March 2020

FS Indirect Tax Alert

VAT & Financial Services Update

March 2020

EY Tax News Update: Global Edition

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COVID-19 – Irish Revenue measures

The Irish Revenue has announced a number of measures to ensure a continuity of Revenue services during the COVID-19 pandemic and to assist primarily small and medium sized enterprise ("SME's) businesses experiencing cashflow difficulties. These include the following:

- Revenue will prioritise the approval & processing of repayments and refunds, primarily VAT and PSWT.
- In general they have suspended audit and other compliance intervention activity on taxpayers premises until further notice.
- Taxpayers should continue to file tax returns including VAT returns even if payment of the liability, in whole or part, is not possible. If key personnel are not available, returns should still be submitted on a "best estimate" basis.
- The application of interest on late payments is suspended for the January/February VAT return and both February and March PAYE (Employers) liabilities.
- All debt enforcement activity is suspended until further notice.
- Current tax clearance status will remain in place for all businesses over the coming months.

An SME is defined by Revenue as having turnover of less than €3million. Revenue has explicitly stated if any other businesses are experiencing temporary cash flow or trading difficulties, then should contact Revenue. We will be happy to assist with any questions you may have in this regard.

This is a constantly evolving situation and we expect further measures may be required in the coming weeks. If you are currently experiencing cashflow difficulties, particularly in meeting your VAT return payments, please reach out to your usual EY contact for guidance.

Withdrawal of VAT exemption for management of Dutch CLO SPVs

The Dutch Tax Authorities recently wrote to stakeholders to advise that collateral management and administration services provided to Dutch CLO SPVs no longer qualify for the fund management VAT exemption and this revised position applies retrospectively from April 2019.

The new approach appears to have been driven by the 2015 Court of Justice of the European Union ("CJEU") judgment in the *Fiscale Einheid* case which outlined the need for a fund to be subject to specific state supervision in order for the fund management VAT exemption to apply. It is possible CLO issuers and/or investors will challenge both the retrospective nature of the Dutch Tax Authorities' decision and their revocation of the VAT exempt position.

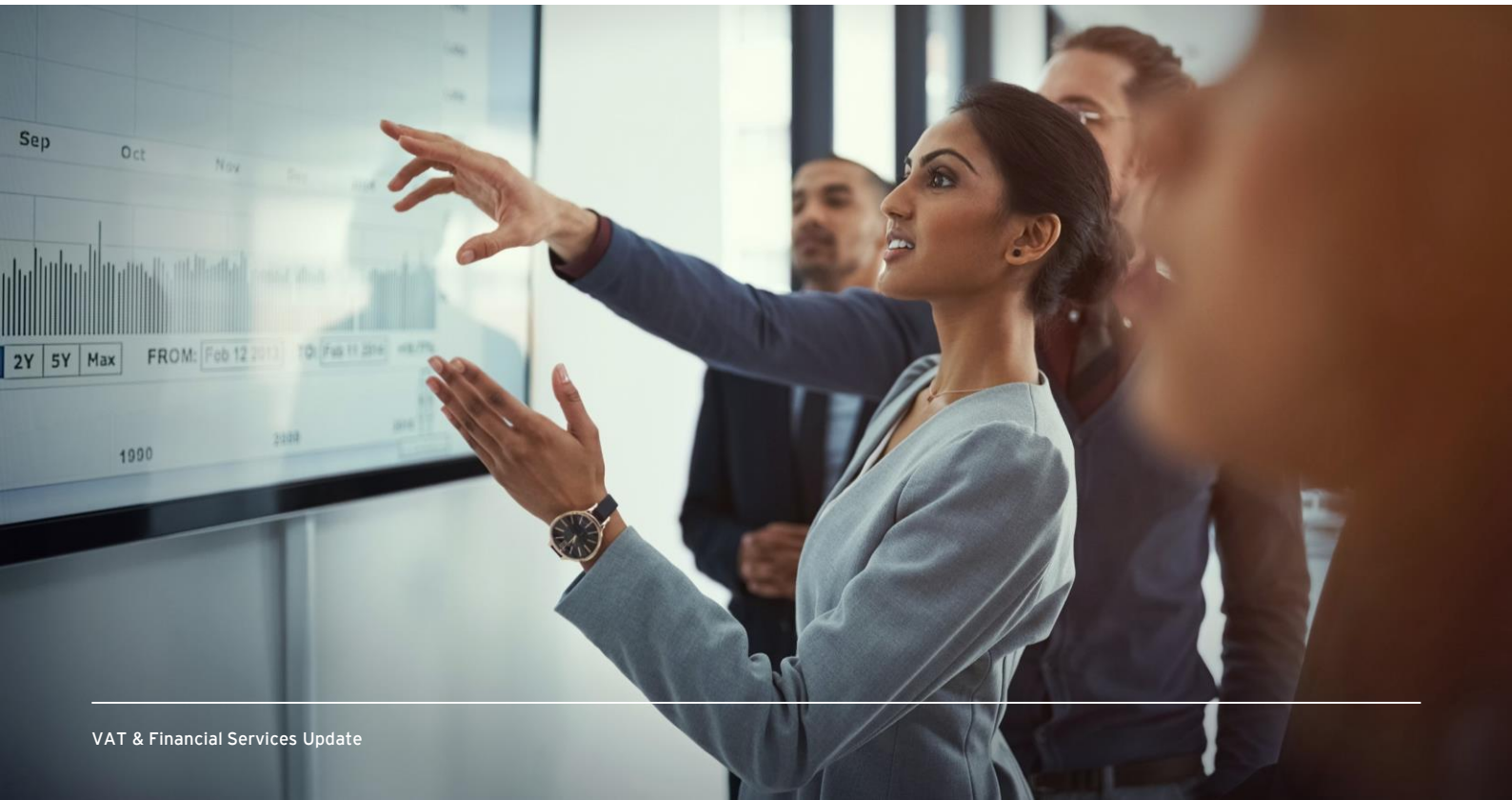
It is likely investors will want CLOs to consider migrating to another jurisdiction where the exemption still applies, such as Ireland. From a practical perspective Irish suppliers of collateral management or administration services to Dutch CLO SPVs should ensure they include their supplies on their EC Sales Lists (VIES returns).

Blackrock Investment Management C-231/19 – CJEU AG opinion released

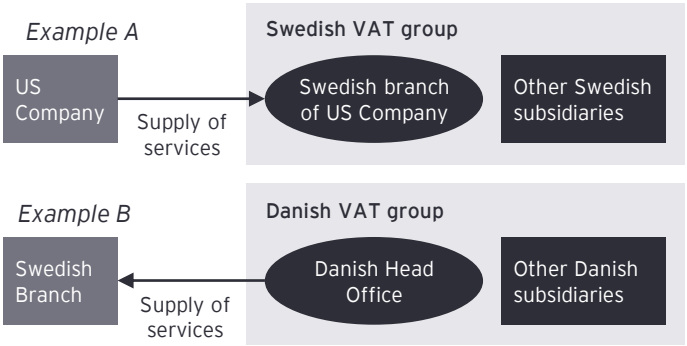
On 11 March 2020 the Advocate General's (AG) Opinion in the above case was delivered. The case concerns a single supply of an investment management service received by a UK fund manager from a US affiliated company, which the UK fund manager uses for to manage both Special Investment Funds (SIFs) (VAT exempt activity) and other funds that are not SIFs (taxable activity). The questions asked of the CJEU are (i) is the single supply to be subject to a single rate of tax? And if so, how is that single rate to be determined? And (ii) may the consideration for that supply be apportioned between the SIF and non-SIF funds?

The AG opined that the supply received by the UK fund manager is a single supply of services consisting of various elements supplied in a complementary way. The AG confirmed that it is not permissible to apply different VAT treatments to different elements of that single supply (i.e. the management of SIFs and the management of other non-SIF investment funds). The AG clarified that the single supply of services supplied to the UK fund manager could not be exempt as applying exemption to management of non-SIF investment funds would not be in line with the principle of VAT neutrality. The AG expressed the view that if the UK fund manager was allowed to apportion the exemption according to the value of SIF and non-SIF assets managed by it, that approach risked exemption being partially applied to the management of non-SIF's given the fluctuating value of assets, and this outcome would be contrary to the principle that exemptions should be applied narrowly.

While we await to see if the Court follows the AG's opinion, this is not an unexpected outcome. It does not close the door on VAT exemption applying where there is a robust framework from the supplier clearing ascribing consideration to each element of the supply. All business, not just those in the investment management industry, that receive or supply a single service comprised of different elements which potentially attract different VAT rates, should carefully consider their arrangements to see if they are impacted by this Opinion.



'Reverse Skandia' case referred to CJEU



You may recall in 2014 the Court of Justice of the European Union (CJEU) held in the Skandia case (C-7/13) that services provided by a US company to its Swedish branch, which was a member of a Swedish VAT group, were liable to reverse charge VAT in Sweden – example A. This was on the basis the services should be regarded as being supplied to the VAT group rather than to the branch. Implementation of the judgment by Member States has been patchy.

The so called "Reverse Skandia' principle has now been referred by the Swedish Supreme Administrative Court to the CJEU in the Danske Bank case.

In this case, Danske Bank, the head office of which is a member of a Danish VAT group, provided services to its standalone Swedish branch (the Swedish branch is not in a VAT group in Sweden) – example B. The Swedish Tax Authorities held that Swedish reverse charge VAT was due but Danske Bank appealed to the courts. The question referred to the CJEU seeks to clarify whether Danske Bank's head office and its Swedish branch are two separate taxable persons for VAT purposes due to the head office being a member of a Danish VAT group. The question referred is as follows:

"Is a Swedish branch of a bank with a main establishment in another Member State a separate taxable person when the main establishment supplies the branch with services and allocates the costs thereof to the branch, if that main establishment is part of a VAT group in the second state, while the Swedish branch is not part of a Swedish VAT group?"

This appeal, which is being taken with the assistance of EY, could have a significant impact regardless of its outcome. If the CJEU holds that a reverse charge applies, it could result in several Member States changing their rules.

It is possible the case will draw other principles into focus. The Spanish Courts in January took the view, in a case involving an Irish head office and a Spanish branch of an insurance company, that supplies between the head office and branch are within the scope of VAT. The Spanish Courts focused on the 'economic independence' test set out in the earlier FCE decision, rather than the 'legal independence' test that most Member States apply. The factors considered were the (i) the functional autonomy of the branch (ii) its decision making capacity (iii) its human means and (iv) the risk policy. The Spanish Court formed the view the branch was comparable to any other legal entity, with its own legal personality. This is a leap from previous ECJ caselaw which has determined that a branch is not a separate taxable person from its head office. It will remain to be seen if this decision in Spain will be appealed to a higher court and/or if any other countries will follow suit.

Cardpoint CJEU judgment - assistance with the operation of ATMs is taxable

The CJEU recently released its decision in this German referral. The CJEU followed the AG's opinion holding that Cardpoint did not make VAT exempt supplies under Article 13(B)(d)(3). In reaching its decision, the CJEU held that:

- Although Cardpoint was responsible for setting up and maintaining the ATMs, filling them with cash (belonging to the bank) and providing hardware and software, it did not approve the transactions and had no decision-making power. Cardpoint transferred data to the bank that issued the bank card and followed the instructions of that bank by paying out the desired amount of money. A record of the relevant cash withdrawal was sent as a posting instruction to the bank operating the ATM. Consequently, the services provided by Cardpoint were not capable of either 'effecting a transfer of funds' or bringing about legal and financial changes characterised as a 'transaction in payments'.
- The services provided by Cardpoint (unlike those in the Bookit case) were not limited to the exchange of data between the issuing bank and the bank operating the ATM as they also included the physical payment of cash. However, the provision of banknotes on withdrawal from a cash dispenser did not constitute a transfer of ownership by Cardpoint to the user of the machine as it was the bank which authorised the cash withdrawal and debited the user's bank account, transferring ownership of the money directly to this user.

- Only the bank operating the ATMs submitted data into the German Central Bank's (BBK) system. The report, which contained the daily transactions created by Cardpoint and transmitted to the BBK, was used to inform the BBK of the transactions that had been completed and cannot expect to have the specific and essential features of a payment being fulfilled.

Banks who have outsourced the operation of their ATMs should consider the implications of this judgment.

Acquiring goods from UK post Brexit – have you an EORI registration?

Financial services businesses not involved in the movement of goods to or from the UK on a regular basis should be aware of the requirement to obtain an EORI registration to facilitate any such movements once the Brexit transition period ends (currently due to end on 31 December 2020).

Having an EORI number is the minimum requirement for businesses to be able to move goods to, from or through the UK post-Brexit. While your business may not regularly acquire goods from the UK, if it is possible you will acquire office equipment, computers or other goods from the UK in the future, it is vital that you obtain an EORI number to be able to do so in a post Brexit world.

EORI numbers are required by EU traders who trade goods with countries outside of the EU. Companies outside of the EU which trade goods with the EU also require an EORI number. Businesses who trade with the UK post Brexit will be required to hold a valid EORI number. If a business does not have an EORI number, it will have a high risk of experiencing significant delays moving its goods to the UK from the EU and vice versa post-Brexit, particularly should a hard Brexit occur. Businesses should apply for an EORI number as soon as possible to mitigate such risk. Businesses should also ensure they have the facility to make a customs declaration and that they know the Commodity Code of the goods or products they will import or export.

EY can assist clients in obtaining an EORI number and ensuring they have the necessary facilities in place to prevent delays post-Brexit. There is a formal registration process which must be followed and EY can provide advice and assistance in this respect.

For additional information with respect to this Alert, please contact the following:

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