

CJEU Danske Bank: VAT on services provided by a head office to a fixed establishment as a result of a VAT group

On March 11, 2021 the Court of Justice of the European Union ('CJEU') rendered judgment in the Danske Bank case (case no. C-812/19). In this case the CJEU ruled that the services provided by a Danish head office to its fixed establishment in Sweden are subject to Swedish VAT, because the Danish head office is part of a VAT group in Denmark. The Danske Bank judgment differs from Dutch practice. This judgment could have major implications for the VAT treatment of intra-group services, in particular if there is a limited VAT recovery right.

Background and points of law

Before we address the Danske Bank case, we would first like to recall the Skandia America Corporation ('Skandia') case from 2014 (no. C-7/13). That case concerned the VAT treatment of cross-border services from a head office to a fixed establishment, where the fixed establishment was part of a VAT group. In the Skandia judgment the CJEU ruled that services performed by the head office of Skandia in the United States for its fixed establishment in Sweden, which was part of a VAT group in Sweden, constituted VAT-taxable services.

For the purposes of VAT, the VAT group in Sweden is regarded as a different taxable person than Skandia's US head office. Despite that the head office and the fixed establishment are part of one legal entity, the fact that the fixed establishment is part of a VAT group in Sweden means that for VAT purposes there are services between two separate taxable persons. Those services are then subject to VAT, unless an exemption can be applied.

After the Skandia judgment, there was uncertainty within the EU about whether or not services between a head office and a fixed establishment are taxable if it is not the fixed establishment, but the head office, that is part of a VAT group. In the Danske Bank case, the Swedish court asked the CJEU to render a preliminary ruling on this question. Danske Bank is a bank with a head office in Denmark that is part of a VAT group in Denmark. The Danish head office allocated costs for an IT platform to its fixed establishment in Sweden, which is not part of a VAT group in Sweden. The question is whether the fixed establishment in Sweden is required to report Swedish (reverse-charged) VAT on these costs. The question referred for a preliminary ruling to the CJEU by the Swedish court is essentially: does a Swedish fixed establishment (that is not part of a Swedish VAT group) have to be regarded as an independent taxable person if the Danish head office (that is part of a VAT group in Denmark) provides services for this fixed establishment in Sweden and the costs incurred for this are allocated to the fixed establishment?

CJEU judgment

The CJEU ruled that the provision of services between the Danish head office of Danske Bank and its Swedish fixed establishment are subject to VAT. The CJEU thus follows the line taken in the Skandia case.

The CJEU concluded that services between a head office and a fixed establishment are only taxable if a legal relationship exists between them in which there is reciprocal performance. In the absence of such a legal relationship between a head office and a fixed establishment that, in principle, form one and the same taxable person, the services are non-taxable internal flows. However, there is a legal relationship between a head office and a fixed establishment if the fixed establishment is regarded as independent from the head office. According to the CJEU, this is the case if the fixed establishment independently performs economic activities and bears the economic risks arising from those activities. In assessing whether there is a legal relationship, account must also be taken of the fact that the head office and/or the fixed establishment may be part of a VAT group.

A head office that is a member of a VAT group, together with the other members of the VAT group, constitute one taxable person. According to the CJEU, by virtue of the territorial limitation of the VAT group regime, a foreign fixed establishment cannot be part of this VAT group, and thus cannot be regarded as being part of the same taxable person as the head office. The fixed establishment must thus be regarded as a separate taxable person. Consequently, the services between the head office and the fixed establishment are taxable.

The CJEU ruling implies that, for the qualification of the relationship between the head office and a fixed establishment, it must be taken into account whether one of them is part of a VAT group in another Member State. Noteworthy here is that the characteristics of the foreign VAT grouping regime need to be taken into account.

Danske Bank also brought to light several other differences between the Danske Bank case and the Skandia case. In response to this, the CJEU ruled that it is irrelevant whether a head office (as in the Danske Bank case) or the fixed establishment (as in the Skandia case) is part of a VAT group. Nor does it matter whether a head office is established outside the EU (as in the Skandia case) or in the EU (as in the Danske Bank case). It also seems to be irrelevant whether are external costs (as in the Skandia case) or internal costs (as in the Danske Bank case) are recharged.

Moreover, the Danske Bank case does not seem to be very different from the actual situation in the FCE Bank case (no C-210/04). It was common knowledge that the head office of FCE Bank in the United Kingdom was part of a VAT group. However, this was not included in the request for a preliminary ruling and the CJEU subsequently ruled that the services provided by the head office of FCE Bank to its non-independent fixed establishment in Italy were not subject to VAT, in short, because they constituted one and the same taxable person.

In many EU Member States the Skandia judgment had a major impact on the VAT treatment of cross-border services between establishments of the same legal person. In practice, the positions taken by the various Member States in response to Skandia are very different. In some Member States, Skandia has had a far-reaching effect and

almost all services between a VAT group and a foreign fixed establishment (that is not part of the VAT group) or head office fall within the scope of VAT. For those Member States, the CJEU's conclusion in the Danske Bank case is a confirmation of their interpretation of the Skandia judgment.

Impact on Dutch practice

To date, the Netherlands has taken the position that the Skandia judgment has no effect in the Netherlands. In 2002 the Dutch Supreme Court ruled that the territorial boundaries of the Dutch VAT group regime mean that taxable persons with a head office or branch in the Netherlands may be part of a VAT group in the Netherlands. If there is a VAT group in the Netherlands, the foreign establishments (head office or fixed establishments) that are part of the VAT group are also considered part of the Dutch VAT group (i.e. are one taxable person). Services from and to the foreign head office or fixed establishment thus remain outside the scope of Dutch VAT. This line is applied in practice and was recently reconfirmed by the Deputy Minister of Finance in the new [policy statement on VAT fixed establishments](#) of December 18, 2020. Consequently, the Skandia judgment had no effect in the Netherlands.

Under the Danish and Swedish VAT group regimes, foreign branches of the VAT group's members are not part of the VAT group. The question is what impact the Danske Bank judgment will have on Dutch practice. We believe that the immediate impact is limited in situations where there is a Dutch fixed establishment (or head office) that is part of a VAT group in the Netherlands. Taxable persons can invoke the Supreme Court's interpretation of the Dutch VAT group regime and the positions taken by the Deputy Minister of Finance, as laid down in the policy statement on VAT fixed establishments. Services between a Dutch fixed establishment that is part of a VAT group in the Netherlands and a foreign head office or a foreign fixed establishment are therefore not subject to Dutch VAT.

In the Danske Bank situation where there is a Dutch fixed establishment with a foreign head office that is part of a VAT group there, the question that arises is whether in future the existence of the foreign VAT group must be taken into account or that current practice can be continued, in which the existence of a VAT group is in fact ignored. In the current interpretation of the Skandia policy, we see arguments for continuing along these lines and regarding services between the head office and the fixed establishment as non-taxable internal flows. In any case, we believe that services purchased by a Dutch establishment (that is not part of a VAT group) from an establishment in another EU Member State (also not part of a VAT group) of the same legal person remain non-taxable, regardless of whether there are establishments in other Member States that are part of a VAT group in their Member State.

The CJEU ruled that it does not matter whether a head office is established outside the EU (as in the Skandia case) or in the EU (as in the Danske Bank case). The CJEU referred here to the territorial limitation of the VAT group provision in the VAT Directive.

We believe that the CJEU does not go so far that a possible VAT group outside the EU must be taken into account (which now includes the VAT group in the United Kingdom).

The question is what implications the Danske Bank judgment may have for the VAT recovery right. We refer in particular to the CJEU ruling in the [Morgan Stanley & Co International plc \('Morgan Stanley'\) case, no. C-165/17](#). The Deputy Minister of Finance recently included the rules from the Morgan Stanley judgment in the aforementioned policy statement on VAT fixed establishments. Neither the CJEU nor the Deputy Minister of Finance has paid attention to the situation where the head office and/or a fixed establishment is part of a VAT group. The Morgan Stanley judgment concerned a fixed establishment that incurred costs that were (partly) used for the turnover of a head office established in another Member State. The judgment did not address whether either one of them is part of a VAT group. The CJEU ruled that for the recovery of VAT on the costs of the fixed establishment, a connection should (partly) be sought with the cross-border use of those costs, and thus the turnover of the head office. This is based on the assumption that a head office and a fixed establishment are part of one and the same taxable person. Services between a head office and a fixed establishment fall outside the scope of VAT and cannot serve as the basis for the recovery of VAT. If such services are nevertheless taxable due to the existence of a VAT group, the determination of the VAT recovery right should not have to take account of the turnover of the foreign branch.

The impact of the Danske Bank case may be viewed differently by the various Member States. It could very well be that the positions that the various Member States take will differ. This was also the case with the Skandia judgment. From an administrative perspective, the impact may also be significant for VAT taxable persons operating internationally via fixed establishments and with a VAT group in one or more Member States. The potential effects on ERP systems will also have to be examined.

Your options

The Danske Bank case may impact the playing field in the Netherlands and in other EU Member States. Certain internal or external costs that are currently recharged without VAT within the group, may in future be subject to VAT. If an entity within your group is established in more than one EU Member State (head office with fixed establishments), we recommend examining the impact of the Danske Bank judgment in each of those Member States.

The Danske Bank judgment also creates an additional administrative burden for VAT taxable persons. For example, you may not only have to review your business model, but also your ERP systems, VAT processes, procedures and control mechanisms and change them where necessary. Are you able to identify potential services between a head office and a fixed establishment based on the information in your systems, and to apply the correct VAT treatment to this?

The tax advisors of Meijburg & Co's Indirect Tax Financial Services Group would be pleased to help you identify the potential implications of this judgment. Feel free to contact one of them or your regular advisor for more information.

KPMG Meijburg & Co
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