



Is VAT payable on costsharing between an head office and its branch?

The Netherlands changes its policy from 1 January 2024.

- On 5 July 2022, the Dutch Ministry of Finance announced an important change to the Decree on the Fixed Establishment (hereafter; 'Decree').
- The Decree has been amended to bring it in line with the decisions of the European Court of Justice (CJEU) in the cases Skandia (C-7/13) and Danske Bank (C-812/19). In those decisions, the CJEU held that services provided between a head office (HO) and a fixed establishment (FE) are VAT taxable if the HO or/and FE belong to a VAT group.
- The amended Decree states that supplies between a FE and a HO remain outside the scope of VAT if none of them is part of the VAT group of one of the EU Member States (MSs).

Background

Supplies within one legal entity are generally outside VAT scope

The CJEU ruled in the case FCE Bank (C-210/04) that provision of services between HO and its FE were outside of scope of VAT. In Morgan Stanley (C-165/17), the CJEU confirmed that a FE and HO are to be treated as a single taxable person, and any costsharing between the entities is outside VAT scope.

Supplies within one legal entity are within VAT scope if one or both establishments belong to a VAT group

The CJEU decided in its decisions in Danske Bank (C-812/19) and Skandia (C-7/13) that if a FE and/or HO are part of the VAT group, then they should be treated as separate taxable persons. The CJEU held that EU VAT grouping is limited to one EU MS and its membership cannot be extended to persons established in other MSs. Consequently, transactions between a HO and its FE are within the scope of VAT when either the HO or the FE or both are a member of a VAT group in the EU.

For example, services provided by a HO to its branch who is a member of a VAT group must be considered provided to the VAT group. Because the branch belongs to the VAT group, the HO and its branch cannot be considered to be a single taxable person. Because the branch belonging to the VAT group is a separate taxable person to its HO, the transactions between them cannot be disregarded for VAT purposes. Any costsharing between the HO and its branch consequently falls within the VAT scope.

Current position in the Netherlands

Up to now, the Netherlands has not applied the principles introduced by the CJEU in Danske Bank and Skandia. In the Netherlands, not only a local establishment but the entire legal entity (i.e. the HO including its foreign establishments) belongs to the VAT group. For example, when a Dutch FE belongs to the Dutch VAT group, then its HO established abroad also belongs into the Dutch VAT group. When a Dutch HO belongs to the Dutch VAT group, then its FEs established abroad also belongs into the Dutch VAT group. Supplies between the FE/HO belonging

to the Dutch VAT group and its HO/FE established abroad are consequently outside of VAT scope. The same approach currently applies if the business involving foreign establishments belongs to the VAT group of another MS. It is therefore possible under the current rules to consider the supplies between HO and its FEs outside of the VAT scope even one or both of them belong into the VAT group. The above is only possible **until 1 January 2024**. The Decree of 1 July 2022 introduces the following changes to the Dutch approach.

The Dutch position after 1 January 2024

Transactions between a HO and its branch/FE will no longer be outside of the VAT scope **after 1 January 2024** if either a HO or its branch/ FE or both belong to a VAT group.

This has major consequences because it means that the VAT may be applicable on cross-border supplies between a HO and its FE. For (partly) exempt businesses it means that the input VAT may not be deductible.

This only applies if the VAT group concerned is established in one of the MSs. In case both establishments are not part of a VAT group of any of the MSs, transactions between them will still be outside the scope of VAT.

The Decree only applies to the supplies between head office and its fixed establishments. The VAT treatment of transactions taking place within other structures (such as between FEs/branches or more generally between entities of the same legal person) are not explained in the Decree but are expected to be treated similarly under the territorial applicability of the VAT grouping introduced by the CJEU. This means that the supplies within the same legal entity may fall within the VAT scope if the HO of this legal entity or any of its FEs is part of a VAT group in the EU.

Conclusions and practical implications

Transactions between a HO and its branch will no longer be outside the scope of Dutch VAT after 1 January 2024 if either the HO or the FE/branch is part of a VAT group in the Netherlands or another MS. This means that the VAT may be applicable on such supplies. The reverse charge may be due if a HO/FE in another MS charges any costs to the Dutch FE/HO. For (partly) exempt businesses it

means that the non-deductible VAT may become due on such costs.

If no VAT groups are involved, then transactions between HO and its FE/branch will remain outside the scope of VAT, applying the CJEU's decisions in FCE Bank and Morgan Stanley.

Planning points

The changes will have major consequences for business structures with cross-border supplies between a HO and a FE, in cases where there is an EU VAT group involved. Businesses need to analyze whether any VAT consequences arise from the change if they have transactions that take place between various establishments of the same legal entity. If any of the establishments are in a VAT group within the EU, then they will be treated as separate taxable persons under the new Dutch rules. The transactions between them will fall within the scope of VAT after 1 January 2024.

If the place of supply is in another MS which does not yet apply the principles of Skandia and Danske Bank, then it is possible that no VAT is due. However, most of the MSs have already taken or are currently taking actions to bring their legislation in line with Skandia and Danske Bank decisions. Therefore, it is important to check the VAT rules of other MSs involved.

For more detailed information about the matters discussed above, please contact us.





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Contact

Do you have questions or do you need more information? Please do not hesitate to contact us. Grant Thornton's international indirect tax team and digital advisory team can assist you in your VAT / customs matters, compliance and update of your systems and processes. Please contact us if you would like to discuss.

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