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URL: http://www.deloitte-tax-news.de/german-tax-legal-news/cjeu-services-exchanged-between-a-company-and-its-foreign-branch-can-be-subject-to-vat.html

01.04.2021

German Tax and Legal News

CJEU: Services exchanged between a company and its foreign branch can be subject to VAT

Following the “Skandia America” case (C-7/13), the CJEU has again ruled how services between a company and its foreign branch are to be assessed in case a VAT group is involved. It remains to be seen whether and how the German tax authorities will apply these principles.

Facts
The applicant is the Swedish branch of the Danish company Danske Bank A/S. In Denmark, Danske Bank A/S is part of a VAT group under Danish law (corresponding to the VAT group within the meaning of Art. 11 of the VAT Directive). Accordingly, permanent establishments located abroad cannot be part of the VAT group (as is also the case from a German point of view). The plaintiff was not part of a VAT group in Sweden.

In all Scandinavian countries, Danske Bank A/S used an IT platform for its business activities. It allocated the costs incurred in connection with the use of the platform for the activities in Sweden to the plaintiff. The plaintiff would like to know whether it, as the recipient in Sweden, is responsible to account for and pay the VAT due for the service "use of the IT platform".

Considering CJEU case law on the relationship between branches and VAT groups (judgment of 23 March 2006, Case C-210/04 "FCE Bank" and judgment of 17 September 2014, Case C-7/13 "Skandia America"), the referring Swedish court is uncertain whether in the present case, the main branch and the plaintiff are to be regarded as separate taxable persons because the Danske Bank A/S is part of a VAT group in Denmark.

Decision
The CJEU has ruled that supplies between a company and its permanent establishment located abroad are subject to VAT. The VAT group to which the company belongs takes precedence and prevents the company and its foreign permanent establishment from forming one enterprise. Therefore, the services between the company and its permanent establishment have to be assessed under the general VAT principles applying to unrelated parties.

Thereby, the CJEU once again gives VAT grouping priority over the principle that services between a company and its foreign permanent establishment are deemed to be provided within the same business (for VAT purposes). This principle has not been abandoned, however, the CJEU has clarified that from its point of view, the existence of a VAT group prevails. The CJEU thus continues its case law from 2014: In the judgment in the "Skandia America" case (17 September 2014, Case C-7/13), the CJEU had commented on the reverse case where a company from a non-EU country had provided services to its branch which was part of a VAT group in Sweden. It had ruled that these services were not exchanged within the same business (for VAT purposes), but were provided by the company to the VAT group which the branch office belonged to. Hence, the VAT group as the recipient of the service was responsible to account for and pay the VAT due in Sweden.

Comments and practical implications from a German point of view
The “Danske Bank A/S” ruling primarily affects internationally active companies that operate through permanent establishments and are not or only partially entitled to deduct input tax. If services are obtained from abroad between a company and a permanent establishment in Germany, these do not have to be subject to VAT as sales under the reverse charge mechanism because the principles of the "Skandia America" ruling have not yet been applied by the German tax authorities. Irrespective of the existence of a VAT group, services between a company and its foreign permanent establishment are considered to be provided within a company and, from a German perspective, do not have to be subject to VAT (section 2.9 para. 2 sentence 2 UStAE (as of 15 March 2021)).

In 2018, the MOF had published a draft circular on the consequences of the CJEU ruling

"Skandia America". According to this, the principles developed by the CJEU should not be generally applicable but only to a limited extent to cases in which services are exchanged between a company in a third country and its permanent establishment belonging to a VAT group in an EU member state. A final version of the letter has not been published yet.

It remains to be seen whether and how the German tax authorities will position themselves after the ruling of the CJEU in the "Danske Bank A/S" case. Hopefully, a possible change in the legal interpretation will be accompanied by a generous non-objection rule. Furthermore, it remains to be seen whether the tax authorities will wait for the CJEU ruling on the German interpretation of the VAT group before making a statement on the issue (pending requests for a preliminary ruling by the Federal Financial Court: cases C-141/20 and C-269/20).

Particularly with regard to input VAT deduction, the “Danske Bank A/S” ruling also has to be seen in connection with the ruling in the case "Morgan Stanley & Co. International" (24 January 2019, C-165/17) in which the CJEU ruled on how to determine the scope of input VAT deduction considering the relationship between a head office and a branch located in different EU Member States.

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