

Indirect Tax Partners

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This morning the European Court of Justice handed down its opinion in *Skandia America Corp (C-7/13)*¹ that had been referred by the Swedish court.

This case had been eagerly awaited as the structure involved is in relatively heavy use by partially exempt businesses to manage VAT costs.

The facts in this case will be familiar to many tax professionals. Skandia America Corp (“SAC”) is a US corporation that had established a Swedish branch. The Swedish branch qualified as a member of a VAT group in Sweden with other Skandia entities.

SAC procured IT services on a global basis and carried out activities in Sweden through the branch which was responsible for processing the external services to produce final products used by various members of the Skandia group. The branch supplied services to companies inside and outside of the VAT group with appropriate transfer pricing mark ups.

As a result of two differing VAT concepts, the supply of services from SAC to its branch and by the branch to other VAT group members was never subject to VAT. By extension (this did not appear to be covered in the facts) the supply from third parties to SAC was also unlikely to have been subject to VAT given its US location.

The first concept that applied (SAC to branch) stems from the ECJ decision in *FCE Bank plc*². In this case from 2006, the court confirmed that a supply from a Head Office to its branch could not be subject to VAT as they were in effect the same taxable person.

The second concept here is that supplies between members of a VAT group are also not recognized for VAT purposes as the group is deemed to be a single taxable person.

As a result of these two concepts no VAT was recognized on transactions at all. The Swedish Tax Authority considered for various reasons that the supply from SAC to the branch was subject to VAT. SAC disagreed and the Court in my mind has found a way to agree with the Swedish Tax Authority and at the same time, not upset the judgment it gave 8 years ago on *FCE*.

Impact for businesses

The judgment in my mind has been cleverly kept narrow. Firstly, EU VAT only becomes due on a transaction when the EU branch is a member of a VAT group. As such, the ability to disregard supplies between Head Office and branch should continue to apply when the branch is not in a VAT group. In addition, the right for a branch to join a VAT group has not been stopped.

Secondly, in answering the second question posed to them, the ECJ stated that it was the recipient of the services – the Swedish VAT group in this case – that was liable to account for any VAT due. This I believe is an important part of the judgment as it means that supplies from EU Head Offices to their non-EU branches are taxed where the branch belongs and not inside the EU, irrespective of whether the non-EU branch is in a non-EU VAT group or not.

Next steps

Anyone with a branch structure that has any part in the EU should review the ruling in light of the judgment. Even fully taxable VAT groups, where administrative relief was the only purpose for VAT grouping an EU branch, will need to consider appropriate VAT compliance on services purchased from abroad.

Businesses that are unable to recover all their VAT will need to quickly examine alternative options as well as determine the likely increased P&L expense that could occur as a result of the judgment.

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=157806&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=386100>

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<http://curia.europa.eu/juris/document/document.jsf?docid=57830&doclang=EN>