

Change to policy statement on VAT fixed establishments

A change to the Dutch policy statement on VAT fixed establishments was published on July 5, 2022. Because of this change, cross-border transactions within a legal entity may be subject to VAT if this entity is a member of a VAT group in a country. The policy statement will take effect on January 1, 2024.

1. Background and impact

The question of whether a transaction within a legal entity can be VAT-taxed if it is conducted between branches in different countries has been a topic of discussion in the VAT practice for years. On June 14, 2002, the Dutch Supreme Court ruled that the answer to this question is 'no' if a foreign legal entity is a member of a Dutch VAT group via a Dutch VAT fixed establishment. In its judgment, the Supreme Court opined that the Dutch VAT group comprises the entire legal entity, i.e. both the Dutch fixed establishment and the foreign head office.

The Skandia and Danske Bank judgments (no. C-7/13 and no. C-812/19 respectively) of the European Court of Justice (CJEU) called this Dutch line of reasoning into question. In those cases, the CJEU ruled that a VAT group constitutes a separate taxable person that is not linked to any foreign fixed establishment or a foreign head office. After 20 years, the Deputy Minister of Finance has now decided to change course by abandoning the line of reasoning that was initiated by the Supreme Court in 2002. The fact that the change is effected by amending a policy statement does raise some questions, however, since the Supreme Court based its reasoning on as yet unamended Dutch legislation. It is impossible for a policy statement to set aside this legislation. This may lead to new legal proceedings going forward.

The question of how to treat a VAT group if it is located outside the EU remains unanswered in the CJEU judgments. Few Member States have adopted policies in this regard. The Italian tax authorities decided in 2021 that a UK-based VAT group should be qualified as a separate taxable person where it concerned services provided from an Italian fixed establishment. The Dutch Deputy Minister of Finance has chosen a different approach. In the policy statement, the term 'VAT group' is defined as a VAT group that is located in an EU Member State; it is clear from the explanatory note that the policy statement does not apply to non-EU-based VAT groups.

The change to the policy statement in principle affects every taxable person that has a combination of fixed establishments and VAT groups in the EU. That said, the judgment will have the greatest impact on taxable persons with a limited VAT recovery right, such as financial institutions and insurance companies, because they can also expect financial consequences.

It seems to follow from the explanatory note to the policy statement that the Deputy Minister of Finance is aware of the impact of this policy change. Given that the amended policy statement will not take effect until January 1, 2024, taxable persons will have the opportunity to prepare for the change, especially in terms of their systems.

2. What can you do now?

We advise taxable persons to map out the impact of the policy change in a timely manner. It is important in this context to identify which cross-border transactions will be affected and which transactions will not be impacted by the change in VAT treatment. Not every cross-border payment will be subject to VAT. To determine the consequences, taxable persons need to work out, for instance, to what extent their branches qualify as fixed establishments for VAT purposes. They should also determine which VAT groups there are and assess transactions for whether or not there are any underlying supplies of goods or services taking place against consideration. If so, these may also be exempt. The systems processing is obviously relevant in this regard; this also applies to taxable persons who only conduct VAT-taxed transactions.

After the relevant transactions have been mapped out, it is important to determine the VAT recovery right. We can imagine that Dutch taxable persons that mainly perform activities for foreign fixed establishments will actually benefit from the implementation of the new policy in some cases, because it may increase their VAT recovery right. In those cases, an earlier implementation of this policy can be used as a reference point. The fact that the policy statement will come into effect on January 1, 2024 seems to point to approved policy, while the relevant basis was provided earlier by the CJEU.

Finally, there is scope for reflecting on solutions. Where the line of reasoning in the Skandia and Danske Bank judgments was implemented earlier in countries other than the Netherlands, we are seeing that VAT losses can be mitigated because of changes in the business model and/or the transfer pricing method.

If you would like to discuss this judgment, feel free to contact the advisors of KPMG Meijburg & Co's Indirect Tax Financial Services Group or your usual advisor.

KPMG Meijburg & Co
July 2022

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