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Focus on the French Supreme Tax Court Decision, November 4, 2020, BNP Paribas Securities Services

VAT - First application of the Skandia case law by the French Supreme Tax Court

Conseil d'Etat, 3rd chamber, 04/11/2020, n°435295, BNP Paribas Securities Services

In a judgment of 4 November 2020, the Supreme Tax Court applied for the first time the Skandia case law of the European Court of Justice and allows the deduction of input VAT for services supplied by the head office to its branches established abroad which were members of local VAT group.

Reminder of the Skandia judgment

In a Skandia case law decision rendered by the European Court of Justice (ECJ, 17 September 2014, C-7/13, *Skandia America Corporation*), it was considered that services supplied by a principal establishment established in a third country (the United States) to its branch established in a Member State (Sweden) were taxable transactions when the latter was a member of a VAT group, as this group could be considered as a single taxable person in this Member State. The Group thus became liable for the tax under the reverse charge mechanism.

The existence of a branch belonging to the VAT group set up in Sweden therefore led to the conclusion that the (taxable) services were supplied to the VAT group itself, considered as a single taxable person. The wording of the European Court of Justice decision explicitly excluded the argument that the supplies of services were merely internal transactions made within the same legal entity (CJEU, C-210/04, March 23, 2006, *FCE Bank Plc*).

Facts of the case

BNP Paris Securities Services is a company established in France, active in financial services intermediation for which it elected to VAT. It provides its EU branches with various services, such as IT services.

Further to several tax audits, the French tax authorities questioned the VAT recovery for expenses incurred in relation with transactions to its foreign branches that were members of local VAT groups, considering that these transactions were outside the VAT scope. However they allowed the recovery of a portion of the input VAT taking into account the proportion of revenues realized subject to VAT realized by these branches in their country of establishment.

The decision of the Administrative Court of Appeal, after having raised that the branches were members of VAT groups and therefore benefited from the status of separate taxable persons from their French head office, had however ruled, in order to refuse the discharge of the tax assessments, that the company did not provide any detail on the transactions carried out by the VAT groups established abroad (depending on whether they were subject to the tax or exempted in the countries concerned) making impossible to determine the recovery of the input VAT on underlying expense. In essence, the Administrative Court of Appeal transposed the principles set out by the European Court of Justice with regard to mixed branches, which makes the right to deduct expenses incurred in a Member State contingent to the analysis of subsequent transactions carried out by the head office established in the other Member State (CJEU, C-165/17, 24 January, 2019, *Morgan Stanley & Co International*).

Solution

For the Supreme Tax Court, it follows from articles 2 and 11 of Directive 2006/112, as interpreted by the CJEU in its Skandia judgment, that "*supplies of services from a main establishment to its branch established in another Member State constitute taxable transactions when the branch is a member of a VAT group*".

It thus cancels the Administrative Court of Appeal decision for error in law which, although recognizing the existence of VAT groups abroad, intended to restrict the recovery rights of the French head office according to the nature of the subsequent operations carried out by these VAT groups. For the Supreme Tax Court**,** the recovery of the input VAT on expenses incurred by the head office must depend on the sole analysis of the reinvoicing to the groups, but in no case on the subsequent operations carried out by these groups.

Since the IT services give rise to an undisputed right of deduction, the French head office should thus be able to recover the VAT credits, which the Administrative Court of Appeal of Versailles, which must further rule on the referral from the Supreme Tax Court, should logically recognize.

Prospective

This decision, applying the Skandia solution for the first time in France, highlights various topics.

Firstly, it opens the possibility to raise claims at French head office level for services (head office expenses, IT support) supplied to their branches that belong to a local VAT group in another Member State. This opportunity will exist when the French head office has been refused the recovery of input VAT, either totally or partially, whereas it could be reclaimed in application of the allocation rule or the deduction coefficient (prorata method). In view of the limitation rules applicable to claims, the French head offices must promptly carry out a thorough review of their operations with their branches before December 31.

This Supreme Tax Court does not address the less frequent reverse situation, where services are provided by foreign branches that are members of a VAT group, to the main establishment established in France. If a strictly symmetrical reasoning were to be adopted, such transactions should logically be considered taxable and make the French head office liable for the tax under the reverse charge mechanism.

Finally, one last question remains open, the so-called "reverse Skandia“ situation, where services are provided by a principal establishment, located in an EU member State and member of a local VAT group, to a branch established in another Member State where no VAT group exists (say France). Although the BNPP Securities Services decision recognizes a VAT group established abroad as a single taxable person, the replication of the Supreme Tax Court reasoning to this different situation raises several questions. In any event, this separate topic should be dealt with by the European Court of Justice in the context of a preliminary question submitted by the Supreme Court of Sweden on October 30, 2019 (C- 812-19 *Danske Bank*).

As a part to this last debate, the consistency of the existing French Tax Authorities' guidelines will have to be considered. These are still based on the principle that, since a foreign company and its French branch constitute the same legal entity, the services that they provide to each other do not fall within the scope of VAT and are therefore not subject to tax.

Thus, the Supreme Tax Court decision could have multiple implications for French head offices or French branches even before the announced creation of a VAT group in France, provided for in article 45 of the draft Finance Bill for 2021, transposing article 11 of directive 2006/112. The introduction of the VAT Group in France should be effective from 1 January 2023.

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