

Tax Alert

Tax department – EU tax practice
15 March 2021

Court of Justice of the European Union: the services supplied by the head office forming part of a VAT group to its branch located in different Member States are subject to VAT.

In *Danske Bank* (case C-812/19 of 11 March 2021), the Court of Justice of the European Union (the “CJEU”) held that the head office a VAT person being part of a VAT group and a branch of such VAT person located in a different Member State – not included in the VAT group – shall be regarded as separate taxable persons for VAT purposes.

1. Facts and legal background

A bank having its head office in Denmark (“**Bank**”) carried out its business activity in Sweden through a branch established therein (“**Branch**”). The Danish head office of the Bank was part of a Danish VAT group, while the Branch was not part of any VAT group. The head office charged to the Branch certain costs in exchange for the use of a computer platform.

The Branch submitted to the Swedish Revenue Law Commission an advance ruling request on the VAT treatment of the costs charged by the Danish head office in relation to the use of the computer platform. The Commission maintained that the Branch was a VAT person separate from the Danish head office, by virtue of the election the Bank made to include the head office in its Danish VAT group. Consequently, the costs charged by the head office to the Branch were to be considered as supplies of services relevant for VAT purposes.

The Branch challenged the ruling before the Swedish Supreme Administrative Court, claiming that the Bank’s head office and the Branch should have been considered as a single taxable person, since the Branch did not carry out any independent economic activity and was not part of any VAT group. Hence, no VAT would be applicable in relation to the costs charged by the Bank’s head office to the Branch.

This being said, the Swedish Supreme Administrative Court observed that, according to CJEU case-law, two possible lines of interpretation could be followed, namely considering the head office and the Branch as a single taxable person (in light of case C-210/04, *FCE Bank*) or taking the view that the head office has become a taxable person different from the Branch by virtue of its joining the Danish VAT group (according to case C-7/13, *Skandia America (USA), filial Sverige*).

The Swedish Supreme Administrative Court referred the case to the CJEU for a preliminary ruling, asking, in essence, whether the Branch constitutes an independent taxable person, considering that it is not part of any VAT group, while the head office is part of a VAT group in Denmark.

2. The CJEU judgment

At first, the CJEU confirmed its case-law by maintaining that, in principle, transactions between the head office and a branch located in different Member States are subject to VAT only if the branch is engaged in an independent economic activity and bears the related economics risks.

However, the CJEU held that, to assess whether transactions between a head office and a branch fall within the scope of VAT, it is also necessary to ascertain whether they belong to a VAT group established pursuant to Article 11 of VAT Directive.

According to Article 11 of VAT Directive, a Member State may elect to qualify as a VAT group all the persons that are (i) established only in such Member state (*i.e.*, the territorial limitation for the VAT group), and (ii) closely bound by financial, economic and organisational links, despite being legally independent, so that such a VAT group can be considered as a single taxable person for VAT purposes.

Hence, the CJEU confirmed that the principles expressed in case C-7/13, *Skandia America (USA), filial Sverige*, are applicable also with respect to the situation in which the head office belonging to a VAT group supplies services to a branch established in a different Member State, so that:

- (i) the branch cannot be considered a single taxable person with the head office considering the territorial limitation of the VAT group (which is to be regarded as a single taxable person); and
- (ii) such a supply of services is to be considered as a taxable transaction for VAT purposes.

Also, the CJEU denied that the different factual pattern of the *Danske Bank* case (*e.g.*, the fact that the head office, rather than the Branch, is part of a VAT group or the head office is not established in a non-EU State) could affect the applicability to the case under examination of the principles put forward in case C-7/13, *Skandia America (USA), filial Sverige*.

In light of the above, the CJEU ruled that in the *Danske Bank* case (i) it is the Danish VAT group (qualifying as a single taxable person) that provides services to the Branch, (ii) the

Branch in Sweden may not be part of the Danish VAT group, due to the territorial limitation set out under Article 11 of VAT Directive, and (ii) the Danish VAT group (to which the head office belongs) and the Branch are to be considered as separate taxable persons for VAT purposes.

3. Final remarks

As anticipated, the decision at stake confirms that principles expressed by the CJEU in C-7/13, *Skandia America (USA), filial Sverige*, are applicable also in a “reverse” situation. Indeed, the case *Skandia America* dealt with the VAT treatment of services provided by the head office established in a non-EU State to its branch, which was part of a VAT group established in member State, as opposed to the *Danske Bank* case where it was the head office being part of a VAT group.

As a consequence, it can now be considered a general principle under CJEU case-law that transactions between the head office of a taxable person and the branch of such person, established a different Member State, qualify as taxable transactions for VAT purposes when either the head office or the branch is part of a VAT group, to the extent that the other requirements for the transactions to fall within the scope of VAT are met.

This is also supported by the fact that the CJEU issued its decision in *Danske Bank* case without the opinion of the Advocate General. Indeed, according to its procedural rules, the CJEU may issue a judgment without the Advocate General’s opinion when the case under exam does not raise any new questions of law.

Contacts

Raul-Angelo Papotti	raul.papotti@chiomenti.net
Massimo Antonini	massimo.antonini@chiomenti.net
Carlomaria Setti della Volta	carlomaria.setti@chiomenti.net
Simone Schiavini	simone.schiavini@chiomemti.net
Margherita Pittori	margherita.pittori@chiomenti.net
Alessandro Zani	alessandro.zani@chiomenti.net