

VAT Developments in Financial Services



Ireland: Wider Capital Goods Scheme Introduced in Finance Bill?

The proposed amendments to the Finance Bill 2005 may indicate perhaps, a first step in the movement towards a wider capital goods scheme. Currently no such scheme exists under Irish VAT law.

The introduction in this Finance Bill of the concept of "deductible adjustment", may provide a partial VAT credit in circumstance where none previously existed. Under the proposed changes this partial credit would only be available in respect of certain property transactions."

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Netherlands: ECJ case - Software: Supply of Goods or Service?

Hearings Levob Verzekeringen BV (C-41/04)

On 24 February 2005, the European Court of Justice (hereafter ECJ) held the hearings in the Levob-case.

Background

The Dutch Levob VAT group (insurance) concluded a contract with the US company FDP for the purchase of software and several other activities. The license on the software was provided to Levob in the US. Levob imported the software in the Netherlands and then FDP adjusted the software for the Dutch market, installed it on Levob's system and gave some training to Levob-personnel.

Levob only paid Dutch VAT on the (low) customs value of the software at the time of importation (value of the data carrier).

The main questions raised before the ECJ are the following:

1. Should the contract between Levob and FDP be regarded as one composite supply?
2. If yes, is it a service?
3. If it is a service, should the general place of supply-rule of article 9(1) EC Sixth Directive be applicable or one of the exceptions of article 9(2) EC Sixth Directive?
4. If the contract between Levob and FDP should not be regarded as one composite supply, should the supply of non-adjusted software be regarded as a supply of goods and should the separate contractual value be the taxable basis for VAT purposes?

5. If the supply of non-adjusted software should be regarded as a supply of services, should the general rule of article 9(1) EC Sixth Directive be applicable or one of the exceptions of article 9(2) EC Sixth Directive?
6. Are the same rules applicable on the service consisting of adjusting the software as for the supply of standard software?

Statements during Hearings

During the hearings, the parties involved made the following statements:

Levob

Levob mainly argued that the contract with FDP should be split into the supply of software (supply of goods) and several additional services (adjustments and installation). For the place of the supply of goods and the importation the rules of Article 8 and 7 EC Sixth Directive are applicable. The additional services fall under article 9(1) EC Sixth Directive and are thus not subject to Dutch VAT.

Dutch Government

The Dutch Government mainly argued that the contract between Levob and FDP must be regarded as one composite supply of services. The place of supply of these services should be covered by article 9(2)(e) EC Sixth Directive, so that Dutch VAT would be due.

Outcome and practical implications

The outcome of this case is still unclear. We expect that the ruling will bring more clarity on the difference in the VAT treatment between standard and specific software. If the ECJ would confirm Levob's view, this will give a huge saving opportunity for financial services companies with regard to the purchase of software.

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United Kingdom: ECJ case - VAT Exemption for Management of Investment Funds?

Hearings Abbey National plc, Inscope Investments Limited (C-169/04)

Background

On 10 March 2005, the ECJ held the hearings in the Abbey National-case. In this case a preliminary ruling was requested by the UK VAT and Duties Tribunal on the interpretation of article 13B(d)(6) EC Sixth Directive, which exempts "the management of special investment funds as defined by the Member States".

The questions about article 13B(d)(6) EC Sixth VAT Directive as laid down before the ECJ can be summarized as follows:

1. Do the Member States have the freedom to define the type of activities that can be regarded as "management" as well as the type of funds which may benefit from the exemption?
2. If the answer to question 1 is no and the term "management" has an independent community law meaning, are charges of a depositary or trustee as meant in the UCITS Directive (85/611/EEC) exempt as "management of special investment funds"?
3. Again, if the answer to question 1 is no and the term "management" has an independent community law meaning, does the exemption for "management of special investment funds" apply to services of a third party administrative manager?



Statements during hearings

During the hearings, the parties involved made the following statements:

Abbey National

Abbey National argued that the term “management” has an independent community law meaning so that the Member States do not have the freedom to give their own interpretation. Contrary to the term “management” in article 13B(d)(5) EC Sixth Directive, the term “management” in article 13B(d)(6) EC Sixth Directive must be interpreted broadly.

Management of special investment funds should include all managerial kind of activities for investment funds. In the view of Abbey these managerial tasks are not limited to investment management but also consist of administrative management and management of liabilities by a depositary or trustee. Therefore the answer to question 2 and 3 should be that the exemption can be applied on these services.

UK Government

The UK Government first argued that the term “management” does not have an independent community law meaning so that the Member States should have the freedom to define the term “management”. If the answer to question 1 would, however, be no, then the term “management” in article 13B(d)(6) EC Sixth Directive should be interpreted narrowly.

It should only cover the specific and essential functions of investment management and not pure technical and administrative activities. Therefore the answer to question 2 and 3 should be that the exemption can not be applied on these services.

Luxembourg Government

The Luxembourg Government more or less submitted the same arguments as Abbey National.

European Commission

The Commission first argued that the term “management” has an independent community law meaning so that the Member States do not have the freedom to give their own interpretation. It further more or less followed the arguments of the UK Government.

Outcome and practical implications

Based on the facts and the opinions presented, the ECJ will probably decide that the term “management” has an independent community law meaning so that the Member States do not have the freedom to give their own interpretation.

The answers on questions 2 and 3 are hard to predict. All parties referred to the Advocate General’s opinion in the recent BBL-case, so it is expected that both the Advocate General and the ECJ will include this opinion in their considerations.

The decision surely will have far reaching effects for the Financial Sector in the European Union. At this moment the VAT exemption on management of special investment funds is interpreted differently per Member State. This decision will bring more clarity on determining which services in the investment management sector are exempt and which are not. This is especially important for investment management companies and funds that outsource or delegate certain activities within the group or to third parties.

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United Kingdom: ECJ case - When Does a Non-EU Supplier Have a "Fixed Establishment" in the EU?

RAL (Channel Islands) Ltd, RAL Ltd, RAL Services Ltd, RAL Machines Ltd v Commrs of Customs & Excise (C-452/03)

The Courts referred questions to the ECJ relating to how the term "fixed establishment" is to be interpreted in the context of services purported to have been supplied outside of the EU by virtue of being supplies treated as made where the supplier belongs.

The case has been heard by the ECJ on 27 January and we are awaiting the decision. The Opinion of the Advocate General has concluded that the appellants' services of permitting the public to use gaming machines should be treated as a supply of entertainment services made in the UK within the meaning of Article 9(2) (c) EC Sixth Directive.

However, the Advocate General noted that in the event that the ECJ did not consider Article 9(2) (c) EC Sixth Directive to be applicable, then where a company established outside the EU provided access to gaming machines using machines and premises leased in the EU, with the required aid of staff outsourced from a third party, that company should be regarded as having a commercial structure in the EU with the minimum resources required for it to be considered to have a "fixed establishment" within the meaning of Article 9(1) EC Sixth Directive. In such circumstances, such a company would be liable to account for VAT in the EU.

If the ECJ disagrees with the Advocate General's conclusion, but accepts his alternative view, this may prove to have important implications for any structure seeking to take supplies outside the scope of VAT by using off-shore companies. For example, where a non-EU supplier is providing services being treated as supplied outside the EU, is there a risk that the tax authorities could bring the supplies within the scope of VAT by identifying resources in the EU that created a "fixed establishment" for the supplier in the EU?

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Financial Services VAT Alert

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