

Financial Services VAT Alert*

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FINLAND

1. Reverse charge mechanism for carbon credits trading proposed in Finland

Financial institutions involved in the trade of carbon credits should be aware of new reverse charge mechanism

The proposal of the government for VAT Act amendments introduces the reverse charge mechanism for carbon emission trading in Finland. According to the proposal, the reverse charge mechanism would apply to supplies to VAT registered recipients. The reverse charge mechanism would apply to all carbon emissions and units which can be transferred in accordance of Article 12 of Directive 2003/87/EC. The new rule is expected to enter into force on 1 July 2010.

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GERMANY

2. Treatment of guarantees provided by car dealers and reinsured by an insurance company.

Providers of (repair) warranties should reassess VAT treatment after Supreme Court decision

A service provided by car dealers that consists of either car repair warranty or, alternatively, the insurance coverage via an insurer has to be regarded as a single taxable service, according to the Supreme Tax Court.

The Supreme Tax Court held that pursuant to the ECJ case Velvet & Steel, the provision of a warranty can only be VAT exempt if the warranty covers payment obligations. This is not the case for car repair warranties. In the case at hand, the car dealer is burdened with the obligation of repairing the car, in case of a defect. The Supreme Court states that this obligation is dominating the qualification of the service as taxable.

The service might be regarded as an insurance service only under the condition that the customer may claim indemnification for repair costs directly and exclusively from the insurance company. In that case, the insurance company would release the car dealer entirely from his obligation to repair the car. This element, however, is not the dominating element of the service, according to the Supreme Tax Court.

The providers of car warranties and insurers in Germany should reassess their services to determine whether these services would be regarded as taxable or VAT exempt following the above mentioned decision.

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LUXEMBOURG

3. 4th PricewaterhouseCoopers VAT conference on Thursday 17 June 2010

“2010: The year of the VAT (r)evolution”

PricewaterhouseCoopers Luxembourg are pleased to inform you that the 2010 VAT Conference will take place on Thursday, June 17, 2010, from 08:30 to 14:00 (Abbaye de Neumünster, 28, rue Münster – Luxembourg).

This 4th edition will again offer its participants the opportunity to attend plenary sessions and workshops. This year, the focus of the Conference will be on practical experiences and best practices following the introduction of the new VAT rules at the beginning of this year. We will also be looking into what the future may have in store.

One of the workshops will specifically focus on the financial services sector.

Please contact the undersigned persons if you would like to receive your personal invitation.

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THE NETHERLANDS

4. ECJ: Dutch rules for refusing input VAT deduction are in line with the EU VAT rules

No change in application of BUA for Dutch businesses after ECJ case.

On 15 April 2010 the ECJ ruled that the Dutch rules for refusing deduction of input VAT on specific costs incurred by a business for its staff (i.e. the provision of 'private transport', 'food', 'drink', 'accommodation' and 'opportunities for recreation') and the provision of 'business gifts' or 'other gifts' are not incompatible with the EU VAT rules.

The Dutch VAT system includes rules for refusing the deduction of input VAT incurred on certain costs, in particular on costs of goods and services intended (wholly or partially) for private consumption (e.g. supplies to staff, business gifts etc.). These rules are laid down in a special Dutch decree (the "BUA").

The Dutch Supreme Court ruled previously that two exclusion categories under the BUA are incompatible with the EU VAT rules and therefore not binding.

With respect to the compatibility of a number of other BUA categories questions were referred to the ECJ by the Dutch Supreme Court.

The ECJ now decided that none of the BUA exclusion categories referred are incompatible with the European VAT rules. Therefore the BUA, insofar as it is tested by the ECJ, is still applicable.

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POLAND

5. Polish VAT regulations in respect of VAT recovery are not in line with the VAT Directive.

Businesses that have not recovered VAT in the past because the VAT recovery percentage would be less than 2% should take action

On 13 April 2010, the Supreme Administrative Court decided that Polish VAT regulations in respect of VAT recovery are not in line with the VAT Directive.

Where a business is not entitled to recover VAT in full, current Polish VAT regulations allow such a business to recover a proportion of the VAT. However, the regulations state that, if this proportion is less than the 2% threshold, no VAT can be recovered.

The decision of the Supreme Administrative Court states that the Polish VAT regulations in this respect are not in line with the VAT Directive.

This could present an opportunity for additional VAT recovery for businesses not reaching the 2% threshold in the past.

Indirect Taxes

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This judgment is important, especially for financial institutions. It gives them an opportunity to obtain significant savings.

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SWITZERLAND

6. Head Office/Branch Relationship from the Perspective of Swiss VAT

Financial institutions with a Swiss branch should be aware of new Swiss VAT law

Under the new Swiss VAT Law the place of business in Switzerland and all domestic permanent establishments together represent a single entity for tax purposes. This means that if the head office and the branch of a company are both located in Switzerland, the "single-entity principle" applies and the transactions between the two parts of the company are considered as purely cost allocations that are irrelevant for VAT purposes. However, where either the head office or the branch of a company is located in Switzerland and the other abroad, the two parts of the company are treated as two different entities for Swiss VAT purposes (separate-entities principle). In that case, any activities carried out by the branch or the head office for the benefit of the other party qualify as supplies for Swiss VAT, as if the transactions were carried out between two independent parties.

This concept is clearly different from the EU's single-entity principle which applies in domestic and cross border situations.

Due to the system of the separate-entities principle the establishment of a branch in Switzerland can lead to double non-taxation in international scenarios.

This could be very beneficial for EU financial institutions with limited recovery that already have a Swiss branch.

However, please bear in mind that on the basis of ECJ's Halifax case, routing of costs with the sole purpose of saving VAT could be considered to be abuse of law.

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UNITED KINGDOM

7. Court decision on VAT exemption for insurance intermediation

All insurers and all businesses earning income from Internet insurance services should be aware of new case law

The Court of Appeal has handed down its decision in the joined cases of InsuranceWide.com and Trader Media Group, which concern the proper scope of the VAT exemption for insurance intermediation.

In InsuranceWide.com, the VAT Tribunal held that the commission income was standard-rated. It was influenced by the fact that the Taxpayer had no power to bind the insurers and had included a disclaimer in its terms and conditions that it was not acting as an agent. Of the five different "phases" of service offering, the Tribunal considered that in the first, the website had merely acted as an introducer; in the second, it had not made recommendations and remained indistinguishable from an advertiser of insurance; and in the third to fifth phases, whilst the Tribunal accepted that it acted as insurance intermediary, it held that this could not be equated with the concept of an insurance agent.

Indirect Taxes

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In *Trader Media Group* which concerned the 'Auto Trader' website, a differently-constituted VAT Tribunal held (on similar facts) that the Taxpayer's services were VAT-exempt. It placed substantial weight on the purpose of (and the concepts underlying) the EC Insurance Mediation Directive (2002/92), which replaced the concepts of "insurance agent" and "insurance broker" (used in its predecessor, the Insurance Mediation Directive (77/92)) with the single concept of "insurance intermediary" - with the explicit purpose of ensuring equality of treatment between the various types of persons and institutions which can distribute insurance products.

On appeal, the High Court was asked to determine a point of law as a preliminary issue to its decision on both appeals.

The High Court ruled that "introducers" of those seeking and those providing insurance services should benefit from VAT exemption, and only those who are mere advertisers should find that their services are standard-rated. HMRC appealed.

The Court of Appeal held that both Taxpayers were providing exempt services, as their activities went beyond those of a mere "click-through" or "conduit" and could fairly be described as "the business of bringing together insurers and those seeking insurance". The Court rejected HMRC's arguments that the exemption cannot apply if there are no legal relationships with the insurer and the insured, and that other characteristic functions are required in addition to the bringing together of insurer and insured.

The Court also rejected HMRC's request for a reference to the ECJ, considering that the relevant legal principles are clear and that the contentious issue was the application of those principles to the facts.

The Court of Appeal disapproved of the High Court's approach of determining a preliminary legal issue (i.e. whether an act of introduction was sufficient to achieve exemption) divorced from the actual facts of the case, and it expressed no view on the High Court's decision on that issue.

This case is of significance to insurers and to all businesses earning income from Internet insurance services. Affected businesses which have not yet submitted claims should do so as a matter of urgency.

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