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FSI Indirect Tax News
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 couldn't issue this newsletter without first commenting on Brexit. Clearly nothing will change in the short term, but the consequences of the UK leaving the EU from a taxation perspective are significant, in particular for indirect tax, which is an EU harmonised tax. Within organisations, a number of people outside of the tax teams are already asking questions on some of the likely impacts, particularly in terms of likely specific changes, and plans for addressing those matters.

The UK tax authorities issued its response to the outcome of the referendum on 24 June stating that there will be no immediate change to the movement of goods and people in and out of the UK from the EU until Article 50 is invoked, it will continue to engage with EU business as normal and be engaged in EU decision-making in the usual way. Nevertheless, there is still a lot of uncertainty surrounding the likely impact of the vote. We have been holding, and will continue to hold, client webcasts and briefing calls to ensure that you are as well informed as you can be on the potential implications. Please contact your regular Deloitte contact or any of the contacts listed at the end of this newsletter if you would like to be kept informed of future events.

In the meantime it is business as usual and we hope that you find the publication useful. Should you have any comments or questions arising from the newsletter, please speak to your usual Deloitte contact or one of the **regional FSI leaders listed below**.

Kind regards
Gary Campbell
Global Indirect Tax FSI Leader

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Area in focus – The effect of the CJEU judgment in *Aspiro* (C-40/15) on the VAT exemption for insurance and insurance related services

On 17 March 2016, the CJEU judgment was delivered in the Polish case *Aspiro* (formerly BRE Ubezpieczenia) (C-40/15). The Court confirmed that in order to access the VAT exemption, the services provided by Aspiro needed to fall within the definition of either "*insurance transactions*" or "*related services performed by brokers and agents*".

Background

Aspiro provided insurers with claims handling services including (but not limited to):

1. receiving and processing of claims of damages covered by insurance;

2. keeping records of damages in the IT system, including updates of such records;

3. determining causes and circumstances of accidents, including organising and conducting inspections of objects and locations of accidents, preparation of documents and other activities necessary to establish liability for damages;

4. conducting necessary correspondence with customers, including the fulfillment of obligations provided by law with respect to notifying the insured, keeping correspondence with other entities whose position is essential in the process of settling the claim;

5. technical evaluation and possible additional assessments in the case of motor insurance claims and preparation of damages reports;

6. providing detailed information about the process of settling the claim, including the rules of conduct in case of damages, the required documents and entitlements;

7. conducting recourse proceedings, excluding litigation; and

8. preparation of transfers and remittances in the computer system.

The Court confirmed that the services provided by Aspiro were not "*insurance transactions*", as the taxpayer had no contractual relationship with the insured party and it did not itself cover any risk.

With regard to "*related services performed by brokers and agents*", the decision appears to reconfirm the key point in *Arthur Andersen* (C-472/03); that this aspect of the exemption is available only to service providers that perform the activities of insurance agents or brokers, which are described in the decision as "*the finding of prospective clients and their introduction to the insurer*".

Below, we look at how the case has had an impact on several EU countries.

Denmark

Denmark has followed the consequences in *Arthur Andersen* quite strictly, and since 2003 it has upheld the position that claims handling is exempt only if supplied by an agent (or other intermediaries). However, *Aspiro* brings clarification to which services, other than claims handling, fall within the exemption when supplied by an agent to an insurance company or to the industry.

Since the core question in *Aspiro* has given confirmation to Danish case law, we do not expect further comments from the Danish tax authorities.

Finland

In Finland, the VAT exemption for insurance services is more extensive than the respective exemption in the VAT Directive. The Finnish VAT Act includes a comprehensive list of services that can be deemed exempt insurance related services and claims handling is included in that list. Claims handling is regarded as an exempt insurance related service regardless of whether the supplier is an insurance broker or agent. In addition, the supplier's relationship with both the insurer and the insured party is not a prerequisite for the exemption to apply under the Finnish VAT Act.

However, as the exemption for insurance services is already more extensive than the respective article of the VAT Directive, a narrower interpretation must be applied. Therefore, services of an auxiliary or preparatory nature, such as providing computer services for claims handling, are not considered exempt insurance related services.

We are not expecting significant immediate changes as a result of the CJEU decision in *Aspiro* as claims handling is specifically mentioned as an exempt insurance related service in the Finnish VAT Act. It is, however, possible that the Finnish regulations will be amended in the future to correspond to the VAT treatment established in the CJEU ruling.

Germany

The current VAT treatment of claims handling services in Germany is in line with the *Aspiro* judgment and so there should be no effect in Germany. We therefore understand the German tax authorities will not be issuing a response.

Italy

The Italian tax authorities (ITA) have not released any comment on the possible implications of the CJEU judgment in *Aspiro*.

The situation is currently unclear in Italy. The ITA have come to differing conclusions in two claims handling cases: (1) that the services supplied by the claimant company qualified as a generic supply of services subject to VAT; and (2) that the services provided by an insurance intermediary/broker (handling of claims with decision making), qualified for exemption as an 'insurance intermediation activity'.

Luxembourg

The Luxembourg tax authorities have not issued any guidance or letters following the CJEU's decision in *Aspiro*. However, this case should not have an effect on the VAT treatment of claims handling services in Luxembourg, since it is consistent with the current Luxembourg VAT practice.

Netherlands

In the Netherlands, claims handling services are taxable where these services are outsourced to a third party. In contrast, claims handling services provided by insurance brokers are exempt. The judgment of the CJEU in *Aspiro* appears to be consistent with the current Dutch VAT practice for claims handling services outsourced to third parties.

Based on this case the Dutch tax authorities could take the position that claims handling services are not sufficiently linked to intermediary services and this may affect the current guidance on the VAT treatment of claims handling services provided by insurance brokers. However no official guidance has been published yet.

Portugal

In Portugal, the impact of the CJEU's decision in *Aspiro* is unknown. No guidance has been issued by the Portuguese tax authorities (PTA) as a consequence of the CJEU's judgment and, in our experience, it is unlikely that the PTA will issue any specific guidance.

The PTA consider that only taxable persons which are legally authorised to perform insurance operations and insurance related services are eligible for the exemption. The PTA's interpretation is that only services supplied by regulated entities in accordance with the national legislation constitute insurance related services. This means that service providers that perform the activities of insurance agents or brokers, as described in the CJEU's decision as "*finding of prospective clients and their introduction to the insurer*", if not properly regulated, cannot benefit from the exemption.

In any case, the main insurance companies perform these kinds of services internally. Other entities like Aspiro, which are not insurance companies, treat such services as taxable, which is in line with the CJEU's judgment. However, insurance companies do carry out similar services to the ones performed by Aspiro, in relation to the Green Card System. Currently, insurance companies are considering such services as exempt, and not reverse charging VAT when acquiring such services from foreign insurance companies and not considering them as giving the right to recover VAT when provided to foreign insurance companies. This is an area the PTA may review as a result of the *Aspiro* judgment.

Sweden

The current practice in Sweden is in line with the CJEU's judgment. Consequently there have not been any guidelines published by the Swedish tax authorities and we do not foresee that the case will have any effect on the VAT treatment of claims handling services.

UK

In the UK, the domestic law and the UK tax authorities' (UKTA) current interpretation of the exemption for insurance intermediary services is not in line with either this decision or that in *Arthur Andersen*. The UK law allows exemption to apply to claims handling or to assistance with the administration of insurance policies in scenarios where the supplier had no involvement in the sale of the underlying insurance policy.

The UKTA have stated in their published guidance that, in the light of the *Arthur Andersen* judgment, they accept the UK exemption for insurance related services is drawn too widely. However, they decided to defer any changes to UK legislation whilst the European Commission was undertaking a wider review of the financial services exemptions in the VAT Directive. That review is no longer ongoing.

The UKTA's published position remains that "amendments to the law will be made in due course" and the timing of the *Aspiro* decision and the Commission's review coming to a close mean it is possible that the UKTA will review their position in the near future.

However, as a result of the UK's recent vote to leave the EU, the UKTA could now be under less pressure to implement the *Aspiro* judgment and will likely hold off doing so whilst the negotiations with the EU are taking place. We expect this will delay/abolish the expected consultation on the VAT exemption for claims handling and policy administration. Therefore the timing and nature of amendments to any guidance or the UK legislation remains uncertain.

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Asia Pacific

Malaysia – Extension to the Fixed Input Tax Recovery rate

Malaysian Fixed Input Tax Recovery rates (FITR) are set by the Ministry of Finance (MOF) and are subject to annual revision. The MOF has extended the FITRs granted for the inaugural year (period spanning 1 April 2015 to 31 March 2016) until 31 December 2016:

Institution Type	Rate
Commercial Banks	70%
Investment Banks	78%

Please note:

- Failure by banks to comply with the above is an offence and the general penalty under the GST Regulations applies.

- In relation to the determination of the FITR rate after 31 December 2016, the banks must submit an application to the MOF at least three months before the expiry of the above FITR rate adopted. The application must be made based on the audited financial statements for the period of three years in arrears. The applications are handled by the respective industry associations.

- Labuan licensed banks are not eligible for a FITR and are required to follow the normal partial exemption rules for determining input tax recovery.

Malaysia – Updates to the Fund Management Guide

The Royal Malaysian Customs Department (RMCD) has been continuously updating its GST guides to align with the changes in the law and/or their understanding. There have been some recent updates to the Fund Management Guide as follows.

Sharia advisory service

In the previous version of the Guide, the RMCD was of the view that the provision of Sharia advisory services in relation to a Sharia based unit trust or Islamic Real Estate Investment Trust was not a supply and therefore not subject to GST.

However in the revised Guide, the RMCD has now updated its view to state that Sharia advisory services are in fact subject to GST.

The above change puts the Sharia advisory services on a par with conventional advisory services whereby both are considered as standard-rated supplies and subject to GST.

Local fund manager appointing a foreign fund manager to manage foreign investment portfolio

In the previous version of the Guide, the RMCD was of the view that where a local fund manager appointed a foreign fund manager to manage an overseas investment portfolio, then the services provided by the foreign fund manager would be considered an outside the scope supply and not subject to GST.

However in the revised Guide, the RMCD has updated its view that the service provided by the foreign fund manager is an 'imported service' provided to the local fund manager and the local fund manager has to account for GST under the reverse charge.

Although not clearly stated, the underlying assumption with the above is that the local fund manager is the one who directly contracts with the overseas fund manager and not the fund. On the basis this holds true and the local fund manager acquires the services for the purpose of the business it operates in Malaysia, then the views expressed by the RMCD appear to be valid.

Singapore – Zero-rating of insurance brokerage

In Singapore, brokerage and the arrangement of reinsurance contracts is exempt from GST, while brokerage and arrangement of direct insurance contracts, including life policies, is taxable. If the brokerage service is provided to an insurer that 'belongs' outside of Singapore, the commission fee should qualify for zero-rating.

For regulatory purposes, overseas insurers are generally required to create a branch in Singapore in order to issue policies to Singapore residents.

Recently, the Inland Revenue Authority of Singapore (IRAS) has been targeting insurance brokers who zero-rate commissions charged to overseas insurers that have a Singapore branch. The IRAS's position is that the commission charged by a broker to an overseas insurer would not qualify for zero-rating if the underlying insurance premium is booked by a Singapore branch of the overseas insurer (i.e. the IRAS views the brokerage services as being provided to the Singapore branch, rather than an overseas establishment of the insurer).

We have seen increased IRAS audit activities in this space and insurance brokers should take steps to review the GST treatment of their commission fees (and rebates).

Singapore – GST audits targeted at the FS industry

The IRAS has been increasing its GST compliance audits on large companies; and letters relating to GST audits, Assisted Compliance Assurance Program (ACAP), and Assisted Self-Help Kits (ASK) are being issued.

We have recently seen two types of letters issued by the IRAS:

- Audit/ACAP Letters: the IRAS selects the taxpayer for a GST audit, unless the taxpayer voluntarily opts for an ACAP review instead of the IRAS audit; and

- ACAP/ASK Invitation Letters: the IRAS invites the taxpayer to perform an ACAP review; or requests the taxpayer to perform an ASK review, but with an option to opt for ACAP instead.

Unlike earlier ACAP/ASK invitations, IRAS is now targeting taxpayers from the financial services industry, and recently, a large number of our clients in the financial services industry have received these letters. The expectation is that GST audit activities will increase; and more GST audit, ACAP and ASK letters will be issued to taxpayers in the industry.

Given recent trends, our recommendation is to take a proactive, rather than reactive approach in relation to GST audits/reviews.

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EMEA

Finland – Decision on the VAT treatment of special investment funds

The Finnish Supreme Administrative Court (SAC) has ruled on the VAT treatment of investment fund A Oy, which was a joint-stock company.

The investment fund had five shareholders who had invested into the share capital and non-tied equity of the investment fund. Albeit it was a joint-stock mutual fund, A Oy was not regarded as a collective investment fund within the meaning of the UCITS Directive nor an alternative investment fund within the meaning of the Alternative Investment Fund Managers Directive.

According to the SAC, only an investment fund which is subject to specific State supervision may be deemed to be a special investment fund in accordance with the VAT Directive. Therefore, the management services that A Oy purchased were not VAT exempt management services of a special investment fund.

Germany – VAT treatment of negative interest

Some banks deduct negative interest from deposits held by certain customers. The services supplied by the bank to the respective customer consist of the custody of the account balance and the administration of the deposit account. Provided the bank charges a fee and/or deducts a negative deposit rate in return for these services, the fee or the negative deposit rate is to be regarded as consideration for a supply for VAT purposes, albeit an exempt supply. Therefore, any input VAT to be attributed to such services cannot be deducted.

If the bank supplies the corresponding service to another taxable person using the services for business purposes, the bank is entitled to waive the exemption under the German VAT Code. If the exemption is waived, the fees charged and/or negative deposit rates deducted will not have an adverse effect on the bank’s input VAT position.

Germany – CJEU judgment in partial exemption case

The CJEU has released its judgment in the case of *Wolfgang & Wilfried Rey* (C-332/14), which confirms that a partial exemption special method (PESM) may be used where it “guarantees a more precise result” than the standard method.

Wolfgang & Wilfried Rey concerned a partial exemption method for a mixed-use commercial and residential development. Applying a standard turnover method, the taxpayer had claimed 78% recovery on construction costs, by reference to its taxable commercial rents and exempt residential rents. However, the German tax authorities preferred a floorspace-based method which resulted in 38% recovery.

The CJEU held:

1. National legislation may allow taxpayers to treat inputs as residual wherever it would be excessively complex to attribute them directly (although the CJEU thought it would normally be fairly easy to identify direct attribution in the case of mixed-use buildings).

2. The CJEU endorsed *BLC Baumarkt* (C-511/10) on when a PESM should be used for any residual input tax which was not directly attributed – a method must "guarantee a more precise result" than the standard method. The CJEU then simply concludes that it is for the national court to decide whether, in this case, floorspace would provide a more precise result than turnover. There are no clear indications about whether the CJEU thought that it would. For example, a detailed cost analysis might demonstrate that the incremental cost of building the apartments was relatively small, even though the associated floorspace was 62% of the entire building. The judgment does not provide much background to the case, but there could be many arguments why a simple floorspace method does not "guarantee a more precise result" than turnover. The CJEU has left the referring court with further thinking to do.

3. The CJEU considered two further questions, albeit their conclusions on these do not seem surprising:

   a. Where the method of input tax calculation changes, this is because it produces a more accurate result and should therefore also be used in any adjustment calculations (e.g. an annual adjustment).

   b. The change in method does not infringe principles of legal certainty or legitimate expectations.

Italy – VAT recovery for holding companies

On 30 March 2016, the Italian tax authorities issued some guidance on the tax treatment of Leveraged Buy Out (LBO) transactions. The guidance clarifies the tax treatment of specific income items that may arise in complex LBO transactions, such as the fees that may be charged to the special purpose vehicle (SPV).

The guidance states that the input VAT incurred on these fees is not recoverable by the SPV if its only activity is to hold shares, as a mere holding company that does not carry out a business activity within the meaning of Italian VAT law.

UK – Draft guidance on pension scheme VAT recovery

The UK tax authorities (UKTA) have published draft guidance which updates the VAT Input Tax and VAT Finance guidance manuals in respect of the CJEU judgments in *PPG* (C-26/12), *ATP* (C-464/12) and *Fiscale Eenheid X* (C-595/13). The draft mainly incorporates and expands on changes in VAT treatments announced in previous guidance issued by the UKTA.

The draft guidance is not yet finalised as the UKTA have still not reached a policy position on a number of issues in relation to *PPG*. One key unresolved issue relates to the UKTA's concept that Investment Management (IM) services could have a 'dual use' in situations where the Trustee has an 'investment activity' (e.g. it owns securities which are bought and sold on its behalf), and either:

a. the IM services are supplied to the Trustee in the course of an on-supply arrangement where the Trustee provides a 'running the scheme' service to the employer; or

b. the IM services are provided to a VAT group including both the Trustee and the employer.

In addition, the UKTA are yet to confirm their position on the accounting and UK corporation tax treatment of payments made by an employer. The key issue is when the employer's payments could be regarded as relating to IM services – hence representing a "*cost of managing plan assets*" for accounting purposes. Such accounting treatment will typically mean that there is no Profit and Loss expense for the cost – and hence no corporation tax deduction.

In order to resolve these outstanding points, UKTA have set up a '*PPG* Input Tax Working Group' to address all outstanding issues and reach workable solutions. Deloitte is represented in the Working Group.

UK – CJEU judgments in payment processing cases

The CJEU has delivered its judgments in the cases of *NEC* (C-150/15) and *Bookit* (C-607/14). The cases concerned the VAT treatment of fees charged by the NEC and Bookit and whether they were exempt from VAT as payments for handling debit and credit card payments.

NEC sold tickets for concerts and other events as a disclosed agent for unconnected third party promoters. NEC charged the customer a 'booking fee' on each ticket sold and a separate 'transaction fee' on each transaction (regardless of number of tickets sold). The transaction fee was for 'fulfilment', i.e. for postage and packing of tickets and was treated as standard-rated for VAT purposes. The issue in the litigation was the VAT liability of the 'booking fee'. NEC considered that it was exempt as a "*transaction … concerning … payments, transfers*" (under Article 135(1)(d) of the Principal VAT Directive), while the UKTA argued it was standard-rated.

Bookit also sold tickets for its principal (a cinema operator) and charged a 'booking fee' on each ticket sold, which they also considered to be exempt. However, Bookit was a wholly owned subsidiary of the cinema chain and therefore, unlike NEC, had a corporate connection with the principal supplier of the ticket.

In the CJEU's view, the activities, which included obtaining card details from the customer, transmitting these to the merchant acquirer, receiving authorisation codes and preparing and submitting the settlement file as a result of which the payment was made, could not together be taken to be a "*specific, essential function of a payment or transfer transaction*". The CJEU commented that the settlement file was just a "*demand for payment in electronic form"* and the authorisation code was "*only authorisation to proceed with the sale*", and therefore neither constituted a "*specific, essential function of the transfer of ownership of the funds in question"*.

In both cases, the CJEU decided that the fees charged fell outside the scope of the EU law exemption for "…*transactions … concerning … payments, transfers …*" and it follows that they were subject to VAT at the standard rate.

UK – Exempt supply of banking services

The UK's Upper Tribunal has dismissed an appeal of an earlier decision and agreed that there was a VAT exempt supply of 'banking services' by ING Direct when it accepted deposits and paid interest on them. The Upper Tribunal rejected the bank's arguments that the telephone and internet facilities used by customers to operate their deposit accounts and the provision of cheque deposit facilities, account statements, etc., were provided free by the bank, and so did not involve supplies made by the bank to its depositors for VAT purposes. The earlier decision being appealed had concluded that the facilities amounted to supplies for (non-monetary) consideration paid by the depositors and that the consideration was capable of being given a monetary value (by a variety of means). The conclusion that the bank was making exempt supplies meant that its claim for a refund of some of the VAT incurred on securing the deposits was unsuccessful.

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