

VAT international newsletter*

Global VAT developments

Issue 2, February 2007

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1. Our international VAT practice in Norway

In the field of international VAT we have a unique position in Norway. Our Norwegian VAT group includes individuals with more than 10 years of experience from various countries within and outside Europe. We are therefore very well positioned to coordinate international VAT assignments from Norway in a very efficient way. We have the competency and experience to see issues, raise questions and find solutions at an early stage and communicate those to group tax function in Norway. We believe this is the reason why many of the leading multinationals in Norway and abroad, in addition to policymakers such as the OECD, use us as their preferred VAT partner concerning international VAT issues.

2. European Union

ECJ Case Law

Are insurance sub-agents' services exempt?

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 as stated in Article 13(B)(a) of the Sixth Directive/Article 135(1)(a) of the VAT Directive. Article 135(1)(a) of the VAT Directive provides for an exemption for insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents.

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 VAT Directive also applies to subagents, when the subagents provide services that are specific to and essential for insurance brokers/agents.

Legislative changes

Update on VAT reform proposals

The European Commissioner for Taxation and Customs, Lazlo Kovacs, has given a number of speeches since the beginning of 2007. These outline the Commission's and the Presidency's priorities regarding indirect tax reform at EU level over the coming year.

VAT Package

The 'VAT package' relates to the Commission's proposals to change the place of supply rules for services and implement the two elements of the VAT simplification proposals, namely the one-stop shop and simplified rules for the refund of VAT to taxable persons established in another Member State.

The Council, in November 2006, agreed to prolong the validity of the e-commerce Directive from 1 January 2007 until the end of 2008. In the Commissioner's view, this two-year extension is sufficient to keep enough pressure for rapidly reaching an agreement on the VAT package and to allow a proper transposition of the new rules into national legislation and the necessary adaptations for affected businesses. Both the Commission and the Council have committed to take forward the work on the VAT package as a matter of priority. The aim is to prepare a comprehensive solution by June 2007, taking into account aspects relating to combating VAT fraud.

However, the Commissioner remains concerned about the position of Germany, which has, until recently, linked its agreement to the VAT package to the possibility for the German Government to apply an optional reverse charge mechanism on a national basis in order to combat tax fraud. The Commissioner is of the view that an optional reverse charge mechanism could have far reaching consequences for both businesses and administrations and therefore needs an in-depth analysis. This should include a public consultation of stakeholders and an impact assessment of the potential consequences of such a possibility. As this is not likely to be finalised before June 2007, he considers that this should not jeopardise the adoption of the VAT package by that time.

Reform of the VAT system

The Commission is to continue the reform of the VAT system. There will be a new **VAT proposal regarding financial services and insurance**. With regard to **reduced VAT rates**, an independent think tank is undertaking an assessment of the impact of reduced rates in terms of job creation, economic growth and the proper functioning of the internal market. The Commission intends to fulfil its obligation to report back by 30 June 2007 to the Council and European Parliament on the basis of the results of the study, which should be available around Easter this year. The Commission is also currently exploring the possibility of a **general mechanism preventing double taxation** for individuals and companies.

3. OECD

Services and intangibles project

The OECD submitted two reports to Working Party 9 in December 2006 concerning the VAT/GST treatment of trade in international services and intangibles.

The business community has raised concerns about several areas of the proposals such as slippage away from developing standards for avoiding double taxation, to sole emphasis on non-taxation and the lack of a coordinated approach for income taxes and consumption taxes. The business community feels there is a need for consumption tax and income tax specialists to work closer on issues surrounding intra-group charges, permanent establishment and double (inappropriate) tax relieves.

The OECD's work is relevant for all type of businesses involved in cross border trade.

4. VAT around the world

Austria

Car leasing

Contrary to a decision of the European Court of Justice, Austria levies VAT on the cross border leasing of cars. However, as a result of a Reasoned Opinion issued by the EU Commission, Austria has been given two months to bring its legislation in line with Community legislation in respect of this matter. The Austrian Ministry of Finance has yet to respond to the issuing of the Reasoned Opinion.

Refund of VAT on roaming costs

In the past, non-EU telecom providers could not obtain a refund of Austrian VAT incurred on roaming and similar charges, due to Austria's use and enjoyment rules. However, in two recent cases, Austrian courts have ruled that this interpretation of the use and enjoyment rules is not in line with EU VAT Law. Following these court decisions, the Austrian tax authorities have issued a new Decree which will enable a refund of Austrian VAT incurred in the past (subject to certain conditions). It is thought that there are substantial amounts of VAT which have not yet been refunded and although claims will have to be reviewed on a case-by-case basis, non-EU

telecom providers should examine their Austrian VAT position as soon as possible and take appropriate actions with a view to obtaining a VAT refund.

China

Duty exemption for spare parts

Spare parts replacement, either inside or outside warranty is becoming more common in China. There is a special Customs program called 'free-of-charge replacement goods'. If importers can meet all of the requirements of this program, they can import the warranty parts duty exempted. However, this requires Customs approval, and their supervision and control of this is tightening. When duty-paid spare part replacement is required, the dutiable value of the warranty replacement parts could attract scrutiny and review by Customs.

Denmark

Supreme Court case concerning VAT deduction and sponsorship agreements

The case in question concerned the VAT deductibility of football tickets purchased by a brewery under the terms of a sponsorship agreement between the brewery and certain football clubs. The question was, whether these tickets could be considered as deductible advertising costs, or whether the tickets were used for non-deductible purposes.

The Danish Supreme Court stated that tickets for national football matches, VIP arrangements and travel abroad, which are distributed in connection with sales campaigns or used as prizes in competitions, are to be considered as non-deductible gifts and are not used for advertising purposes. Moreover, the Danish Supreme Court found that the valuation of the tickets should be based on market value. However, it is questionable whether valuing the tickets at market value is compatible with general EU practice as the value of the ticket usually constitutes the bulk of the sponsorship amount, although the tickets are normally of a much lower value from the perspective of both the football club and the sponsor.

Cost sharing association not subject to VAT – Binding ruling

The Danish Tax Administration has issued a binding ruling, stating that the activities of a joint secretariat formed by local labour unions, handling the management of joint interests and secretarial tasks, but also participation in political committees on behalf of the local unions, should be regarded as the

activities of a cost-sharing association under Article 132(1)(f) of the VAT Directive and are thus not subject to VAT. (This provision corresponds to the wording of Article 13A(1)(f) of the 6th directive.)

Finland

Back office insurance related services are exempt

The Supreme Administrative Court of Finland ruled on 10 January 2007 that a back-office service provider has the right to exempt from VAT its supplies of insurance-related services to the insurance company in accordance with the Finnish VAT Act. The services concerned calculation, provision of solutions, statements and decisions relating to the insurance activities. The insurance company used these services for processing applications for compensation in accordance with the terms of its insurance agreements.

Even though the national exemption of insurance services is wider than the exemption in Article 13(B)(a) of the Sixth VAT Directive (Article 135(1)(a) of the VAT Directive), according to the Supreme Administrative Court, the Directive as interpreted by ECJ case law is not applicable as the decision in the case at hand is solely based on the interpretation of the national rules.

The rules of the Sixth VAT Directive could not be invoked against the taxable person as Finland had wrongly implemented the Directive. The Finnish VAT Act giving the back-office service providers a wider exemption for insurance-related technical services than the exemption granted in the Directive is clearly against the Directive. The European Court of Justice has ruled (C-472/03, Arthur Andersen) that similar services to the case at hand fall outside the scope of the VAT exemption in Article 13(B)(a) of the Sixth VAT Directive concerning insurance-related services.

Germany

Deductibility of VAT in holding companies

The Ministry of Finance has issued a decree setting out the circumstances under which it is prepared to recognise a holding company as a taxable person with the entitlement to deduct input VAT. A managing holding company, e.g. for the coordination of business policy within a group is a taxable person with a corresponding right to deduct VAT. Conversely, a finance holding company which merely holds investments in the expectation of a dividend or capital gain on sale is not a taxable person and cannot deduct input VAT.

If a VAT group parent company is not regarded as a taxable person under the definitions set out in the decree it cannot offer its subsidiary economic integration. The requirements for forming a VAT group are therefore not met.

Italy

Changes to EC sales listings and Intrastat

The Italian Decree dated 20 December 2006 has modified the rules regarding the submission of EC sales lists and Intrastat. Business with VAT compliance obligations in Italy therefore need to update their manuals.

The Netherlands

Short-stay rental of apartments to expatriates are not VAT exempt

On 26 January 2007, the Dutch Supreme Court ruled that the rental to expatriates of furnished apartments for a period of 5 months is not VAT exempted. The VAT exemption for letting of immovable property is not applicable because, according to the Dutch Supreme Court, the letting of apartments for a period of five months is similar/comparable to the provision of accommodation in the hotel sector or similar sectors like the provision of accommodation in holiday camps, which are excluded from the VAT exemption (Articles 135(1)(l) and 135(2)(a) VAT Directive).

Norway

Supreme Court case concerning group registration

The Olympia Capital group of companies provides debt management services. The group consists of various companies established in Norway and abroad. This case relates to the holding company established in Norway and two subsidiaries established respectively in the United Kingdom and Denmark.

The UK and Danish group companies provide taxable debt collection services for the Norwegian company whose activities consisting of financial type services are being exempt without credit. In Norway the debt-collection services provided from abroad are subject to the reverse charge mechanism.

The issues before the Supreme Court were:

(i) whether it is a requirement under Norwegian VAT law to be included in a VAT group that (foreign) companies have business activities in Norway; if yes

(ii) whether the companies in the case at hand perform business activities in Norway; and
(iii) whether Norwegian law is in conformity with the EEA-agreement.

The Court found that the first question had to be answered in the affirmative.

As to the second question, the Court concluded that the foreign established companies had no business activity in Norway. The Court observed that the foreign established companies had no employees in Norway and that the services were performed exclusively outside Norway. The Court emphasised that the only link to Norway was the ownership.

The Court then went on to consider whether Norwegian VAT law, requiring a business activity in Norway as a precondition for group registration, is in conformity with the EEA-Agreement. The appellant referred to the EEA-Agreement art 31 (freedom of establishment) and art 36 (disallowing discrimination based on nationality) and argued that Norwegian law would contradict the principles laid down in those articles. The Court rejected those arguments and held that for an unlawful breach of freedom of establishment or discrimination to be in place, there must be a different treatment of equal situations. The Court did not find that this was the case. On the contrary any company, foreign or Norwegian may be included in a VAT group as long as they perform business activities in Norway. The Court also observed that no EU-country currently allowing group registrations would allow the forming of a VAT group unless there are business activities in the country performed by all members of the group.

Singapore

Increased GST rate

It was announced in the 2007 Singapore Budget that the GST rate hike from 5% to 7% will be effective from 1 July 2007.

South Africa

Are VAT rulings binding?

Many businesses have through the years obtained VAT rulings from SARS regarding the application of the VAT Act on whether or not they must be registered as vendors in South Africa. Many foreign businesses which have been registered as VAT vendors in South Africa would also have obtained other VAT rulings, such as to meet the requirements of the

VAT Act as to self-invoicing or apportionment calculations, or to obtain confirmation of SARS's interpretation of the VAT treatment of certain transactions. In the past, where SARS gave a written ruling to a person, the ruling could not be withdrawn retrospectively, provided the ruling was accepted and all material facts were known to SARS. Due to a VAT amendment which came into effect on 1 January 2007, written rulings issued by SARS prior to that date will not be binding, unless the binding effect of the ruling is confirmed by SARS.

Ruling confirmation requests for old rulings must be lodged before prescribed expiry dates.

Sweden

Sale of shares – deductibility of VAT

The Administrative Court of Appeal in Gothenburg and the Board for Advance Tax Rulings, have in three recent cases ruled that companies are entitled to deductions of input VAT on costs incurred when selling shares in a subsidiary. According to the rulings, the costs in question should be seen as directly related to the taxable business performed by the companies.

The three rulings in question differ from previous Swedish case law, according to which such deductions have been denied as the costs have been viewed as being directly linked to a non-VATable sale of shares. The Swedish Tax Agency has appealed the cases to the Swedish Supreme Administrative Court and a verdict can be expected during 2007. If the Court rules in favour of the companies, other companies who have previously been denied deductions of input VAT for such costs can apply for reassessment. The general reassessment period in Sweden is six years.

Switzerland

Place of supply of analytical services

In Rulings, the Federal Tax Administration (FTA) has applied, on an individual basis, the principle that the place of supply of analytical services is where the recipient is domiciled. In an official publication, the FTA has now confirmed this. This rule will be applied to all analytical services, regardless of whether they are more scientific oriented or are in connection with consultancy work and more client oriented.

United Kingdom

Landmark case concerning who is the recipient of a supply

Zurich Insurance Company has been granted leave to appeal the UK High Court's decision that consultancy services were supplied to its UK branch and not to its head office in Switzerland. This case is significant in the context of global contracts (i.e. those where one multinational contracts with another to provide services on a global basis). The taxpayer has its head office in Switzerland, with branches and subsidiaries all over the world. It engaged PwC in the UK to assist with implementation of systems in its UK, Ireland and South Africa offices but, at a later stage, all work was channelled through PwC in Switzerland. PwC (UK) invoiced their services to PwC AG in Switzerland, who then invoiced the taxpayer in Switzerland. The judgment records that Swiss VAT was initially charged but was later refunded. HMRC concluded that the supply of the services by PwC AG to Zurich should be regarded as being received by the UK branch rather than by the Swiss head office. This meant the UK branch was subject to UK VAT under the reverse charge procedure and an assessment was raised, which was appealed. The Tribunal, finding in favour of Zurich, held that the consultancy services provided by PwC AG were supplied to Zurich at its head office in Switzerland and not to its UK branch. The High Court, however, overturned this decision, holding that the services were supplied to the UK branch. The appeal will be to the UK Court of Appeal.

Ukraine

Delayed VAT refunds violate Human Rights Convention

The European Court of Human Rights (ECHR) has upheld a business' claim for damages (and costs) where the Ukrainian State had withheld VAT refunds and compensation for considerable periods (Intersplav v Ukraine: No 803/02). The Applicant in these proceedings is a Ukrainian-Spanish joint venture based in the town of Sverdlovsk in the Lugansk Region, Ukraine. It manufactures goods using recycled scrap metal purchased in Ukraine (bearing a 20% VAT rate) and then exports these at a zero VAT rate. It is therefore entitled to a refund of the VAT due on the price of the scrap metal.

Since 1998, the Applicant had been complaining without success to the Lugansk Regional Tax Administration and the State Tax Administration about the failure of the Sverdlovsk Town Tax Administration to issue certificates for the VAT refunds on time. However, while recognising the existence of the State's debts to the Applicant, the authorities found no fault

with the Sverdlovsk Town Tax Administration. The Applicant also instituted more than 140 sets of proceedings in the Lugansk Commercial Court against the Sverdlovsk Town Tax Administration and the State Treasury Department in order to receive compensation for the delayed VAT refunds.

The Applicant maintained that, as of 18 June 2004, the amount of the State debt to the company confirmed by court decisions was UAH 26,363,200 (around EUR 4,119,250). The Applicant complained, in particular, that the State's practice of groundlessly refusing to confirm its entitlement to VAT refunds constituted an interference with the peaceful enjoyment of its property, and caused significant losses to its business, in violation of Article 1 of Protocol No 1 of the European Convention on Human Rights (protection of property).

The Court held, unanimously, that there had been a violation of Article 1 of Protocol No 1 and awarded the Applicant EUR 25,000 for pecuniary damage.

Whilst the ECHR cannot order the Ukraine authorities to make an immediate payment of the VAT refunds in question to the Applicant, it can order payments in damages and this is what it has done. That in itself may result in the Ukraine authorities re-visiting the claims in question and making a decision as to payment or otherwise.

The case therefore shows that, for any business in a position where monies have been withheld by the authorities for an extended length of time and this has resulted in significant losses to that business, a claim in damages to the ECHR (for violation of Article 1, Protocol No 1 of European Convention on Human Rights) may provide a remedy to be used in conjunction with, or as an alternative to, other available remedies.

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