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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 hope that you find the publication useful and we welcome your feedback. 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 – Overview of VAT grouping rules

The Court of Justice of the European Union's judgment in *Skandia* (C-7/13) significantly impacted the opportunity for businesses to structure their activities through VAT grouping. The guidance that has been released following the judgment in most cases depends on how each EU Member State considers the VAT grouping rules to apply in their territory. It quickly became clear that VAT grouping rules are not harmonized on an EU level (and also in non-EU jurisdictions, if applicable).

In addition, different approaches are adopted by the tax authorities with regards to VAT grouping. For example, over the past couple of years, we have seen a change in the UK Tax Authority's attitude to the inclusion of branches of overseas service companies within UK VAT groups. Experience suggests that any new applications for VAT grouping are frequently met with very high levels of scrutiny.

An overseas company must have a UK fixed establishment (FE) in order to be included in a UK VAT group (along with other VAT grouping conditions). The UK FE can be constituted via a UK branch of the overseas company, provided that the UK branch meets the requirements for a FE to exist. By the inclusion of a UK branch into a UK VAT group, the entire overseas entity becomes a member of the UK VAT group. The existence of a UK FE for VAT purposes depends on the nature of the parties and services in question. In order to be considered a FE and consequently as the supplier/recipient of services, EU and UK rules stipulate that an entity needs to have sufficient substance in terms of 'permanent human and technical resources'.

Given the lack of harmonization of VAT grouping rules at an EU level and the different approaches from the tax authorities in this regard, it may be useful to see some general information on VAT grouping rules from different jurisdictions.

Please see attached a document containing a snapshot of VAT grouping rules applicable in a number of countries.

Asia Pacific

China – New Guidance on VAT in the FSI industry

After the issuance of Circular 36 – the general VAT reform guideline – the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) have been collecting feedback from taxpayers in specific industries and have, accordingly, issued several circulars and bulletins.

The MOF and SAT jointly issued guidance [Caishui [2016] No. 140 (Circular 140)] on 21 December 2016 that clarifies the VAT treatment for certain financial transactions as follows:

1. Income derived from the holding of financial products

Circular 140 clarifies that interest (including income of the same nature but differently named, such as 'principal-guaranteed returns', 'fund usage fees', etc.) derived from the holding of financial products where the principal can be fully recovered when the financial product reaches maturity, is subject to VAT under the category 'loan services'. However, if the recovery of the principal is not guaranteed, the income received is not considered as interest income and therefore not taxable for VAT purposes.

This should provide more certainty to taxpayers and standardise the practice of determining whether income derived from the holding of financial products should be treated as interest for VAT purposes. However, it is still unclear whether and how the financial accounting treatment will impact this issue, as in practice, some tax authorities tend to determine the nature of income by reference to its accounting treatment. Disputes potentially could arise for certain income that is recorded as 'interest income' in a taxpayer's books even if the recovery of the principal cannot be guaranteed according to the relevant contract.

Similarly, the main guidance on China's VAT reform (i.e. Circular 36) provides that if the investment income is fixed or guaranteed, the income should be considered interest income and thus subject to VAT. However, it is not entirely clear how to determine whether income is 'fixed or guaranteed', e.g. in cases where the income is computed on the basis of a floating interest rate, whether the income will be considered fixed or guaranteed and whether its accounting treatment will be taken into consideration is still unclear.

2. Held-to-maturity financial products

A long-disputed issue is whether the redemption of financial products (e.g. bonds) when they mature should be considered a 'transfer of financial products' that would be subject to VAT at 6%. Circular 140 clarifies that such a redemption is not a transfer of a financial product for VAT purposes and so not subject to VAT. However, any interest income derived from holding the financial product is still subject to VAT at 6%.

3. Overdue interest

Circular 36 generally provides that a VAT liability will arise when an interest payment becomes due. However, if the interest is overdue for at least 90 days, interest accrued after the 90-day period will be subject to VAT when it is actually received by qualified financial enterprises (e.g. banks).

Circular 140 expands the scope of 'qualified financial enterprises' to include securities firms, insurance firms, finance leasing companies, securities investment funds, fund management companies and other enterprises that are authorised to engage in a financial business by one of the four government regulators (i.e. People's Bank of China, China Banking Regulatory Commission, China Securities Regulatory Commission and China Insurance Regulatory Commission).

It is worth noting that certain taxpayers, such as micro-credit companies and pawnshops, are authorized to provide loan services by government departments other than the above regulators. Technically, these taxpayers cannot apply for the above VAT treatment.

4. Taxable person of asset management products

Circular 140 provides that the asset manager of an asset management product should be considered as the taxable person for VAT purposes.

There has been no clear guidance on which party should be considered the taxable person of the plan and be responsible for handling the various VAT filing issues in the operation of the plan. The clarification made by Circular 140 seems to significantly increase an asset manager's VAT compliance burden.

Nevertheless, there are some outstanding VAT issues:

- Even if the asset manager is considered the taxable person in relation to an asset management product (i.e. an investment plan), should the product (or the plan) be regarded as an entity distinct and separate from other plans (managed by the same manager) or the manager itself for VAT purposes? If so, the output VAT of a plan cannot be offset by input VAT incurred by other plans (managed by the same manager) or the manager.

- Should the VAT invoices of professional firms (e.g. law firms or accounting firms) or underwriters that provide services to the plan be addressed to the plan or to the manager? Should VAT invoices for management service fees charged by the asset manager to the plan be issued by the manager to itself; and if so, can the input VAT be recovered by the manager?

- Should the investment income be subject to VAT in the hands of the investors after the distribution?

5. Pre-reform losses from trading of financial products

According to Circular 140, any losses incurred on the trading of financial products during the period January-April 2016 (in which Business Tax, instead of VAT, still applied) may be carried forward to offset the trading gains derived during the period May-December 2016 for VAT purposes.

Before the VAT reform, the taxable base of trading of financial products for Business Tax purposes was computed by offsetting the gains and losses of each taxable period within the same calendar year. It is unclear whether the same method applies after the VAT reform. In particular, Circular 140 does not address the following situations:

- If a taxpayer derived trading gains during the period January-April 2016, and incurred losses during the remainder of 2016, can the taxpayer apply for a refund of Business Tax by offsetting the gains and losses for the two periods?
- If a taxpayer derived trading gains during the period January-November 2016 and incurred losses in December, can the taxpayer apply for a refund of VAT by offsetting the gains and losses?

6. Finance leasing business

According to Circular 36, finance leasing companies who are approved by the competent government authorities (e.g. the People's Bank of China, China Banking Regulatory Commission, Ministry of Commerce) are allowed to deduct certain items from their gross revenue for VAT purposes.

Due to the recent regulatory relaxations, formal approval may not be required to set up a finance leasing company; instead, a filing requirement with the relevant government authorities may apply. Circular 140 confirms that these companies are eligible for the above VAT treatment even though they have not received formal approval.

Malaysia – Deemed Input Tax Credit narrows for insurers

The Goods and Services Tax (Amendment) Regulations 2016 amend the GST Regulations and came into effect on 1 January 2017.

The amendment makes it clear that insurers would not be entitled to claim a Deemed Input Tax Credit (DITC) for any cash payments that relate to items that would be considered a blocked expense under the Goods and Services Tax Act 2014 (e.g. medical expenses).

Although few insurers were claiming DITCs, this further narrows the scope of the concession.

Malaysia – Fixed Input Tax Recovery rate process changed for banks

Effective 1 January 2017, the process for assigning a Fixed Input Tax Recovery (FITR) rate by the Minister of Finance was changed for commercial and investment banks. Previously, a rate was issued taking into consideration the license held by the respective bank, however this has now been moved to an individual bank rate.

There has been a significant variance amongst the rates assigned, with some banks receiving rates as low as 5% and many well below the previously assigned rates of 70% for commercial banks. The Minister of Finance has advised banks to go through their respective associations for any queries on the method of calculating the FITR rate.

The new process will require rates to be updated on an annual basis and banks would need to individually submit data to the Malaysian Tax Authorities each year to be approved by the Minister of Finance.

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EMEA

European Union – Advocate General opines on *DNB Banka* (C-326/15) and *Aviva* (C-605/15) cases

Advocate General (AG) Julianne Kokott has released her opinions in two cases concerning the cost sharing exemption, which should allow a cost sharing group (CSG), established by organizations that cannot recover VAT, to exempt supplies it makes to its members.

In *DNB Banka*, she suggested that the exemption in the Principal VAT Directive (PVD) could be relied upon directly by taxpayers, even if had not been transposed into national law. However, the CSG had to be an entity that was potentially a taxable person in its own right – *DNB Banka* could not claim the exemption based only on common membership of a corporate group. In her view, the exemption should only apply to public interest exemptions and was not available to financial services organizations.

In her opinion in *Aviva*, AG Kokott elaborated on her views of the scope of the cost sharing exemption. The original proposal for the exemption had been limited to CSGs that supported doctors. By the time the Sixth Directive was adopted in 1977, the wording of the exemption had been extended to include CSGs that supported any organization that could not recover input tax. However, the exemption remained within (what is now) Article 132 PVD, which concerns exemptions granted for public interest reasons (such as healthcare and education). In the scheme of the Directive, AG Kokott suggested that the CSG exemption operated as an extension to the public interest exemptions, and there was no basis to extend it to businesses in the insurance sector (and other sectors which claim exemption under Article 135 PVD).

Denmark – New guidance on the condition for direct reimbursement of costs in independent groups

The Danish Tax Board ("DTB") do not accept the VAT exemption for cost sharing groups in a situation where the costs are reimbursed according to a cost-plus method based on transfer pricing regulations. This was established in a recent binding ruling from the DTB.

Even though the Court of Justice of the European Union ("CJEU") is expected to answer the question in the case C-326/15, DNB Banka, the DTB issued a binding ruling regarding the condition for direct reimbursement of costs and the link with transfer pricing rules towards the end of 2016. The independent group was a foreign VAT group, and one of the members was in a Danish VAT group with insurance activities. The foreign VAT group supplied services and was reimbursed based on the cost plus method.

The DTB did not agree that the supply of services could be VAT exempt as supplies within a Cost Sharing Group. The conclusion was entirely based on the fact that the group would be reimbursed according to a cost-plus method, which was applied for direct tax purposes. The DTB found that the application of a margin – no matter for what reason – did not allow the independent group to qualify for the VAT exemption.

It will be interesting to see how the CJEU rules in the DNB Banka, Aviva and the Commission vs. Germany cases, and whether the DTB will need to revoke their position regarding this VAT exemption.

Denmark – VAT treatment of the transfer of an insurance business

A transfer of an insurance business, where the transferring entity has ceased trading and includes personnel in the transfer, qualifies as an outside of scope transfer of a going concern for VAT purposes.

Since the CJEU case of *Swiss Re* (C-242/08), where it was stated that the transfer of an insurance portfolio does not qualify as a VAT exempt insurance transaction, there has been great uncertainty in Denmark as to whether the transfer of insurance contracts or the whole business would be subject to VAT.

However, it has now been established by the Danish Tax Board (DTB) that a transfer of insurance contracts, in certain scenarios, does qualify as a transfer of going concern which is disregarded for VAT purposes.

The ruling was given on the grounds that:

- The transferor ceased to carry out activities related to the transferred contracts and
- Both personnel and contracts were transferred.

It was also settled that it was not a condition for the transfer to be considered a transfer of going concern that the continuing business was registered for VAT. According to the wording of the Danish VAT Act, it is a condition for a transfer of a going concern that the transferee is registered for VAT. This should, according to the DTB, be interpreted as only being a condition for partly or fully taxable businesses.

This binding ruling brings certainty to many transfers of contracts; however, there is still a risk that VAT is applicable in respect of a pure transfer of contracts.

Denmark – VAT treatment of financial contracts with electricity as underlying asset

With reference to the case of *Granton Advertising* (C-461/12), the Danish Tax Board (DTB) decided that a Danish company which independently from an electricity supplier guarantees a maximum price for the purchase of electricity is supplying a financial contract which is exempt from VAT on the basis that the contract did not give a right to or establish a title to the goods (i.e. electricity).

The company guaranteed that the customer would not pay more than a maximum price for its electricity. The customer purchased electricity according to an independent contract with an electricity company. The price according to this contract would fluctuate according to the market, and the customer would need to settle the electricity according to the market price. In order to mitigate the risk of increasing prices, the customer would enter into a separate contract with the supplier of a financial contract on electricity. If the price were to increase above the agreed maximum, the company supplying the financial contract would refund the spread between the market price and the agreed maximum.

Finland – Supreme Administrative Court decision on the VAT treatment of payment related services

On 3 February 2017, the Supreme Administrative Court (SAC) issued a ruling in relation to the VAT treatment of services provided by Company A to a bank where a merchant made an agreement for accepting card payments with the bank, which consisted of following:

- Setting up the merchant to the acquiring system of Company A
- Authentication requests of the card payment transactions via Company A's system to Visa and MasterCard
- Sending the response received from Visa and MasterCard to the merchant's payment terminal
- Receiving the information on the card payment transactions provided by the merchant at the end of the day
- Preparing an accounting message for the transfer of funds and forwarding it to Visa and MasterCard
- Calculating the settlements and service fees and preparing a payment file delivered to the bank.

Charges and settlements between the merchant and the bank were realised via the payment file without input from the bank, but money did not pass through the bank accounts of Company A.

According to the ruling, the acquiring services were, in this case, considered to form a distinct whole and fulfill in effect the specific, essential functions of a financial service. Since the services provided factually had the effect of transferring funds and entailed changes in the legal and financial situation, they were deemed to be exempt financial services. Therefore, the bank acquiring the services was not required to account for VAT under the reverse charge mechanism for the services received from Company A.

Finland – Unofficial update on CJEU's judgment in *Skandia* (C-7/13)

According to an unofficial update, the Finnish Tax Authorities (FTA) are currently having discussions concerning the implementation of the CJEU's judgment in *Skandia* (C-7/13) with the Federation of Finnish Financial Services and the Finnish Ministry of Finance. Further, the FTA are preparing draft guidance. According to the update, *Skandia* will not be implemented retrospectively, but the duration of the transition period is still open for discussion. The exact manner in which *Skandia* will be implemented is also partially open.

Germany – VAT treatment of sale and leaseback transactions

Following the Supreme Tax Court's (STC) judgment of 6 April 2016 (V R 12/15) regarding the VAT treatment of certain sale and leaseback transactions, the German Tax Authorities (GTA) have adjusted the German VAT Application Decree.

Currently, sale and leaseback transactions are treated as the exempt provision of finance by the 'lessor' to the 'seller/lessee' if the right to dispose of the asset sold and leased back remains with the 'seller/lessee'. However, according to the STC's judgment, the exemption for the provision of finance services does not apply under these conditions, if the sale and leaseback transaction has been undertaken to enable the 'seller/lessee' to capitalise an (intangible) asset which the 'seller/lessee' produced or developed himself (according to Section 5 para. 2 German Income Tax Code self-created intangible fixed assets cannot be included in the balance sheet). Under these circumstances it is possible that the 'lessor' does not provide a VAT exempt financing service to the 'seller/lessee' but a taxable service consisting of the participation in a 'balance sheet designing project'; in particular if the 'lessor's' purchase of the asset is for the most part financed by the 'seller/lessee'.

Italy – VAT treatment of co-insurance services

On 4 November 2016, the Supreme Court released its judgment in a case regarding the VAT treatment of a co-insurance agreement in which the insurance risk is shared between various insurers. In such contractual relationships, one of the companies (referred to as the 'delegated insurer') carries out various tasks, being delegated from the other companies to manage and to execute the insurance relationship. In relation to the VAT treatment of the cost sharing amounts paid to the delegated insurer by the other co-insurers in proportion to their own quotes of the assumed contractual risks, the Italian Tax Authorities (ITA) considered that the delegated insurer cannot benefit from the exemption.

The Supreme Court has decided, taking into consideration the *Aspiro* case (C-40/15), that the VAT exemption relating to insurance services could apply to the various supplies if they could form, from an economic point of view, a single insurance service. Accordingly, following the Supreme Court decision, an assessment will be required to determine if these supplies should be regarded as a single or multiple supply.

Italy – VAT treatment of servicing activities in the context of securitisation

In guidance issued on 17 November 2016, the ITA considered the VAT treatment of servicing activities rendered in the context of securitisation transactions carried out by the entity originating the relevant receivables (the Originator). In particular, the ITA was asked for clarification regarding the VAT treatment of these services with respect to 'in bonis' receivables (performing receivables where the debtor is compliant, i.e. not credit recoveries further to default which are taxable for VAT purposes). In this regard, the guidance concludes that the aforementioned activities rendered by the Originator qualify for the VAT exemption, since they are deemed to be services relating to the 'management of credit by the person granting it'. Thus, the guidance has clarified that the CJEU principles expressed in *Denplan* (C-175/09) do not apply to the servicing activities rendered in the context of securitisation transactions.

Luxembourg – VAT treatment of directors' fees

The Luxembourg Tax Authorities (LTA) issued formal guidance regarding the application of VAT to directors' fees on 30 September 2016. The Circular confirmed the view that the services of independent directors provided for consideration are within the scope of VAT, clarifying the previously unharmonized position in Luxembourg. Furthermore, it granted a grandfathering period until 1 January 2017 for independent directors to update existing agreements which did not foresee the application of VAT to such services supplied in Luxembourg.

Based on discussions between the LTA and professional organisations representing the fund management industry following the publication of this Circular, it is understood that, to the extent that the services of independent directors can be seen as 'specific and essential management of an eligible investment fund', these can benefit from the exemption under Article 44 s.1 (d) of the Luxembourg VAT law. Accordingly, services provided by independent directors to an eligible investment fund which is established as a corporate entity could be seen as exempt from VAT in Luxembourg on the condition and to the extent that these services constitute the specific and essential management of that fund.

For directors' services provided to the management companies of eligible investment funds, however, or to the general partners of eligible investment funds established in the forms of an SCS, SCA or SCSp, the position is less clear. Certain persons have taken the view that directors' services provided to general partners which have been established for the sole purpose of acting as such for an eligible investment fund should be capable of being fully exempt as the specific and essential management of that fund. The prevailing view, however, is that directors' services provided to general partners of eligible investment funds as well as those provided to management companies are only capable of exemption to the extent the services relate to the management of the funds themselves, not to the management of the general partners or management companies.

Netherlands – New decree on Insurance Premium Tax

On 14 February 2017 the State Secretary for Finance published a new decree on Insurance Premium Tax (IPT). This replaces an older decree of 21 February 2014 and contains several updates. In summary, the main amendments are as follows:

- The scope of the exemption for the insurance of seagoing vessels is extended. In particular an exemption is introduced for the cover of the mortgage-related interest in a seagoing vessel if the creditor, rather than the ship-owner, takes out the insurance.

- Further elaboration on the exemption for export credit insurance. This exemption applies to the insurance of a Dutch interest, comprising the export of goods or services. A Dutch interest is only present if, as a result of some form of credit or capital, goods or services are exported from the Netherlands.

- Rules regarding taxation in cases of co-insurance are stricter. The leading insurer must now collect the full premium and will only pay the IPT if the insurance contract was concluded via an insurance broker that is liable for the tax.

- An approval for intermediary activities by retailers/franchise holders has been added. Instead of the retailer/franchise holder, the (EU/EEA) insurer can be held liable for IPT if specific conditions are met. This approval prevents a significant growth in taxpayers of Dutch IPT and avoids an administrative burden for retailers/franchise holders.

This decree is relevant for insurers, intermediaries and brokers (including retailers/franchise holders).

Sweden – VAT treatment of payment services

The Swedish Tax Authorities (STA) have issued guidance summarizing their view on payment services and the intermediation of such.

According to the STA, a payment service must include changes in the legal and financial situation existing between the person giving the order and the recipient and between those parties and their respective bank. The change in the legal and financial situation is the specific and essential aspect of the payment services transaction. It is not sufficient that the service is necessary for the transfer of funds. Instead the service must also lead to an account being credited/debited.

An exempt payment service also exists when the supplier receives, processes and forwards payment instructions or equivalent information that leads to an account being credited/debited. In this case the supplier is required to act in its own name and undertakes an independent and essential step in the transfer of funds from the payer to the receiver. A sub-contracted service can be exempt from VAT if deemed as an independent and essential step in the transfer of funds from the payer to the receiver and provided that the sub-contracted service is specific and essential for the payment service.

The guidance also comments on the difference between payment services and debt collection/factoring and states that an assessment has to be made based on the purpose of the service, i.e. if the purpose of the service is to provide for a payment to be made in a secure, efficient and user-friendly way or if the purpose is to secure payment and to relieve the client from his administrative burden. Lastly, the guidance states that exempt intermediation of payment services exists when the service does what is necessary for the parties to agree on the transfer of funds.

Given the complexity of the area, the guidance is rather short and mainly states principles laid down by the CJEU. The STA's focus on the actual transfer of funds from one account to another, and thereby excluding many IT suppliers and other suppliers in the transaction chain, implies a limitation of the application of the exemption. Therefore companies applying the payment service exemption should consider undertaking a review of their business in light of the new guidance.

UK – VAT treatment of asset finance administration charges

The UK Tax Authorities (UKTA) have accepted that, under certain circumstances and depending on the specific contractual arrangements, 'administration fees' levied by a car hire/leasing company operator to its customers, as a result of being required to deal with a traffic or parking violation committed by that customer, could be viewed as outside the scope of VAT rather than subject to VAT at the standard rate. This is on the basis that the payment of an administration fee does not represent any consideration for a service provided by the car hire/leasing company, but rather represents compensation for the fact that it has been compelled to process these violations, by statute or regulation as registered keeper of the relevant vehicle. As a result, there is an opportunity to make a claim for a refund from UKTA for overpaid output tax.

Such claims are possible for those on contract hire and those on contract purchase (where title to the car does not transfer until all payments have been made.

UK – VAT grouping consultation

Deloitte UK has submitted a response to the UKTA with regard to the 'Scope of VAT Grouping Consultation'. The subject of this consultation was to hear from UK businesses, advisory firms and others on the options around eligibility requirements for VAT group registrations and the impact of policy changes following the CJEU's decisions in *Skandia* (C-7/13) and *Laurentia + Minerva* and *Marenave Schiffahrts* (C-108/14 and C-109/14). Results from the consultation are not expected until the UK summer.

UK – Update on cases regarding VAT treatment of pension fund management

In March 2013, the CJEU decided, in the case of *Wheels Common Investment Fund Trustees and Others* (C-424/11), that Wheels' defined benefit pension scheme was not a 'special investment fund' and, accordingly, that its management was not exempt from VAT. Despite being unsuccessful, Wheels has been allowed to amend its appeal to line up behind the new lead case, *United Biscuits*, which is due to be heard at the High Court in the UK in October 2017.

United Biscuits is based on an alternative argument based on the principle of fiscal neutrality. As HMRC currently allow regulated insurers to treat their defined benefit pension fund management as VAT-exempt supplies, United Biscuits argue that HMRC should allow non-insurers to apply the same VAT treatment, as their services are fundamentally the same.

To protect their position it is recommended that businesses with existing appeals update their grounds of appeal to include a fiscal neutrality argument under Art 135.1(a) and now stand behind *United Biscuits* as the lead case.

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