



LexisNexis®

This article was first published on Lexis®PSL Tax on 9 April 2015. Click for a free trial of [Lexis®PSL](#).

No change--Skandia and the VAT grouping rules

09/04/2015

Tax analysis: The Court of Justice of the European Union (CJEU) has held in *Skandia* that services provided by a US company headquarters to its Swedish branch were supplies for VAT purposes. The judgment concerned the Swedish VAT grouping rules and the result is a VAT fiction with real financial consequences, according to Tarlochan Lall, a tax lawyer and barrister at Monckton Chambers, and difficult to decode. Here, he considers whether there is inconsistency in HMRC's conclusion that, although no change is required in UK law, *Skandia* will have an impact on certain businesses.

Original news

Revenue and Customs Brief 2/2015: VAT grouping rules and the *Skandia* judgment, LNB News 10/02/2015 118

HMRC has concluded that the CJEU judgment in Skandia (Skandia America Corp, (USA), filial Sverige: C-7/13 [2014] All ER (D) 125 (Sep)) does not require changes to the current UK VAT grouping rules. However, changes will be required to UK VAT accounting and VAT may become due where an overseas establishment of a UK group is situated in a member state which operates similar grouping provisions to Sweden, namely, that only the branch physically located in the country can belong to the VAT group. HMRC will confirm in due course which other member states this affects. The accounting changes will apply to services performed on or after 1 January 2016.

What were the key findings in the CJEU judgment in *Skandia*?

The CJEU held that services distributed by *Skandia*'s HQ in the US to its branches in Sweden were supplies for VAT purposes. Prior to *Skandia*, they would not have been regarded as supplies, under an earlier CJEU judgment in *Ministerio dell'Economia e delle Finanze v FCE Bank plc: C-210/04 [2007] STC 165, [2006] All ER (D) 351 (Mar)*. The CJEU in *FCE Bank* had held that as an HQ and a branch form parts of the same legal entity, they cannot make supplies to each other. Generally, that remains the position. The change of heart in *Skandia* was due to the fact that under Swedish law, only the branch had become a member of the Swedish VAT group. The HQ, although the same legal entity as the branch, was not part of that group. The CJEU held that as a VAT group is treated as a single person, and Sweden does not treat the HQ as a VAT group member, then legal personality was effectively severed in two for VAT purposes. Once severed, for VAT, there could be supplies between HQ and the branch. It is all a VAT fiction; but with real financial consequences!

Why has HMRC concluded that no changes are required to UK law?

HMRC has taken the approach that the UK's treatment of VAT grouping is EU law compliant and it can remain. *Skandia* may be regarded as a decision arising out of its specific facts, in particular how Sweden treats VAT groups. *Skandia* does not say that VAT groups can only be treated in one way. The UK approach to VAT grouping was regarded as having merit by the Advocate General.

In what circumstances does HMRC see Skandia affecting the VAT treatment of UK companies?

HMRC will consider *Skandia* to affect the VAT treatment of UK companies where a UK headquartered company has a branch in a country with the Swedish type of VAT grouping rules and that branch is in a VAT group. HMRC intends to publish a list of countries with VAT grouping rules similar to those of Sweden but has not yet done so. It is understood that Belgium has the Swedish type of VAT grouping rules. Germany is also thought to have similar VAT grouping rules, so it will be interesting to see if Germany is also on HMRC's list.

HMRC's business brief does not say anything about a situation where the headquarters is in a country with a Swedish type of VAT grouping, where that HQ is VAT grouped there and that company has a UK branch. It is not clear whether only the HQ is in a VAT group and not the branch. If it is, *Skandia* could apply to movements of services between the HQ and the UK branch.

Skandia only applies to entities established in or with branches in the EU. Around 150 countries have VAT now. It is not yet known whether the same point will arise in respect of services allocated between UK and non-EU countries which have VAT grouping rules which are similar to the Swedish VAT grouping rules.

Can you give an example of a situation in which the revised treatment would be relevant?

- o Services provided by a branch of a UK company in a Swedish style VAT group (or other members of that VAT group) to the UK HQ will be subject to the reverse charge in the UK.
- o Where the UK HQ provides services to the branch in a Swedish style VAT group (or other members of that VAT group), there will be a supply. However, there would be a reverse charge where the branch is located: there should be no UK VAT. The supplies will need to be taken into account in the UK input tax calculations.
- o Where the UK HQ is a member of a UK VAT group, services provided:
 - o from the overseas branch in a Swedish style VAT group (or the other members of that group) to the UK VAT group members will be subject to the VAT reverse charge in the UK
 - o from the UK VAT group members to the overseas branch (or the other members of that group) will be subject to the reverse charge in that other country, and will need to be taken into account in calculating the UK input tax

Although *Skandia* concerned the distribution of externally acquired services, it is thought that the greatest impact will be on internally generated services provided to or from branches, in particular where staff are moved between branches and HQ or other VAT group members.

When will the revised treatment come into effect, and should businesses be doing anything to prepare for this?

HMRC has stated that the revised treatment will apply from 1 January 2016. It is understood that many businesses are considering reorganising their activities. Such reorganisations may take many forms. Each will turn on its facts. I expect most groups will consider whether internally generated services should be moved around or how they should be allocated within the group. The financial impact of *Skandia* may be greater than has been recognised thus far.

Overall, do you agree with HMRC's interpretation of the judgment?

I am not convinced HMRC needed to introduce the changes they have by Business Brief 2/2015.

Overall, the UK grouping rules were regarded by the Advocate General as having much merit, and were compliant with EU law in that the whole legal entity is VAT grouped and the UK has specific anti-abuse

provisions. The Advocate General also noted that art 11 of the VAT Directive 2006/112/EC allows member states to introduce anti-abuse provisions.

It is difficult to make sense of the *Skandia* judgment. Its underlying purpose seems to be to tackle potential abuse involving routing services through non-EU entities. The UK, having introduced specific anti-abuse provisions, would seemingly have been unaffected. However, the *Skandia* judgment is part of EU law now and cannot be disregarded. An issue for HMRC was how to treat services allocated between countries which have the Swedish type of VAT grouping and the UK. The UK appears to have taken the opportunity to say that if there is a supply, the consequences of that supply must follow. The revenue impact of the change remains unclear.

The UK could have opted to consistently follow its rules and *FCE Bank* and say that if a supply comes in from a Swedish style VAT group, as it is within the same legal entity, it would remain outside the scope of VAT. It would not have created any conflict with the other member states because any supply takes place where the business customer is, ie in the UK, assuming the HQ is in the UK. 'Outside the scope' treatment would not have been irrational. Consistently with *FCE Bank*, the UK could have treated the services as being outside the scope because they are made within the same legal entity. Where the services come into a fully taxable HQ, there will be compliance obligations, but the reverse charge should be revenue neutral. However, where the UK HQ is exempt or partially exempt, there will be a real VAT cost. In that sense, HMRC's decision is opportunistic in taking extra revenue. The decision is also inconsistent with the view of the UK that the HQ and the branch are not separate taxable entities.

Arguably, not to follow *Skandia* would not have breached EU law. There is an apparent conflict between the CJEU's judgment in *Skandia* and *FCE Bank*. The Advocate General in *Skandia* expressed the opinion that just including the branch in the VAT group was 'unlawful under Article 11 of the VAT directive'. That relegates *Skandia* behind *FCE Bank*. To the extent that abuse was a concern, the UK already has its own anti-abuse rules. Other countries, such as Germany, are also understood to have anti-abuse rules. This leads to the conclusion that the UK did not need to change its rules on the basis of the *Skandia* decision, which is arguably confined to its particular facts.

Tarlochan Lall is a barrister at Monckton Chambers and a tax lawyer with some 25 years' experience. His practice includes advising on European and public law in the context of tax-related matters, as well as advising businesses and their owners on all direct and indirect tax concerns. As a barrister, he continues to advise on contentious and non-contentious matters. He is a member of the VAT Experts Group, which was set up by the European Commission in 2012.

Interviewed by Jane Crinnion.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.