

# IFS Newsalert

## International Financial Services (IFS) - Ireland



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#### Decisions in recent VAT cases

As VAT is a pan-European tax, it has always been the situation that decisions in European VAT cases have had a major impact on the operation of VAT in all of the EU domestic territories. We set out below some important recent VAT decisions and opinions from Europe which are expected to have an impact on the VAT position in financial services operations in Ireland.

#### Advocate General's Opinion - Andersen Case (C- 472/03)

The Advocate General's opinion in the Andersen case (Arthur Andersen, C-472/03) issued on 12 January 2005. The case concerns the VAT status of back office activities provided to an insurer. In his opinion the Advocate General concluded that the services provided by Andersen to Universal Life, a Dutch life assurance company, were not exempt services.

The Advocate General concluded that the back-office activities performed by Andersen (now Accenture) were not "independent" of the activity of the insurer (Universal Life) and the services supplied by Accenture should not be considered as services relating to insurance transactions performed by insurance brokers/agents.

The services provided by Accenture to Universal Life consisted of the following: acceptance of requests for insurance, handling of requests for amendments to the insurance policies, handling of claims, termination of insurance policies, calculation and payment of commissions to insurance agents, design and management of IT systems.

The Advocate General stated that in order to benefit from the exemption for services performed by insurance brokers or insurance agents, it was essential that the activities were supplied in a professional broker/agent type capacity, where the intermediary role was decisive. There had to be a direct relationship between broker/agent and the insured party, i.e. the broker/agent had to act independently of the insurer.

In the Advocate General's opinion there was no clear relationship between Accenture and the insured parties, and an indirect relationship with the insured was insufficient in order for the services to benefit from the exemption.

It is worth noting that the Advocate General specifically stated that, in relation to the services provided by brokers/agents and with whom Accenture dealt with on behalf of Universal Life, e.g. by arranging the payments of commission, that the services of these brokers/agents were covered by the exemption in EU law.

Interestingly in a footnote to his opinion the Advocate General did envisage that an agent did not need to maintain personal contact with prospective customers; this could possibly be handled by a third party acting on his behalf.

The European Court of Justice is expected to issue its judgment in this case within the next 3 months. If the Court concurs with the Advocate General's opinion, this could leave insurance companies facing a VAT bill that was not envisaged on entering into outsourcing contracts.

Further, such a judgment of the Court could impact on future outsourcing arrangements, as insurance companies may have to reassess the benefits of entering into such arrangements.

Quite clearly if the Court agrees with the Advocate General's opinion, the decision will represent a barrier to the optimal organisational structure of insurance companies (internal resources vs. outsourcing) and ultimately may make EU insurance businesses less competitive; somewhat ironic given the strategy of the EU at another level in the context of the "Lisbon" agenda which is committed to enhancing competitiveness and innovation in the EU.

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## The European Court of Justice Judgement: Banque Bruxelles Lambert SA ("BBL") v Belgian State C-8/03.

The European Court of Justice issued its judgement in the BBL case on the 21 October 2004. The Court confirmed that SICAVs (i.e. open-end investment companies which have as their sole object the collective investment in transferable securities) are carrying on an economic activity and are taxable persons under EU VAT law.

As such, the Court confirmed that where services are supplied to SICAVs established in a Member State other than that of the supplier of the services, the place where those services are provided is the place where the SICAVs have established their business.

This judgement is in line with the practice in Ireland, in respect of services to Irish funds and services to foreign funds by Irish service providers. The judgement is welcome, as a negative judgement from the Court might have had significant VAT implications for Irish Funds and Irish/Non-Irish service providers.

## European Court of Justice: Hearing Italian Head Office to Branch case (C-210/04)

This case concerns a cost sharing arrangement between an Italian branch and a UK head office. The Italian Supreme Court has referred a question to the ECJ as to whether a branch, established in one EU Member State and its Head Office established in another EU Member State, may be regarded as independent persons for VAT purposes.

The Italian Supreme Court has asked the ECJ to rule on the following questions:

1. If the ECJ is of the view that an independent legal relationship can exist between the Branch and Head Office, what conditions must arise for the relationship to exist?
2. Is the passing on of costs by the Head Office to the Branch, to be regarded as consideration for services supplied by the Head office to the Branch?

3. If the ECJ rules that the Branch is not independent of the Head Office, then is a national administrative practice of treating the Branch/Head office as separate legal entities contrary to EU law?

The hearing of this case is expected to take place early next year and we will keep you updated on developments.

## Danish Central Customs and Tax Administration agrees methodology for VAT recovery calculation with Danish Bankers' Association.

In late November 2004 the Danish Customs and Tax Administration authorities published guidelines for the calculation of partial deduction for banks pursuant to Section 38(1) of the Danish VAT Act. These guidelines were published following negotiations between Danish Revenue and the Danish Bankers' Association and are effective for the accounting year 2004 and later years.

It is interesting to note that the authorities have agreed a turnover basis as the default basis for apportionment of credit. Included in the definition of turnover is interest income, interest expense (offset against interest income), fees and commission income, exchange adjustments and other ordinary income. The rationale for including interest expense (according to the guidelines published) is that it only makes financial sense to offer a service consisting of deposits if the deposits can be used for lending or investment activity and therefore the borrowing and lending/investment activity are directly and naturally linked to each other. In addition, in the calculation of taxable turnover the authorities have agreed that the capital element of lease repayments should be included.

While the guidelines only have application in Denmark it is helpful to see the approach taken and should be considered in the context of any discussions with Irish Revenue with regard to input credit apportionment.

If you have any comments on the content of this publication, or have any other issues you would like to raise, please contact your usual tax contact within PricewaterhouseCoopers, or one of the following:

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