20 May 2005, Issue 7

Financial Services VAT Alert

VAT Developments in Financial Services

Belgium: Administrative Decision Confirms Belgian View on VAT Treatment of Factoring

In reference to the answer of the Minister of Finance to a parliamentary question (see FS VAT Alert 2005/6), a recent administrative decision confirms the position of the VAT authorities with respect to the VAT treatment of factoring.

The factoring fee will be subject to VAT (with credit), whereas the revenue (interest) received for the advanced payments will remain VAT exempt (without credit). These advances must be considered an aim in itself and therefore not ancillary to the (taxed) factoring service (Decision n° E.T. 106.246, 1 April 2005).
For further information please do not hesitate to contact Jan Servaes (+32 2 710 73 63), Manuel Van der Veken (+32 2 710 44 04) or François Mennig (+32 2 710 43 64).

Germany: Case Law - VAT Treatment Trailer of Fees Paid in Addition to a Success Fee for the Distribution of Shares in Funds

The Lower Fiscal Court of Düsseldorf decided that trailer fees being paid in addition to a one-time sales commission to intermediaries for the distribution of shares in funds should qualify as part of the remuneration for VAT exempt intermediary services regarding the shares in funds (Lower Fiscal Court of Düsseldorf, recently published decision dated 16 February 2005, 5-K-2030/03).

This Fiscal Court was reacting to a decree issued by the Regional Finance Office in Frankfurt on 8 April 2003 stating that trailer fees which are paid to intermediaries depending on the period of time an investor holds the shares in funds and the value of these shares are the remuneration for a separate service subject to VAT. According to the decree the content of such a service is to keep and to strengthen the relationship with the client so that he will keep the shares in funds.

Appeal to the Federal Fiscal Court was granted by the Lower Fiscal Court and will probably be lodged by the tax office involved in the case. Until a possible decision by the Federal Fiscal Court, taxpayers should make sure that VAT assessments on trailer fees do not become final (e.g. by filing objections against such assessments).
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Finland: Case Law – Investment Management Out of Scope?

The Administrative Supreme Court gave a decision on 1 February 2005 (T 214), concerning investment management. The Administrative Supreme Court stated that investments to limited partnerships and the realization of the investments are out of scope of VAT. The company outsourced the investment activity to an investment management company. The investment company acted in the clients name and account independently by deciding on the investments and attending to the advisory board work on behalf of the client.

The Supreme Court stated that the investment management company was a substitute for the investor and therefore also its´ activity was out of scope of VAT. The decision has raised debate and argumentation. Therefore an advance ruling would be needed before the decision could be applied.
For further information please do not hesitate to contact Juha Laitinen (+358 9 2280 1409) or Marja Hokkanen (+358 9 2280 1722)

Malta: Widening of scope for 13th Directive refunds

With effect from 26 April 2005 an application for a refund of Maltese VAT by taxable persons who are not registered for Maltese VAT purposes and who are established outside the European Union no longer requires the condition of reciprocity. Up to that date, such VAT refund claims were only entertained if the country in which the said taxable person was established afforded similar refunds to taxable persons established in Malta.
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Netherlands: ECJ Goed Wonen-case - Legitimate expectations and legal certainty does not preclude mechanism of retroactive legal effect

On 26 April 2005, the European Court of Justice (ECJ) ruled that the principle of the protection of legitimate expectations and legal certainty does not preclude the mechanism of retroactive legal effect of an amendment of national legislation. Retroactive legal effect is exceptionally justified when the reason for it is in the general interest and the legitimate expectations of taxable persons are duly respected.

In this respect a reason of general interest is prevention of the risk that contrived arrangements would be put into operation on a large scale during the legislative process of the amendment, which is specially designed to combat such arrangements. The ECJ stated that it is for the national court, which best knows the circumstances of the case, to assess whether the risk was significant enough to justify the retroactive effect of the law.

For the legitimate expectations it is relevant that economic operators carrying out such arrangements were warned of the impending adoption of that law and of the retroactive effect of it in a way that enabled them to understand the consequences of the legislative amendment planned for the transactions they carry out. Whether the legitimate expectations have been respected must be assessed in the light of law-making tradition in each Member State.
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Netherlands: ECJ Levob-case - Software: Supply of Goods or Service?

On 12 May 2005, the Advocate General Kokott gave her opinion regarding the Levob-case. In short, it concerns the VAT treatment of a software supply by a US company ("FDP") to the insurance company Levob in the Netherlands. Levob purchased the standard software (on a data carrier) in the US and imported it into the Netherlands.

Subsequently, FDP adjusted the software for the Dutch market, installed it on Levob's system and gave some training to Levob-personnel (See also FS VAT Alert 2005/5).

Summarized the main questions raised before the ECJ were whether the contract between Levob and FDP should be regarded as one composite supply and if so whether it is a service.

The supply of standard software (on a data carrier)

Regarding the supply of the standard software AG Kokott distinguishes two transactions: the supply of the data carrier and the supply of the license agreement. According to her it is beyond doubt that with the supply of the data carrier there is a transfer of title and, for that matter, there is a supply of goods. The supply of the license agreement does not constitute a supply of goods. However, according to the AG it is arguable whether the supply of the license agreement can be regarded as a single supply. Tentatively the AG concludes that the supply of the standard software on a data carrier qualifies as a supply of goods.

The supply of tailor-made software

Parties agreed that the supply of the tailor-made software qualifies as a supply of services. AG Kokott in principle agrees on this. However, according to her there are situations possible where the supply of tailor-made software qualifies as a supply of goods. For example, this is the case if the software would be tailor-made at the premises of the supplier and subsequently supplied to the recipient on a data carrier.

One composite supply

Referring to the ECJ-case CPP, AG Kokott decides that – since there is not one element in the Levob-case to be regarded as ancillary to the other (principal) element – decisive is whether the elements are so closely bound that, from an average recipients point of view, the separate elements on their own lack the required practical purpose. Even though the standard software was supplied on a data carrier and the different elements were invoiced separately, AG Kokott is of the opinion that the supply of the standard software and subsequent adjustments (plus installation and training) are so closely bound that they constitute one composite supply.

A supply of goods or services?

AG Kokott decided that the supply of the standard software, the adjustments, installation and training as a whole, can be qualified as one composite supply of services – as mentioned under article 6(1) Sixth Directive – if, when taking all the circumstances into account, the service aspect predominates. The service aspect predominates for example when:

- ◊ The adjustment of the standard software is decisive for the use of it by the recipient;
- ◊ The adjustment and installation are so valuable that these cannot be regarded as ancillary services; and
- ◊ The service aspect represents the largest part of the value of the supply.

Finally, AG Kokott decides that the place of supply of this one composite service is, according to article 9(2)(e) Sixth Directive, the country where the recipient is established.

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Netherlands: Case Law - Conditions VAT Grouping Eased

On 22 April 2005, the Dutch Supreme Court ruled in a case which has a huge impact on the date of commencement of a VAT group. The Supreme Court ruled that for VAT purposes, a VAT Group exists by law when the conditions are met. An approval of the tax authorities is not required for commencing a VAT group.

Since 1 January 1989 the Dutch VAT Act (Wet OB 1968) requires that the following conditions have to be met in order to form a VAT Group:

◊ parties have to be connected organisationally, financially and economically in such a way that they form a unity / group; and
◊ an approval / written decision of the tax authorities is required, stating that the parties can be seen as a single taxable person for VAT purposes.

The VAT group commences as of the first day of the month following the month in which the approval was issued by the tax authorities. The request for an approval for a VAT group was not honoured with retrospective effect. In some cases however the tax authorities would allow parties, who already met the conditions before the approval, to act as if the VAT group already existed before the official starting point of the VAT group.

As of mid 2004, the Ministry of Finance decided that this way of working, although practical, was not in-line with the means and wording of the VAT Act and would no longer allow the practical approach of the tax authorities. Following the recent ruling of the Dutch Supreme Court, it would appear that the recent view taken by the Ministry of Finance is incorrect.

In the case at hand, the taxpayer asked the tax authorities to approve a VAT Group application with effect from 1 September 1999. The request was submitted on 7 January 2000. The tax authorities granted the request by an approval dated 22 February 2000 stating that the commencing date of the VAT group would be 1 March 2000 and not 1 September 1999 as requested.

The Dutch Supreme Court ruled that the tax authorities' point in this case was not correct. The commencement date of the VAT group should neither depend on the intentions of the parties nor on the intentions of the tax authorities. The timing of submitting the request for a VAT group by the parties and the date of the approval by the tax authorities do not matter according to the Dutch Supreme Court. That approval is merely meant for purposes of legal certainty for the parties involved and the legal liability of the parts of the VAT Group for VAT debts of the VAT group.

The Supreme Court states that the starting point of a VAT group is the moment the parties are economically, financially and organisationally connected, in such a way that they are united enough to operate as a group.

Practical implications

With this ruling of the Supreme Court the conditions - from a taxpayer's point of view - to form a VAT group are eased. This gives taxpayers a new series of unexpected opportunities for both VAT planning and mitigating VAT risks in the past and in the future.

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United Kingdom: Business Brief concerning Andersen

On 18 May 2005, the Tax Authorities released their much anticipated Business Brief in respect of Andersen. The Authorities have suggested that certain insurance administration and claims handling services will only fall within the exemption where the provider had also previously introduced the policyholder to the insurer. The exemption may still apply to services of sub-agents provided that there is a direct contractual link between the principal agent and the agent providing the introductory service.

The Tax Authorities plan to consult the insurance industry before making any amendments to the existing legislation. The consultation paper is due to be issued in July 2005. The consultation will last for 12 weeks.

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