Indirect Tax

Financial Services VAT Alert

PricewaterhouseCoopers

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Edition 2007/1

Editorial

We are pleased to present you with the PricewaterhouseCoopers Financial Services VAT Alert containing the latest European VAT news in the sector. This Alert is intended as an easy tool for you to keep track of the ever changing VAT in the Financial Services Sector. If you have any queries or need assistance, please contact us.

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BELGIUM

1. Withdrawal of administrative decision following Andersen judgement

(Decision E.T. 103.851/2 of 14 November 2006)

In a recent decision, the Belgian VAT administration stipulates that services performed by average commissioners, and more in general, people charged with settlement of claims on behalf of insurance companies still qualify for VAT exemption for insurance intermediaries. Previously, following the ECJ judgement in Arthur Andersen & Co Accountants, the Belgian VAT administration decided that these services were no longer VAT exempt *(Decision E.T. 103.851 of 25 April 2005*).

Meanwhile, a study group with members of the European Commission and the Member States has been set up to examine the VAT exemption for financial and insurance transactions. In view of their proposals, the European Commission has asked Member States to refrain from any change in national VAT legislation and guidance.

As a consequence, the Belgian VAT administration has withdrawn its previous decision. Nonetheless, in its new decision, the Belgian VAT administration stresses that only services provided within the scope of claim settlements are exempt. As before, back-office services do not qualify for VAT exemption.

The Belgian VAT administration also notes that people charged with claim settlements are still able to refer to the Andersen judgement and can opt to charge VAT on their transactions. However, it should be noted that this choice, in principle, is irrevocable.

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2. Open market value in Belgian VAT law as from 1 January 2007

The Rationalization Directive of 24 July 2006 did introduce the **notion of transfer pricing and the arm's length** principle in VAT.

In order to introduce the open market value in Belgian VAT law, articles 32 and 33 of the Belgian VAT Code have been amended with effect as from 1 January 2007.

In Belgium, the arm's length principle for VAT will only apply in the following circumstances:

- the consideration is **lower** than the open market value; and
- the recipient of the supply or the service does **not have a full right of VAT deduction**.

Moreover, in Belgium the open market value will only apply in the following relationships:

- an **employer and its employees** and relatives until the fourth remove;
- associations and their members, private companies and their partners, legal bodies and their directors and members of the board of management and their relatives until the fourth remove.

The definition of open market value is in line with the Rationalization Directive. To the extent no comparable supply of goods or services can be ascertained, the open market value shall mean:

- in respect of **goods**: an amount that is not less than the purchase price or, in absence of a purchase price, the cost price determined at the time of the supply;
- in respect of **services**: an amount that is not less than the full cost to the taxable person providing the services.

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3. New wording and scope regarding VAT exemption for management of special investment funds

In order to align the Belgian VAT Code with the law of 20 July 2004, the wording of the VAT exemption for the management of special investment funds has been modified (article 44, §3, 11° of the Belgian VAT Code, equivalent of article 135(1)(g) VAT Directive (new) / article 13B(d)(6) of the EC Sixth VAT Directive) (old).

Apart from the wording, the scope of the VAT exemption for the management of collective investment funds has been widened. By making reference to the law of 20 July 2004, the following categories of special investment funds now qualify for the VAT exemption:

- Belgian public undertakings for collective investments (such as in the past);
- Belgian private undertakings for collective investments (new general category);
- Belgian institutional undertakings for collective investments (new general category).

Nevertheless, at this stage, there has been only one Royal Decree applicable for public undertakings for collective investments. This means, in practice, it is not possible at this stage to constitute regulated private or institutional Belgian undertakings for collective investments (except for some dedicated securitization and private equity vehicles).

Moreover, the VAT exemption for the management of special investment funds as from now on also includes the **management of pension funds and their assets** as defined in the Law of 27 October 2006. Up till now, the management of pension funds did not qualify for the VAT exemption *(see parliamentary question no. 19 of 1 September 2003).*

This reform is part of an overall strategy to attract pan-European pension funds. In this respect, please note that the Belgian government has taken several measures to come to an attractive tax regime for these type of funds by making their tax regime similar to that of Beveks / Sicavs.

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FRANCE

4. Invoicing rules – concessions made to banks and financial institutions

Following an approach from professional associations with a view to mitigate the administrative burden in relation to invoicing compliance, the Direction de la Législation Fiscale ("DLF") confirmed the concessions already made since 2003 and announced the introduction of additional more flexible rules for Investment Service Providers and Banks.

Some of the main adjustments are as follows:

- simplified invoicing rules introduced for exempt transactions with no right to deduct, but no relief from the obligation to issue invoices,
- simplification of the mandatory information to be shown on invoices regarding the exemption from or self assessment of VAT;
- simplification of self-billing and the sub-contracting of invoicing to third parties, by way of "tacit" authorisation for services supplied between companies of the same trade,
- relief from the obligation to keep "paper" copies of invoices drawn up and stored electronically, but sent to the customer in printed form.

Discussions are still in progress with the DLF (particularly regarding the possible relief of companies in this sector from the obligation to issue invoices for certain exempt transactions and the postponement of the application of penalties for failing to comply with the new rules).

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FINLAND

5. VAT exemption of insurance-related services

Supreme Administrative Court, 10 January 2007, D:nro 1037/2/06

The Supreme Administrative Court of Finland has ruled that a back-office service provider has the right to exempt its supplies of insurance-related services to an insurance company in accordance with the Finnish VAT Act, even though this conflicts with recent ECJ rulings.

The services concerned calculation, provision of solutions, statements and decisions relating to the insurance activities. As the Finnish VAT Act exempts certain insurance-related technical services including the services provided in this case, the Court ruled that the back-office services provided by the company were not subject to VAT in Finland.

Even though the national exemption of insurance services in Finland is wider than the exemption in Article 135(1)(a) of the VAT Directive (13(B)(a) of the EC Sixth VAT Directive (new)), according to the Supreme Administrative Court the rules of the Sixth VAT Directive could not be invoked against the taxable person as Finland had wrongly implemented the Directive.

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GERMANY

6. Option to tax the lease of a building to a bank: abuse of tax structuring possibilities

Federal Fiscal Court (BFH), decision dated 9 November 2006,V R 43/04

A company affiliated to a bank had been constructing an office building from 1993 to 1995 and leased it to the bank from 1995 to 2005. The bank had provided the financing of the building by shareholder debts and had influenced the construction process. The affiliated company opted for taxation regarding the lease and claimed deduction of the corresponding input VAT incurred on the construction costs.

The Federal Fiscal Court ("BFH") referred amongst others to the decision of the European Court of Justice from 21 February 2006 ("Halifax"). The BFH also pointed out that from a VAT point of view income tax advantages do not justify the option to a taxable lease leading to an immediate deduction of input VAT for the construction costs. However, in general the option to taxation regarding the lease is possible if the lessor has economic or other important reasons (non-tax).

In the meantime the German VAT Act has been changed: the option to taxation is now possible only if the lessee uses the building exclusively for transactions which do not exclude the input VAT deduction.

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HUNGARY

7. Factoring - VAT Act amended regarding assignment of receivables

As of 1 January 2007, the Hungarian VAT Act has been amended regarding the VAT treatment of the assignment of receivables by the creditor in course of a factoring transaction.

Previously, the Ministry of Finance and the Tax Authority held the view that assignments connected to a factoring transaction were independent supplies of services by the creditor to the factor for a consideration, while the factoring service supplied by the factor for a factoring fee was a separate transaction.

Following the amendment of the Act, the assignment of receivables as part of a factoring transaction no longer qualifies as a taxable transaction, i.e. it is outside the scope of VAT. This provision ensures that the assignor (creditor) of receivables has full VAT deduction rights. The amendment does not contain any instructions regarding transactions that took place before the amendment came into effect.

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IRELAND

8. Revenue Commissioners publish their final report of the VAT on Property Review Project

The Revenue Commissioners, over the last two years, have carried out a review of the current system of applying VAT to property transactions. The review recommends a number of changes to the system including the introduction of a capital goods scheme.

The Government has indicated that it is planning to engage in a wide consultation process with interested parties before deciding on any changes to the VAT treatment of property transactions. Notwithstanding that, it is likely that there will be significant changes to the system of applying VAT to property transactions in the 2008 Finance Bill.

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9. VAT on rating agency services

A group representing the Irish Securitisation industry is currently in discussions with the Revenue Commissioners with regard to the VAT treatment of rating agency services and how they apply to securitisation transactions.

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LUXEMBOURG

10. VAT for investment funds – circular

On 29 December 2006, the Luxembourg VAT administration issued a circular regarding the implementation of the Abbey National and BBL cases.

Regarding Abbey National, the circular indicates that only the “monitoring” part of the custody services should be liable to VAT and thus not the whole services performed by custodian.

The circular confirms that the 12% VAT rate is applicable to the taxable part of the custody services. This is a favourable element for the competitiveness of the Luxembourg fund industry. Service providers must determine a taxable amount based on objective elements. The tax will be due as from 1st April 2007. No other change in the application of article 44.1.d) of the Luxembourg VAT law (which implements article 13B(d)6 of the EC Sixth VAT Directive (old) / 135(1)(g) of the VAT Directive (new)) is introduced.

Regarding BBL, the administration considers that Sicav and other vehicles listed under article 44.1.d) of the Luxembourg VAT law should be considered as VAT taxable persons performing exempt supply of services. This implies that they do not need to register for VAT except in specific cases.

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THE NETHERLANDS

11. Non-EU financial institution without a permanent establishment in the EU had a right to a refund of Dutch VAT

In a recent judgment, the Dutch Supreme Court decided that in principle every taxable person (under Article 4 of the EC 6th Directive) has the right of deduction of input VAT, regardless of the place of establishment or the place of the supply of the services.

This case concerned a non-EU financial institution which requested a refund of Dutch VAT incurred in the course of its business under the EC 13th Directive. The financial institution had no EU establishment and provided services solely to customers established outside of the EU.

The Dutch tax authorities argued that the right of deduction based on Article 17(3)(c) of the EC Sixth VAT Directive (169 VAT Directive) is restricted to taxable persons which are established in the territory of the EU.

The Dutch Supreme Court rejected this argument. The Dutch Supreme Court noted that under Article 15 of the Dutch VAT Act, the right of deduction is not subject to any conditions

regarding neither the place of establishment nor the place of supply of services. Therefore, Article 15 of the Dutch VAT Act permits the right to deduct in this case. The Dutch Supreme Court ruled that the fact that the Dutch VAT Act is potentially not in line with the provisions of the 6th, 8th and 13th Directive, cannot be held against the taxpayers.

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SPAIN

12. Spanish Parliament passed anti-fraud legislation containing several VAT measures – VAT grouping

New anti-fraud legislation passed by the Spanish Parliament on 21 November 2006 included, among others, new rules introducing VAT grouping provisions.

VAT Grouping

As from 1 January 2008, groups of companies established in Spain may opt for the new regime that presents two different categories:

1. A method which allows in-group companies to transfer their respective VAT credit and payment positions to the parent company at the end of each VAT period, so the parent company makes one single payment or, alternatively, asks for one single refund of the net VAT amount.
2. An additional option for those applying the aggregation method, based on a special rule for calculating the taxable amount in transactions carried out within the Spanish VAT territory between companies in the VAT group.

   This special rule only takes account of costs of goods or services received from outside the group to be used directly or indirectly, totally or partially, in transactions inside the group.

   All the companies forming the VAT group will be held jointly and severally liable for the VAT debts resulting from the application of the VAT grouping provisions and those applying the second option (special rule on taxable amount) will be subject to an additional administrative burden in the form of separate cost accounting that reflects external costs and the attribution criteria.

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13. Spanish Parliament passed anti-fraud legislation containing several VAT measures – taxation of connected parties

New anti-fraud legislation passed by the Spanish Parliament on 21 November 2006 includes, among others, new rules relating to connected parties

Taxable amount in transactions between connected parties

New legislation implements Council Directive 2006/69/EC amending Article 11(A) of the EC Sixth VAT Directive (75 VAT Directive) and improves former provisions related to the value of supplies between connected parties contained in the Spanish VAT law in line with the text of the amending Directive. Cases are limited now to those referred to by the Directive, i.e.

- Where the consideration is lower than the open market value and the recipient does not have a full right of deduction.
- Where the consideration is lower than the open market value and the supplier does not have a full right of deduction and the supply is subject to an exemption without VAT credit.
- Where the consideration is higher than the open market value and the supplier does not have a full right of deduction and the supply is one with VAT credit.

Definition of what must be understood as “open market value” is equally aligned with the text of the amending Directive.

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