Indirect Tax

PricewaterhouseCoopers

Financial Services VAT Alert

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Edition 2007/2

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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Edition 2007/2

AUSTRIA

1. Portfolio management services & fund administration services; draft of the amended VAT Act

In Alerts 2006/13 and 2006/10, we informed you of the proposed changes to portfolio management services in the Austrian VAT guidelines. The Austrian legislator has issued a draft of the amended VAT legislation.

Place of supply

The draft legislation follows the ruling of the European Court of Justice (further: ECJ) in "BBL" (C-8/03), so that certain services with regard to the management of special investment funds as defined by the Member States are treated as supplied where the recipient (qualifying as a taxable person) is established.

However, according to the wording of the draft legislation this rule does not apply to the management of special investment funds established outside the EU. This means that such services would be taxed in Austria.

VAT exemption

The Austrian legislator extended the scope of the VAT exemption for fund management services according to the ruling of the ECJ in "Abbey National plc / Inscape Investment Fund" (C-169/04).

However, similar to the place of supply rules, the Austrian legislator does not seem to apply the broad exemption for the management of special investment funds if they are established outside the EU.

Moreover, pension funds or special purpose vehicles e.g. for securitization are not mentioned in either the draft legislation or the VAT guidelines.

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BELGIUM

2. VAT revision also applicable to services similar to investment goods

The Recast of the EC Sixth VAT Directive (Directive 2006/112/EC; further EC VAT Directive) allows for the possibility that services which have characteristics similar to those normally attributed to investment goods can also be subject to a VAT revision where there is a change in the taxable use of the services.

In Belgium, the Program law of 27 December 2006 did levy this option by amending article 48, §2 of the Belgian VAT Code with effect as from 7 January 2007.

As a consequence, services which have characteristics similar to those normally attributed to investment goods (e.g. clientele, patents and licences) are now also subject to the revision period of 5 years applicable for investment goods (except for buildings and rights in rem for which a revision period of 15 years applies).

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FRANCE

3. Direction de la Législation Fiscale defines 'placing of shares'

Since 1 January 2005, the placing of shares has been exempt from VAT (without the possibility to opt to pay the tax). However, the concept of placing was not clearly defined up until now.

Following a joint initiative by the trade associations ("AFEI" and "FBF") at the end of 2006, a written reply has just been obtained from the French tax legislation department (Direction de la Législation Fiscale ("DLF")) on this question.

The DLF confirms that "placing" can be defined as the active search for subscribers and refers to three of the transactions cited by the trade associations as an objective illustration.

It adds that a distinction should be made between "placing" and the "reception and transmission of orders on behalf of third parties", which is subject to VAT if the option has been exercised.

The DLF specifies that the business of underwriting should be treated as a buyer-seller activity and not as "placing".

It is recommended to review the terms of any relevant agreements entered into to assess the VAT treatment of each transaction, depending on the circumstances.

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GERMANY

4. Entrepreneurship and input VAT deduction of holding companies

The German Federal Ministry of Finance issued a decree setting out the circumstances under which it is prepared to recognize a holding company as an active business operation with the entitlement to deduct input VAT.

Where a holding company carries out taxable activities in addition to the management of its investments, the holding company will be divided into two sectors from a VAT perspective: a business sphere for VAT purposes and a non-business sphere. The holding company will only be entitled to deduct the input VAT incurred for activities related to its business sphere.

In addition, holding companies qualify as entrepreneurs where investments are held under the following conditions:

- the investments are purchased and sold in the context of a securities trading activity;
- the investments are held in connection with an actual or intended business objective;
- the investments are held for the purposes of the management of subsidiary companies (for example, by providing administrative, financial or technical services - note, these services must be supplied for a consideration).

Please note that the authorities set out further requirements. There are also implications for fiscal unities which include a holding company.

The circular letter applies to all open cases. However, until 30 June 2007 holding companies mediating the financial integration to the parent company will be accepted to be part of the fiscal unity, even if the above mentioned conditions for the holding company are not met.

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THE NETHERLANDS

5. Dutch Supreme Court refers question to the ECJ regarding the scope of the insurance exemption

Dutch Supreme Court, 9 February 2007, no. 40.533
Court of 's-Hertogenbosch, 29 July 2002, no. 00/02308

On 9 February 2007 the Dutch Supreme Court referred a preliminary question to the European Court of Justice (ECJ) with respect to the interpretation of the VAT exemption in Article 13(B)(a) of the EC Sixth VAT Directive (Article 135(1)(a) of the EC VAT Directive) for insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents.

A Dutch registered insurance broker/agent, X, provided insurance brokerage services between (potential) policyholders and insurance companies for which E, another Dutch company, is appointed intermediary.

E is authorised to arrange insurance policies for and on behalf of these insurance companies. X provided intermediary services to E with regard to these insurance transactions.

The consideration for X's activities consisted of 80% of the commission receivable by E for the concluded insurances.

The Dutch tax authorities adhere to a strict interpretation of the VAT exemption in Article 135(1)(a) of the EC VAT Directive. The Dutch Higher Court took the view that X did not qualify as an "insurance broker" or "insurance agent" for the services provided in the name of E. Therefore, the Court qualified X's activities as VAT taxable.

The Dutch Supreme Court has asked for a preliminary ruling because it wants to know whether the VAT exemption of article 135(1)(a) of the EC VAT Directive also applies to subagents like X, when X provides services that are specific to and essential for insurance brokers/agents.

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POLAND

6. Granting of loans – wrong interpretation of Polish tax authorities worth millions

The Polish tax authorities generally take the position that non-financial companies which grant loans from their own financial means do not act as VAT taxpayers.

As a consequence, such loans are not within the scope of Polish VAT, but instead should be subject to another tax called civil law activities tax ("CLAT"). In our opinion there is no legal basis to adopt this approach.

Under Polish tax law regulations the provision of a loan is generally subject to CLAT at 2%. However, this tax is designed for non-business activities and should not be levied on business transactions. Our opinion is also supported by practices in other European countries.

As a consequence, taxpayers who have paid CLAT may claim a refund from the Polish tax offices.

We have been successful in recovering CLAT for companies that have already paid it on granting of loans.

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SWEDEN

7. Swedish implementation of Abbey National

The Swedish Tax Agency has in a guideline adopted the view presented in the ECJ decision "Abbey National" (C-169/04). The scope of the exemption has therefore been somewhat extended. We are in the near future awaiting rulings from tax courts as regards the scope of the exemption.

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8. Ruling from the Supreme Administrative Court - bundled services

In a recent ruling by The Swedish Supreme Administrative Court the supply of bundled services by a Swedish company to a company established outside Sweden was regarded as subject to Swedish VAT at 25 %.

The court concluded that the supply of the various services (raising of invoices, sending of invoices, follow-up of payment etc) constituted one composite supply.

If the services had been supplied separately the reverse charge mechanism would have applied, i.e. no Swedish VAT would have been due.

The position taken by the court will have an effect when Swedish companies buy this type of bundled services from abroad, i.e. the service might be deemed as supplied outside Sweden. This could of course have a positive effect for VAT exempt businesses.

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UNITED KINGDOM

9. HMRC suffer significant defeat on VAT recovery methods for hire purchase ("HP") and asset finance businesses

Royal Bank of Scotland Group plc v Commissioners of HM Revenue & Customs

The VAT Tribunal has delivered its decision in the RBS case, which concerned whether the partial exemption (ie, pro rata) method used by an RBS subsidiary secured a fair and reasonable recovery of residual input tax.

This important decision directly contradicts HMRC's current, and widely criticised, policy of refusing to allow HP and asset finance businesses to recover any of their residual input tax relating to hire purchase transactions.

In a decision which is highly critical of HMRC's policy of zero recovery, the Tribunal held that the RBS pro rata method was fair and reasonable. The decision was based on a careful analysis of the various processes involved in effecting an HP deal.

As for HMRC's assertion that the recovery rate should be zero, the Tribunal suggested that no "sensible and realistic person" would seek to support it.

While the Tribunal accepted that it did not have jurisdiction to substitute its own special method, it implied that that a values-based method (producing higher recovery rates) may also be fair and reasonable.

HMRC's policy is now in considerable doubt and looks unlikely to be sustainable going forward.

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