International VAT Conference 2020
Webinar series

Financial Services VAT

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Agenda

1 Introduction

2 Policy considerations

3 Payment transactions

4 VAT grouping

5 Branches

6 Fund management services

7 Miscellaneous

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1 Introduction

Introduction

- Risk of irrecoverable VAT & disputes with tax authorities increase as outsourcing (either within a group or via third parties) becomes the norm for technology spending

Outsourcing

- Intra-entity flows are under pressure in light of new regulation and case law in respect of VAT grouping & the concept of branch

Cross-border flows

- Post-Brexit VAT laws are uncertain as regards financial services both from a regulatory and judicial point of view

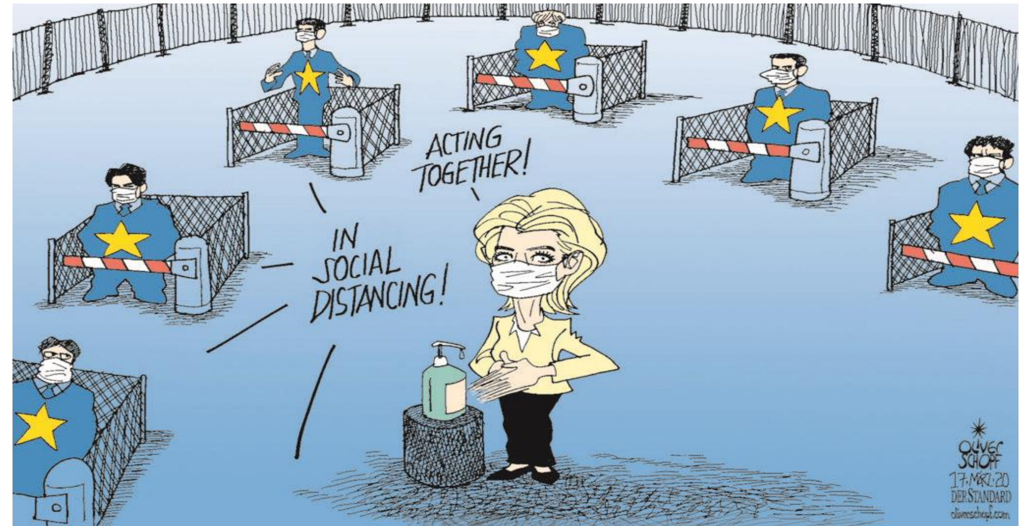
Brexit

Policy considerations

Policy developments

Review at EU level

- Last meeting of the Group on the future of VAT on 30 April 2020 outlined 5 options on the table
- Outcome of the study undertaken by the Commission was expected for the summer 2020 although the Covid crisis may have delayed the process
- Expectations? no substantive deviation from previous review dated 2007 although a wider reform might be possible if there is political support (more likely post Brexit)



Policy developments

Review at UK level

- In March 2020, the Government has announced that it will set up an industry working group to review how financial services are treated for VAT purposes
- There has been no other official communication since then, very likely due to the Covid crisis
- Expectations are probably that the Covid crisis has changed the way the UK Tax regime will look like (to be confirmed in the next Budget)

Policy developments

Brexit considerations

- Export of financial services to the EU and vice versa will grant input tax recovery unless both parties agree otherwise
- More generally, Brexit may be an opportunity for both the EU and the UK to flex and simplify rules but it will largely depend on the fiscal policy post Covid crisis

Payment transactions

Payment transactions: few considerations

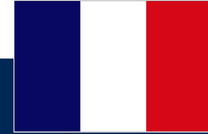
DPAS judgment was recently perceived as putting pressure on the VAT exemption for payment transactions in *Target* case (FTT) although the appeal recently lodged before the Court of Appeal may depart from it post-Brexit

Recent NL experience shows that traditional VAT exempt payment services may be requalified into taxable supplies with VAT recovery despite historical NL policy dated from 1980s (e.g. card issuing services)

Market trend for banks is to massively increase technology spending to deliver payment services which puts the VAT liability of inter-company charges under pressure, thereby forcing businesses to review the nature of the services in detail

VAT grouping

Possible implementation of VAT grouping?

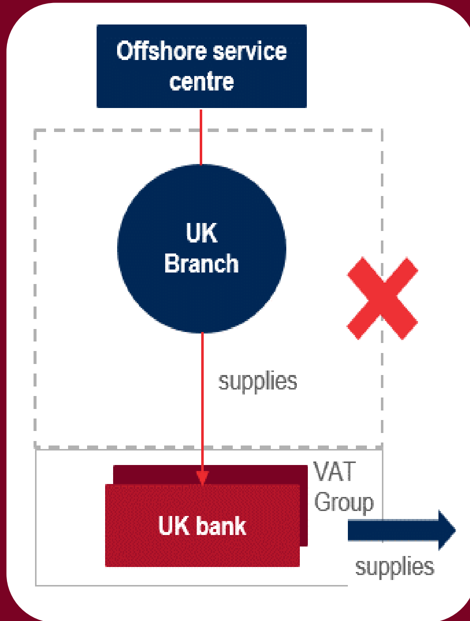


French reform

Currently no VAT grouping in France (the cost sharing exemption is still being used).

VAT grouping rules will be effective as of 1 January 2023. Option to be done before October 2022. Cost sharing exemption will be withdrawn simultaneously.

Branch in VAT group and consultation



UK VAT grouping

Pending FTT in Barclays (see diagram)

More broadly, HMT launched a consultation on 28 August 2020 in respect of VAT grouping rules regarding 3 areas:

(1) establishment provisions

(2) compulsory VAT grouping

(3) eligibility criteria

Concept of VAT grouping in DE law

Referral to the CJEU

In Norddeutsche Gesellschaft für Diakonie mbH (C-141/20), the taxpayer challenges the German provisions as regards VAT grouping.

The issues relate to different aspects of VAT grouping:

(1) the concept of representative member

(2) the threshold for financial integration between members

(3) whether a company can be seen as independent if it is fully controlled

“Reverse Skandia”: in or outside the scope?

Referral to the CJEU

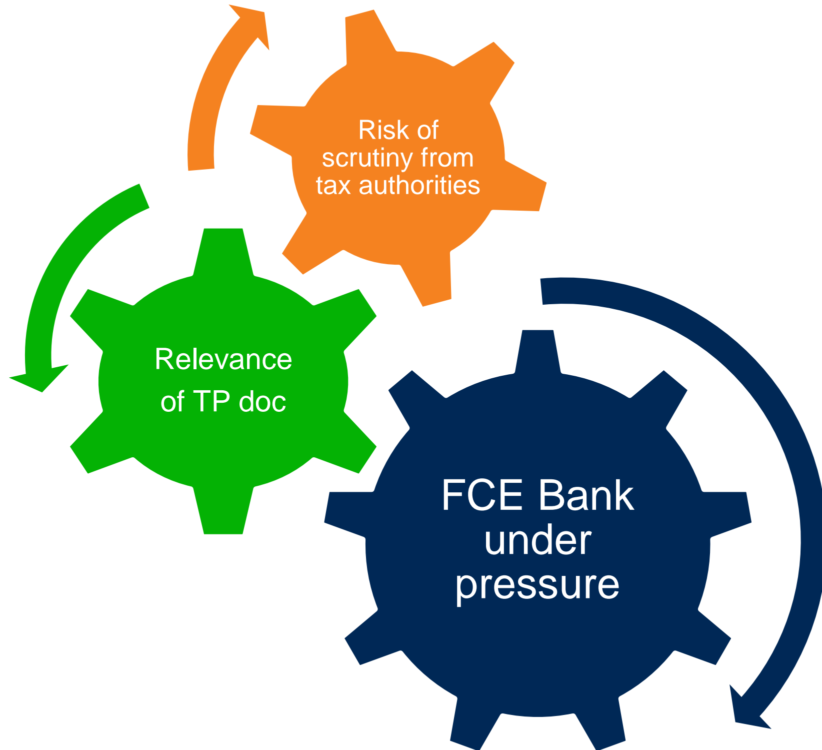
In Danske Bank (C-812/19), the taxpayer challenges the application of Swedish VAT in a reverse Skandia scenario.

Skandia was a Swedish case and yet again another referral is submitted. The issue is whether the Swedish branch of a Danish head office in a VAT group in Denmark has to self-account for Swedish VAT on IT services it receives, noting that the Swedish branch is not in a VAT group.

Impact?

Branches

(In)dependence of the branch and intra-entity flows



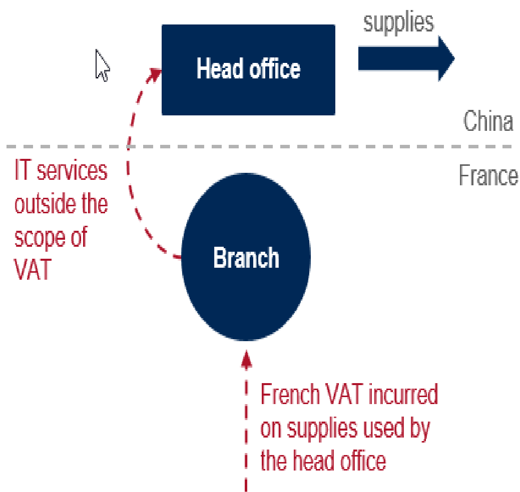
Central Administrative Court's Judgment

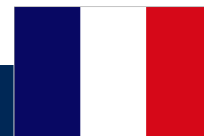
The Court applies FCE case and concludes that the branch is a different VAT taxpayer as it bears the economic risk of the economic activity and carries it out independently from its HQ.

The Court points out that the fact that the branch is not a separate legal entity and therefore does not have its own equity to assume the losses independently, does not lead to consider that the branch cannot be treated as a separate VAT taxpayer.

Wider consequences?

Branch’s input tax recovery in Bank of China





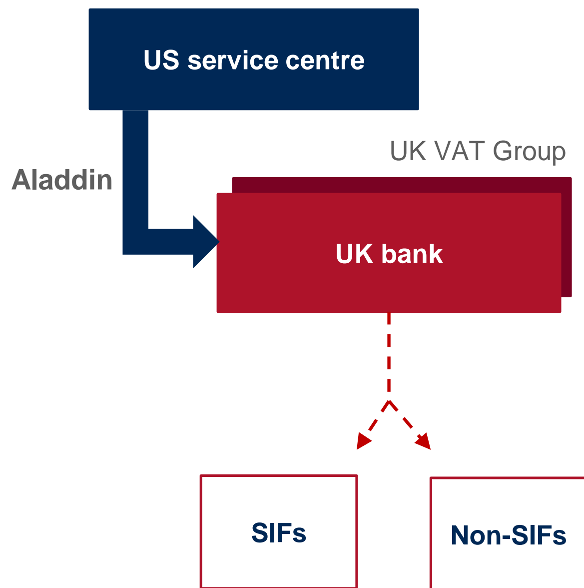
Referral to the CJEU

In Bank of China (C-737/19), the taxpayer requests the Court to confirm whether the conclusion reached in Morgan Stanley is applicable to the situation in which the head office is outside the EU.

In particular, the question is whether the French branch of Bank of China head office in China can recover input tax in France by applying the double layer test set out in Morgan Stanley. If so, the issue is to characterise the supplies made by the Chinese head office for French VAT purposes in order to determine the VAT recovery ratio.

6 Fund management

Blackrock judgment: disappointing decision



Conclusion of the CJEU

The supply of a platform managing both SIFs and non-SIFs cannot fall within the VAT exemption and should therefore be taxable on the basis that:

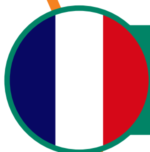
(1) one cannot look at the nature of the majority of the funds under management to determine the tax treatment as it would exempt from VAT funds that are not SIFs

(2) since the platform includes non-SIFs, the services at hand cannot be specific to the management of SIFs

Are there solutions?

Blackrock judgment: domestic reaction

The judgment comes as a disappointment for the industry. Based on our understanding, the CJEU did not scrutinize the facts appropriately which led to an unfortunate decision. However, the case will be dealt with by a domestic court which may depart from the CJEU decision (especially post-Brexit).



The judgment is perceived as unfortunate and difficult to understand in terms of how the CJEU reached such a conclusion. French Tax Authorities are yet to provide any guidance.

The judgment has not triggered any particular reaction from the Spanish Tax Authorities. The expectation is that there will not necessarily be any official guidance published.

The judgment itself has not triggered any reaction from the Dutch Authorities. However, the Authorities are focusing extremely on the investment fund management exemption, which we will discuss later.

No response has been published by the German Tax Authorities to date. The conclusions are being discussed controversially among practitioners. It is conceivable that the case will not be introduced into the German VAT Guidelines for wider application but rather used on a case-by-case level. Notably, the Federal Court and the Authorities have taken a rather strict stance when it comes to the fund management exemption (e.g. qualification of eligible funds).

Outsourcing of the management of SIFs

Two new referrals to the CJEU

In DBKAG (C-59/20), the issue is whether the granting by a third-party licensor to an investment management company ('IMC') of a right to use specialist software specifically designed for the management of SIFs - and intended exclusively to perform specific and essential activities in connection with SIFs - falls within the concept of management of SIFs.

In K (C-58/20), the issue is whether specific tasks – such as ensuring that the income received by unit-holders is taxed according to the law – falls within the management of SIF.

Dutch CLO SPVs

New position of the NL Tax Authorities (January 2020)

Following revocation by Dutch tax authorities of tax rulings previously relied on by Dutch Collateral Loan Obligation (CLO) issuers for treatment of collateral management and administration fees, the DTA are taking the position that investment management fees are now subject to 21% Dutch VAT. This change in policy is ascribed to the CJEU judgment in *Fiscale Eenheid X*. The DTA take the view that CLO managers are not subject to specific state supervision. Such CLO managers are generally subject to MiFID supervision.

The most controversial part of the decision is its retrospective application which goes back to 1 April 2019 and absence of a grace period. Baker McKenzie successfully challenged this position.

Baker McKenzie is now in the process of challenging the principal position of the DTA. A remarkable detail is that –at the moment- there are two pending cases before the Dutch Supreme Court which see to the question whether MiFID supervision is sufficient to apply the exemption. Both Court of Appeals confirmed this question and so did the AG of the Dutch Supreme Court, making the position of the DTA and their approach to revoke the ruling even more questionable.

SIFs: FR guidance updated

Updated guidance from the French Tax Authorities (May 2020)

The French Tax Authorities have amended their guidance as a consequence of the re-wording of the scope of VAT exemption in more generic terms last year. The scope of the exemption remains the same except the inclusion of collective funds owning real estate properties.

Miscellaneous

German developments & UK condemned for TMO regime

Exchange fees

It is general practice in Germany to treat exchange fees payable at stock markets as taxable services because they would nor fall under a financial service VAT exemption. In the course the efforts to structure regulated financial services products post BREXIT there has developed a discussion about whether such services should be requalified as VAT exempt financial turnover.

VAT exemption for transfer of life insurance portfolio

The German Federal Court (V R 57/17) ruled that the transfer of a life insurance portfolio may, even considering the principles established by the ECJ in Swiss Re (C-242/08)), qualify as VAT exempt turnover in relation to receivables.

UK condemned by the CJEU for the TMO regime

In European Commission v UK (C-276/19) the CJEU found that the UK had failed to notify the Commission when adjusting the list of terminal markets on which commodity derivatives trading is VAT zero-rated. On 15 May 2020, HMT announced that they are reviewing the decision and will provide details on next steps in due course. In the meantime, it stated that the decision does not require businesses to pay VAT on historic transactions and the law applying to derivatives trades continues to apply so that no VAT is due.

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