whether the company has access to human and technical resources; and (ii) whether the company can receive and use services for its economic activity in that jurisdiction.

Whilst these are fairly standard tests to consider if a fixed establishment has been created, the AG's opinion is significant because he commented that it is not a requirement for the company to use its "own" human and technical resources. Instead, it is only necessary to consider if the company has access to third party resources in a way that is "comparable" to accessing its own resources.

If the CJEU agrees with the AG's opinion, this could extend the scope around when a fixed establishment may be created to include situations where a business has control over a third party's resources and can use them as if it were its own. This is likely to be of particular interest to FSI businesses such as high frequency traders that receive colocation services in overseas territories, but may also have wider reaching application across the industry.

Sweden

AG's opinion in Skandia released

The Advocate General ("AG") has released his opinion in the case of Skandia America Corporation USA, filial Sverige (C-7/13) ("Skandia"). The referral to the CJEU from Sweden concerns the VAT treatment of supplies made into and within a Swedish VAT group, where a VAT grouped Swedish branch

of an overseas business used services that the overseas business had procured from third parties.

The AG stated that an overseas establishment can be included in a VAT group, and that (following established case law) "supplies" between a head office and a branch should not be liable to VAT. However, the AG suggests that, where a combination of a branch structure and VAT group leads to "non-taxation", this contravenes EU law. Importantly, the AG does not appear to draw a distinction between services that have been "bought-in" by the overseas business (as is the case in Skandia), and the recharge of the overseas businesses own internally generated costs.

As such, there is a risk that, if the CJEU follows the AG's reasoning, it may be necessary to account for VAT on certain head office "supplies" made into a VAT group, particularly where those "supplies" are used to provide services to other VAT group members. For businesses that cannot recover all their VAT, such as banks and insurers, this would mean an increase in irrecoverable VAT on services supplied cross-border under VAT grouping arrangements.

Whilst we await the decision of the CJEU, businesses with similar arrangements in place should review their situation and consider alternative arrangements. These alternatives may include various cost-sharing mechanisms, business restructuring or potential functional VAT exemptions.

ASIA PACIFIC UPDATE

Malaysia

Introduction of GST in Malaysia on 1 April 2015

The draft GST Bill was tabled in Parliament on 31 March 2014 and passed the lower house on

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7 April 2014 after just two days of debate. The Bill also passed through the committee stage reading with no amendments ensuring that the consumption tax will start at a flat rate of 6% on 1 April 2015.

The draft exempt supplies order (which will be part of secondary legislation and is yet to be gazetted) provides for the exemption of various financial services including, but not limited to, the operation of any bank account, the provision of loans and the trading of securities. The guidance on commercial banking issued by the Royal Malaysian Customs specifically states that a supply of financial services provided in exchange for an interest or spread will be exempt from GST.

However, additional services whereby a basic charge or fixed fee is imposed will be subject to GST at the standard-rate. Examples of such fee-based services would be loan processing, supply of ATM cards and intermediary services in which fees or commissions are being charged (e.g. services consisting of arranging, broking, underwriting and advising).

Similar to the Singapore rules, the draft Bill provides for a Fixed Input Tax Recovery rate ("FITR") so that banks and other approved FSI businesses can recover input tax subject to the FITR, although the rates and the details are yet to be confirmed. With less than twelve months to go, FSI businesses in Malaysia should ensure that they are considering the impact that the introduction of GST will have on their business and are taking the required steps to prepare.

New Zealand

GST refunds for non-residents

A special GST registration regime for non-residents came into effect on 1 April 2014. The regime enables non-resident businesses that do not make supplies in New Zealand to claim GST incurred on goods and services acquired in New Zealand (something that has not been

possible previously). This may be relevant if overseas financial organisations are intending to attend events / conferences in New Zealand in the future, for example, the 2015 ICC Cricket World Cup.

In order to make GST refund claims in New Zealand under the new regime, the expenses must be incurred by a business person or entity that would be considered to be engaged in a taxable activity if its activity were carried out in New Zealand. Financial services are generally GST-exempt in New Zealand, although these services can be treated as taxable in certain situations (e.g. in business to business transactions). Therefore, a bank established in, for instance, the EU, may be entitled to recover a percentage of GST incurred in New Zealand, despite not being considered a taxable person in New Zealand. The claimant will be required to use a fair and reasonable recovery calculation, based on the business activities that the claimant undertakes.

Singapore

Guidance on where a fund is established for GST purposes

IRAS recently issued a revised GST e-tax guide for the fund management industry. Most of the guide has not changed from the previous version, however there is one statement, set out below, which should be considered. Although IRAS is of the view that the statement is not a new position, the fact that it is now in its guidance could result in an additional GST cost for a number of businesses.

The statement (at paragraphs 3.6-3.10 of the guide) reads as follows:

A fund that does not have any employee and administration office of its own outside Singapore and relies wholly on a local fund

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manager to carry on its business activities is treated as belonging in Singapore (i.e. having a Business Establishment (BE) in Singapore) as it is carrying on a business in Singapore through the local FM. Any services provided by GST-registered suppliers (including the FM's supply of fund management services) to the fund should be standard-rated as they are most directly used by the fund's BE in Singapore. However, if the fund conducts its board meetings at a fixed place outside Singapore on a permanent basis such that it gives rise to a Fixed Establishment (FE), the supply of fund management services will be treated as most directly used by the FE outside Singapore.

To illustrate with a few examples:

1) A Singapore FM provides services to a Cayman Islands based fund with its directors located in the Cayman Islands, US and UK. If the directors always hold their board meetings in the Cayman Islands, US or UK, that location would be a fixed establishment outside Singapore. Therefore, the FM should be able to zero-rate its services to the fund on the basis that the FE of the fund is not Singapore;

2) A Singapore FM provides services to a Cayman Islands based fund with its directors located in the Cayman Islands, Singapore and UK. If the directors always hold their board-meetings in different locations, or via video-conference/teleconference, the fund does not have a fixed establishment in a place outside Singapore. Following IRAS's statement, the fund has a business establishment in Singapore through the FM. The FM should charge GST on its services to the fund.

3) A Singapore FM provides services to a Bermuda based fund with the only directors being located in Singapore. If the directors always hold their meetings in Singapore, the business establishment of the fund is Singapore, so the FM services should be subject to GST.

The implication of IRAS' stated position is that some funds will suffer GST on their services, not just fund management, but also other advisory services, e.g. lawyers, accountant's fees etc. Where the fund is a qualifying fund (e.g. under Section 13R, 13X etc of the SITA) or is a trust or REIT investing in qualifying investments (e.g. infrastructure outside Singapore) it should be able to claim back a certain portion of the GST incurred via remission.

Since releasing its revised guidance, IRAS is now seeking to clarify its position in respect of this. For the moment, businesses can choose either to continue to apply zero-rating or to charge GST pending IRAS's confirmation of the position. IRAS has said that if businesses choose to apply zero-rating and IRAS later determines that this was incorrect, IRAS may, on a case-by-case basis, waive the penalties that would ordinarily be levied because of the under-charge.

Taiwan

Taiwan Ministry of Finance issued a proposal to change the rate of business tax for the FSI sector

The Taiwan Ministry of Finance recently proposed that the business tax rate ("BTR") should remain at 2% for enterprises engaged in supplying investment trusts, securities, futures, commercial papers and pawnshops. The BTR will revert to 5% for all other operations which are not connected exclusively with these businesses. In addition, the rate will increase from 2% to 5% for authorised businesses in the banking and insurance industry. The proposal has been approved by the Executive Yuan and is currently under review by the Congress.

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