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# ***Financial Services VAT Alert***

## **Tracking EU VAT Developments**

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## Editorial

Welcome to the May edition of the FS VAT Alert!

In this edition you will see that there is again a lot going on at the level of the Court of Justice of the European Union. You will read news on the hearings regarding the VAT treatment of SWIFT services and the sale of distressed debt. We have an important referral to the ECJ regarding the sale of shares in real estate companies which is interesting to read in conjunction with the decision of the Swedish Supreme Administrative Court. The Bulgarian Administrative Court has referred some questions on national restrictions regarding the taxable amount for transactions between related parties and restrictions to input VAT recovery on supplies linked to free of charge output transactions. Germany reports on the VAT treatment of fees paid to a general partner of a partnership for the assumption of personal liability. Luxembourg shares news on the draft law on VAT warehouse regimes, which could benefit investment funds investing in a.o. art work, wine, precious metals, and the Netherlands give some interesting information on the VAT treatment of negotiation of credits and securities. More details below.

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## **EUROPEAN UNION**

### **1. While Member States present at the hearing consider SWIFT services as VAT taxable, the EU Commission abstained from commenting**

Nordea Pankki Suomi Oyj (“Nordea”) is a commercial bank that has bought services from the Belgian corporation SWIFT, which helps banks and other financial institutions transmitting standardised monetary transaction messages (e.g. in interbank payments traffic and securities dealings) with the help of SWIFT’s software and its secured network.

Nordea has reverse charged VAT on these services but considered them subsequently as VAT exempt. It had therefore asked for a refund of the VAT paid to the State, which was denied by the Finnish VAT authorities. Nordea has appealed to the Finnish Supreme Administrative Court regarding the decision of the Finnish VAT authorities to not refund the amount of VAT reverse charged. The Court has decided to hold off the decision and referred a question to the Court of Justice of the European Union (“ECJ”) on whether swift services used in payment transactions and securities transaction settlements between financial institutions are exempt from VAT.

Nordea has motioned that the ECJ would rule that swift services used in payment transactions between financial institutions and swift services used in clearing securities transactions are exempt from VAT. All the Member States present at the hearing (Finland, Belgium, Germany, Greece and the UK) are of the opinion that swift services are VAT taxable. The EU

Commission did not submit its comments on the VAT treatment.

If the ECJ follows the opinion of the Member States present at the hearing, banks will suffer a higher VAT cost. If not, banks established in the Member States that currently consider these services as VAT taxable will reduce their VAT leakage on unrecoverable VAT and might potentially claim back VAT paid on these services in the past.

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### **2. Commission considers distressed debt sale taxable supply**

The European Commission has submitted to a hearing before the ECJ that a purchaser of distressed debt who acquires full title and risk, is making a taxable supply of services to the vendor for VAT purposes. However, according to the Commission, the value of that supply should be determined by reference to the difference between the amount paid for the debts and the discounted value ascribed by the parties to the debts, rather than the face value of the debts, i.e. taking into account the likely extent of non-recovery and the cost of financing the debt pending recovery (GFKL Financial Services: C-93/10).

It remains to be seen whether the ECJ will follow the Commission’s line when giving judgement.

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### **3. Preliminary question on the VAT treatment of services performed by a real estate broker in relation to the sale of shares in real estate company**

*The Dutch Supreme Court has referred questions to the ECJ concerning the scope of the exemption for transactions, including negotiations, in shares, interests in companies, and securities as mentioned in art 135(1)(f) of the Principal VAT Directive.*

The referring Court is seeking to ascertain whether the exemption in art 135(1)(f) includes negotiations and transactions which essentially aim to (indirectly) transfer immovable property by transferring all the shares in the real estate company owning the immovable property.

This is a highly relevant case as the outcome will determine whether services performed by a real estate broker aimed at and/or resulting in the transfer of shares in a real estate company should be regarded as VAT exempt intermediary services in relation to the sale of shares or as VAT taxed services relating to the underlying real estate.

For clients selling or acquiring shares in a real estate company and who are not entitled to a full deduction of input VAT we advise to check with the real estate broker whether its services can be supplied VAT exempt.

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### **4. EU Commission refers Czech Republic to the ECJ for allowing non-taxable persons to join VAT groups**

In the FS VAT Alert of April 2011, we have already reported on the infringement proceedings initiated by the EU Commission against Ireland, the Netherlands and the UK for allowing non-taxable persons to join VAT groups. The ECJ has now also initiated such proceedings against Czech Republic. The remaining Member States that we asked by the EU Commission to amend their VAT rules in this regard are Denmark, Finland and Spain. It remains to be seen whether these Member States amend their VAT rules. Otherwise, it will only be a matter of time before such proceedings will be initiated against them.

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### **5. Referral to the ECJ on national restrictions regarding the taxable amount in case of transactions between related parties**

*This decision can affect tax payers in all EU Member States, which have implemented the rules on the application of the "open market value" as taxable amount.*

The Administrative Court of Varna referred several questions to the ECJ on national restrictions regarding the taxable amount. One of the questions referred is on whether restricting the taxable amount of supplies

between related parties to the open market value, irrespective of the VAT recovery status of the supplier/recipient, is in line with Community law.

According to the current Bulgarian VAT Law, the taxable amount of transactions carried out between related parties, including in the specific cases mentioned in article 80(1)(a), (b) and (c) of the VAT Directive, should be the open market value.

In this regard, the ECJ was also asked to comment on whether Article 80(1) of the VAT Directive constitutes an exhaustive list of the cases representing the circumstances in which the Member States may take measures whereby the taxable amount in respect of supplies has to be the open market value of the transaction.

If the ECJ confirms that Article 80(1) of the VAT Directive provides an exhaustive list of cases, any disputes with the tax authorities, where the taxable amount applied between two related parties with full input VAT recovery right, should be resolved in favour of the tax payer.

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## **6. Referral to the ECJ on national restriction of input VAT recovery for supplies used for free of charge transactions or for activities other than the economic activity of the taxable person**

The Administrative Court of Varna refers questions to the ECJ with respect to a restriction for the input VAT deduction

provided in the Bulgarian VAT Law. In the case at issue the Bulgarian revenue authorities refused a taxable person input VAT deduction in relation to VAT paid on leasing instalments related to cars used by the members of the management. The reason put forward by the revenue authorities was that the taxable person did not present sufficient proof that these cars were used for economic activities.

One of the questions referred to the ECJ has regard to the interpretation of the requirement 'are used' as per article 168 of the VAT Directive and to whether this requirement should be satisfied in the tax period in which the goods were purchased or the services received or in a subsequent tax period. The Administrative Court further asked whether the purpose (i.e. the use or future use) of the goods or services acquired by a taxable person should be regarded as a prerequisite for the initial establishment of the right of deduction or as grounds for the adjustment of the amount of input tax deducted.

This decision could affect tax payers in all EU Member States, which, similar to Bulgaria, have not implemented a mechanism for the adjustment of the amount of input tax deducted on goods used for activities others than the economic activity of the taxable person or for carrying out free of charge supplies but are later used for carrying out supplies entitling to input VAT deduction.

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## GERMANY

### 7. Decision of the German Supreme Tax Court on the VAT treatment of fees paid to general partners of closed-end funds

*General partner's fee for assumption of personal liability is subject to VAT. This is in particular relevant for all funds set-up as a partnership, which is not entitled to deduct input VAT.*

The German Supreme Tax Court (BFH) decided on 3 March 2011 that a fee paid for the assumption of personal liability by a managing general partner of a closed-end fund set-up as a limited partnership is not VAT exempt as the general partner's liability concerns not only monetary but also non-cash liabilities. Furthermore, according to the BFH, the personal liability of a general partner has to be qualified as part of a complex service (including management and representation services). This decision confirms the view of the German tax authorities concerning the VAT treatment of such services.

According to the reasoning of the BFH one can also conclude, that the personal liability of a general partner might be a supply of services subject to VAT, even if the general partner does not provide management and representation services. This is contrary to the current opinion of the German tax authorities laid down in the German VAT Application Guideline, where the assumption of liability by a general partner,

who does not provide management and representation services, is not qualified as a supply for VAT purposes, i.e. outside the scope of VAT. It remains to be seen whether the Federal Ministry of Finance will adjust the Guideline accordingly.

Taxpayers who may be affected by this decision should contact their usual PwC VAT adviser or Sylvia Neubert in order to check whether in their particular case the assumption of liability has to be qualified as supply of service subject to VAT.

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#### DID YOU KNOW? – CZECH REPUBLIC

##### Proposal to amend the VAT rates

The Czech Government parties have introduced to the Czech Parliament the Amendment of the VAT Act that increases as of 1 January 2012 the reduced VAT rate to 14% and applies the single VAT rate of 17,5% as of 1 January 2013.

Businesses with limited or no right to input VAT deduction should be aware of these proposed changes.

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## LUXEMBOURG

### **8. Draft law on VAT warehouse regimes – could be of benefit for funds investing in artwork, wine, precious metals, etc.**

The Luxembourg Ministry of Finance has published a draft law regarding the implementation of VAT warehouse regimes which could reduce VAT burden for investment funds dealing in goods like artworks, wine, precious metals, etc. and commodities' traders.

This draft law aims at implementing VAT warehouse regimes, in which all operations (such as e.g. the entry into the regime, successive sales within the warehouse, ancillary services such as warehousing and packaging) made on goods placed under such regime, would benefit from a temporary VAT exemption. VAT would only become due when the goods will exit the regime. These VAT warehouse regimes could benefit to all kinds of products (except those subject to retail sales) whatever their origin.

These regimes could notably be of interest for goods of high values. They could be of interest for investment funds specialised in e.g. wine, artworks, precious metals, etc. as this would avoid VAT pre-financing and simplify compliance and reporting requirements. The VAT warehouse regime can also be advantageous for commodity trading in case of successive sales of allocated goods.

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## MARKET TRENDS - BRANCHING

Increasingly across the FS sector, the subsidiary model is being questioned for a number of reasons. In this regards, implementation of a branch structure rather than a subsidiary structure could have a number of benefits such as e.g. the alignment of corporate and operating structures and will also imply a number of adjustments from a VAT perspective: VAT treatment of the transfer of assets and liabilities, de-registrations, new registrations, possible issues linked to local presence of fixed establishments, computation of a new input VAT deduction right, etc. In addition, a branch structure can also allow the implementation of VAT-efficient cost-sharing structures.

For further information on this topics, please feel free to contact Frédéric Wersand at [frederic.wersand@lu.pwc.com](mailto:frederic.wersand@lu.pwc.com) or at +352 49 48 48 2519

## THE NETHERLANDS

### **9. Court decision about Article 135 (1)(b) VAT Directive – negotiation of credits**

*The Court in Arnhem has judged that the supply of leads/data of consumers to granters of credit must be qualified as negotiation of credits. For this reason it is exempt for VAT purposes.*

The case is about a website which collects leads, which in this case are consumers seeking credit and/or mortgage products. After a number of automated tests to determine the consumers need, the leads are forwarded to financial institutions. The financial institutions pay for the data and

get in touch with the consumers themselves. They seek to close an agreement with consumers without any further involvement of the website.

In the Courts view, the website (i.e. intermediary) does everything necessary to have two parties close an agreement. As a result, in the Courts view, it is in accordance to the case of Volker Ludwig and thus these services are exempt from VAT.

Lead generators and financial institutions working with lead generators should review their position immediately in order to file protective claims with the tax authorities or start communications to discuss their contractual position, both retrospectively as well as going forward.

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### **10. Court decision about Article 135 (1)(f) VAT Directive – negotiation of securities**

*The Court of Haarlem has judged that the display of investment results of selected investment funds and additional information about these funds, in order to find participants for these funds, qualifies as negotiation of securities. For this reason it is exempt of VAT.*

The case concerns a website that entered into 'client remisier' (middle man) and marketing agreements with investment funds. The website shows investors the opportunities to invest in selected funds. In addition, it is possible for the investors to get personal advice about these funds.

In the Courts view, these services qualify as VAT exempt negotiation of securities. The activities of the website take place in the phase of preparation. As soon as the investor contacts the fund, the activities of the website are ended. The compensation for the website depends on whether the investor actively participates in the fund. The elements of advising and advertising are inherent to the negotiation. In the Courts view it is in accordance with the case of CSC and thus these services are exempt of VAT.

Brokers, client-remisiers, marketeers and financial institutions working with these parties should review their position immediately in order to file protective claims with the tax authorities or start communications to discuss their contractual position, both retrospectively as well as going forward.

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## **SWEDEN**

### **11. Real estate brokers' services are VAT exempt if property is sold via a corporation**

The Swedish Supreme Administrative Court ruled on 27 April 2011 that real estate broker's services are VAT exempt if the property is sold via a corporation. The reason being that the services supplied are relating to the sale of shares and not the sale of property.

The ruling is applicable when the structure of the real estate transaction via a corporation is agreed prior to the sale through an engagement letter. Should it be determined later on that the property will be sold via a corporation it is not certain that the VAT exemption rule for sale of shares is applicable.

Real estate brokers and other similar agents in the market of intermediation of properties will conduct VAT exempt business going forward in this regard.

The buyers in the financial sector will decrease their costs going forward relating to transaction costs of properties via corporations. However, it is uncertain how to treat historic VAT costs. On the one hand, the real estate brokers will be able to reclaim the output VAT charged to their clients from the Tax Agency and forward this VAT to their clients; on the other hand the Tax Agency could then also reclaim historically deducted input VAT from the real estate brokers. Therefore, we assess that it will be essential how the agreement is worded in order for buyers in the financial sector to reclaim output VAT from the real estate brokers.

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