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## Editorial

We are pleased to present you 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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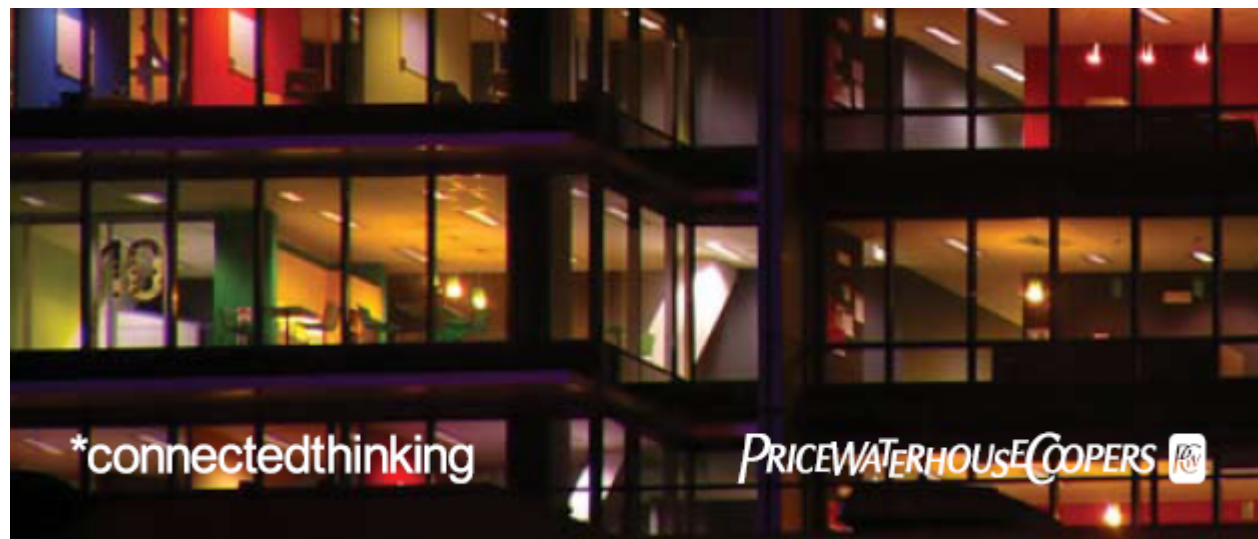
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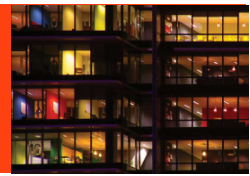
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## AUSTRIA

### 1. Abuse of law

In Austria the hiring out of immovable property is in general exempt from VAT, with the option for taxation. Often a financial services company will outsource the construction of a building to a project company (separate legal entity) which puts up the building and hires it out to the financial services company. If the project company opts for VAT, it is entitled to full deduction of the input VAT on the building costs.

The German Federal Fiscal Court decided on 9 November 2006 that the outsourcing of the construction of an office building only for the purpose of deducting input VAT can be regarded as abusive and rejected the input VAT deduction for the project company.

In Austria, we understand that a similar case is pending and that the Austrian tax authorities seem to have the opinion that this structure can be regarded as abusive. At the moment it cannot be foreseen whether this is the general point of view of the Austrian Tax Authorities, particularly as similar procedures are accepted in the public sector under certain conditions. Taxpayers should carefully review such structures and at least be able to provide evidence of a (non-tax) business purpose. The consideration for hiring out the building to the financial services company should in any case be at arm's length to defend the structure.

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## BELGIUM

### 2. VAT grouping - anti-abuse measures and administrative obligations

#### *Anti-abuse measures*

Following the introduction of VAT grouping in Belgium, a new anti-abuse provision is included in the Belgian VAT Code (new section 19bis). It provides that intangible services (as defined in section 56 of the EC VAT Directive and

equivalent section 21, §3, 7° of the Belgian VAT Code) rendered by a foreign taxable person to its permanent establishment (Belgian branch) that is a member of a Belgian VAT group will be characterised as a deemed supply of services. The taxable amount will be the normal market value (section 33, §1, 3°).

The scope of the provision has been limited to cases of abuse ("channelling"). In our opinion, the legal text is not in line with the ECJ decision in the FCE Bank case (C-210/04).

#### *Administrative obligations*

On Tuesday 8 May 2007, the 27 April 2007 Finance Act (Programmawet/Loi-programme) and the 25 April 2007 (Miscellaneous Provisions) Act (IV) were published in the official gazette. Both Acts provide new VAT provisions and/or changes to existing VAT provisions to further create the legislative framework for VAT grouping in Belgium.

The key points are:

- The Belgian VAT authorities will attribute a VAT number to the VAT group. The members of the VAT group keep their existing VAT number (as sub-number to the number of the VAT group) also in their relation with third party suppliers and customers.
- For intra-group transactions, no invoice is required but a "document" needs to be issued. Self-billing and outsourcing are possible.
- The EC sales listing is to be filed by the members of the VAT group, as is the yearly client listing for transactions to third parties with a Belgian VAT number. The VAT group must file a yearly listing for transactions between members of the VAT group.
- An adjustment (positive or negative) of the VAT initially deducted needs to be performed by the members entering or leaving a VAT group within the revision period of a capital goods item. The revision is, however, offset against a reverse revision at VAT group level.



- The members of the VAT group are jointly and severally liable, but only for payments (VAT, interest, penalties etc) due on taxable events within the period of the VAT grouping.

Administrative practice notes regarding the more practical aspects of introducing and operating a VAT group are still being prepared.

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## EUROPE

### 3. Cross-border VAT grouping rejected by the Commission

Cross-border VAT grouping has been rejected by the Commission as a solution to the problems associated with VAT and financial and insurance services.

The Commission's reason for rejecting cross-border VAT grouping is that the solution would not be in line with the requirements of fiscal neutrality, because it would allow economic operators to transfer VAT advantages obtained in one Member State to another.

The Commission will now focus on the following two solutions:

- a cross-border model based on the principles of article 132(f) of the EC VAT Directive; and
- the authorisation for an option to tax for cross-border supplies in a containment field structure.

At this stage, there is limited detail about how the two solutions will work in practice. Further information will be released by the Commission following their Working Party meetings in June and July.

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## GERMANY

### 4. Impact of ECJ ruling “Velvet & Steel Immobilien und Handels GmbH”

On 19 April 2007 the ECJ decided (C-455/05, Velvet & Steel Immobilien und Handels GmbH) that article 135(1)(c) of the EC VAT Directive (formerly article 13B(d)(2) of the EC Sixth VAT Directive) must be interpreted as meaning that the concept of assumption of obligations excludes obligations which are non-pecuniary, such as the obligation to renovate a property.

This decision leads to a clarification for the German VAT practice that regardless of the unrestricted wording of the respective national provision, Section 4(8)(g) of the German VAT Act, the VAT exemption only applies for pecuniary obligations.

It remains a moot point whether the current interpretation of Section 4(8)(c) of the German VAT Act which covers the transfer of non-pecuniary debts is still valid in the light of the present ECJ-decision.

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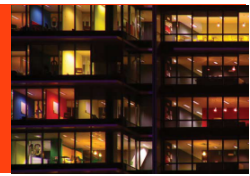
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## LUXEMBOURG

### 5. Interpretation of VAT status and received third party services according to VAT authorities / Impact for undertakings for collective investments with effect of 1 April 2007

In a VAT Circular issued on 29 December 2006, the Luxembourg VAT Authorities clarified their position with regards to the VAT status of undertakings for collective investments (UCIs) and the VAT treatment applicable to the services they receive from third parties. The Circular is effective from 1 April 2007.

The Circular follows from the BBL decision (C-8/03) dated 21 October 2004, in which the ECJ specified that SICAVs (“Sociétés d’Investissement à Capital Variable” – “Open-Ended Investment Companies”) have to be considered taxable persons for VAT purposes.



The Circular states that the turnover of UCIs is exempt from VAT under article 44(1)(d) of the Luxembourg VAT Law (LVL). Therefore, even though they are taxable persons, they will not have to charge VAT on their revenues and will in principle be exempt from the obligation to register for VAT, to issue invoices and to file returns. However, they will have to register for VAT and fill in VAT returns if they have to pay Luxembourg taxes on goods (e.g. marketing publications) or on services from abroad (e.g. lawyer's fees). That being said, they will only need to file a "simplified" VAT return instead of the standard one.

The Circular extends VAT taxable status to all entities referred to in article 44(1)(d) LVL. These are:

- investment funds under the supervision of the CSSF ("Commission de Surveillance du Secteur Financier"), i.e. Luxembourg investment funds and foreign funds marketed in Luxembourg;
- Luxembourg pension funds;
- SICARs, ("Sociétés d'Investissement en Capital à Risque") which are investment companies dedicated to Private Equity and Venture Capital; and
- securitisation vehicles.

The Circular also clarifies a number of other points:

- the managing entity of a "Fonds Commun de Placement" (FCP, i.e. unit trust) is the taxable person for VAT purposes and not the FCP itself;
- umbrella funds should be regarded as a single taxable person. Registering each sub-fund will therefore not be necessary;
- following the Abbey National decision, it is recognised that a custodian bank's activity has more than one component and only the supervision activity is taxable. It would therefore be incorrect to consider that all services rendered by the custodian bank are taxable;
- custody services are unaffected by the increase in the rate of VAT from 12% to 15% as from 1 January 2007 and remain taxable at 12%.

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## FRANCE

### 6. Position DLF on VAT recovery for French branches of foreign businesses

In a letter of 14 February 2007 (from the 'Direction de la Législation Fiscale' (DLF)) to a law firm), the DLF informs of its intention to repeal an administrative note of 4 August 1983 which provides for the conditions to be met by foreign businesses for exercising their VAT deduction right when they have a French branch registered for VAT in France.

The 1983 note provided for a VAT deduction system based on the setting up of separate business sectors in the accounting of the branch (a sector for expenses in relation to 'internal' transactions with the head office and a sector for 'external' transactions with third parties).

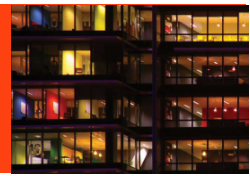
Furthermore, the tax authorities considered that the head office could deduct the VAT using the VAT returns filed on behalf of its French branch provided that it complied inter alia with the time limit provided by the EC 8th VAT Directive VAT refund procedure.

In the 2007 letter, the tax authorities confirm that when the branch is VAT registered in France, the head office can no longer apply the EC 8th Directive procedure with respect to expenses incurred on its behalf.

First of all, it should be pointed out that this letter is not enforceable because the note of 1983 has not officially been repealed.

Second, it should not be inferred from the letter that the French branch of a foreign banking group could have a right to fully deduct the VAT charged on the expenses that it incurs.

However, this letter could definitely be the starting point for the French tax authorities to address and somehow refresh their position regarding hot topics in the banking and financial sector such as the payroll tax and VAT recovery



rules applied to French branches of foreign businesses.

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## UNITED KINGDOM

### 7. Tribunal decides that debt negotiation is taxable if ancillary to a supply of debt collection made to the creditor

*HBOS Plc (20118)*

This case concerned HBOS's redrafting of their agreements with third party debt collection agents with a view to securing exemption. HBOS argued that, as they only used such agents for the most difficult 10% of cases, and as the agents had (and regularly exercised) the authority to vary the terms of the agreement with the debtor, the services amounted to the exempt debt negotiation rather than taxable debt collection.

The Tribunal focused on the activities of the agents rather than the drafting changes and decided that the dominant purpose of the supply was the recovery of money, to which the re-negotiation of terms (which was not an aim in itself) was ancillary. HBOS had therefore received single supplies of taxable debt collection services.

The Tribunal has decided that, where a debt collection company is engaged and paid by a creditor to pursue debts on terms empowering it to vary the amount and number of instalments payable by the debtor, but the supply of debt negotiation is ancillary to a principal supply of debt collection services, it constitutes part of a single, taxable service.

This appears to contrast with the guidance issued by HMRC in Business Brief 30/2003 following the case of Debt Management Associates (17880). However it appears that the fundamental distinctions drawn by the Tribunal were that, in the HBOS case, the recipient of the supply was the creditor, and that the recipient of the supply regarded the collection of the debt as the principal supply.

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### 8. Abbey claims – HMRC revises policy on unjust enrichment

The European Court of Justice (ECJ) decision in the Abbey National case (C-169/04) led to a large number of claims for retrospective repayment of VAT overpaid to HMRC by fund administrators (and fund managers).

Following its defeat in the Court of Appeal in Baines & Ernst in July 2006, HMRC has reviewed its policy on unjust enrichment as it applies to Abbey claims.

HMRC now accepts that to invoke unjust enrichment, following Baines & Ernst, it must prove that the VAT accounted for by claimants was passed on to their customers (rather than assuming that it has).

Therefore, subject to routine checks, HMRC will pay net claims in full (regardless of what reimbursement arrangements exist between the administrator and its customers).

All taxpayers who have submitted Abbey claims which remain unpaid should contact HMRC immediately with a view to obtaining payment.

Any AUT, OEIC or TBS administrators who have not yet submitted claims should do so as a matter of urgency.

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